No. 08-10386

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRADLEY SMITH,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. This Court has jurisdiction under 28 U.S.C. 1291. Appellant was sentenced on August 22, 2008, and final judgment was entered August 29, 2008. E.R. 56.[1] A notice of appeal was filed August 29, 2008. E.R. 62.

[1] This brief uses the following abbreviations: "E.R. ___" for the page number of Appellant's Excerpts of Record; "S.E.R. ___" for the page number of the Appellee United States' Supplemental Excerpts of Record; and "Br. ___ " for the page number of Appellant's opening brief.

STATEMENT OF THE ISSUES

1. Whether the district court erred in refusing to suppress excerpts of Smith's grand jury testimony.

2. Whether the district court abused its discretion in excluding Smith's proposed expert witness.

3. Whether the district court clearly erred in finding that Smith evidenced an intent to carry out his threats against Henderson, justifying a six-level sentencing enhancement.

4. Whether the district court committed legal error in applying a three-level sentencing adjustment where the jury found that Smith intentionally selected Henderson as a victim because of his race.

5. Whether the district court committed plain error in adding a two-level adjustment based on Smith's leadership role in Count One.

6. Whether the district court abused its discretion by not discussing in its sentencing decision Smith's argument about sentencing disparity.

STATEMENT OF THE CASE

On August 2, 2007, a federal grand jury charged Bradley Smith with interfering with housing rights, in violation of 42 U.S.C. 3631(a), and willfully making a materially false statement in a matter within the jurisdiction of the United

States, in violation of 18 U.S.C. 1001(a)(2). E.R. 728-730. Count One of the indictment charged that from June 1, 2005, to May 24, 2007, Smith willfully injured, intimidated, and interfered with Alfred Henderson on account of Henderson's race and because he was living in Modesto, California. E.R. 728-729. Count Two charged that on or about May 15, 2006, Smith knowingly and willfully made a materially false, fictitious, and fraudulent statement and representation by telling an FBI agent that he never threatened to burn a cross on Henderson's lawn. E.R. 729-730.

Prior to trial, the district court denied Smith's motion to suppress portions of his grand jury testimony. E.R. 3-8. During trial, the district court ruled that expert testimony Smith sought to introduce did not satisfy Rule 702 of the Federal Rules of Evidence. E.R. 547-549.

On May 19, 2008, the jury convicted Smith on both counts. E.R. 615-616. The court sentenced Smith to 78 months imprisonment on Count One, 60 months imprisonment on Count Two to run concurrently with the sentence on Count One, and 36 months of supervised release following imprisonment. E.R. 53.

STATEMENT OF FACTS

1. Henderson's Testimony

In June 2005, Alfred Henderson, a 52-year old African-American, lived in Modesto, California, and actively participated in the citizens' band (CB) radio community. E.R. 253-256. Defendant Bradley Smith, who is white, also actively participated in the CB community in Modesto at that time. S.E.R. 1, 14. Henderson testified that he had been participating in CB radio since 1974 in various communities in California. E.R. 253. In June 2005, he was living in Modesto with his wife, also African-American. E.R. 253, 255. While broadcasting on CB radio, Henderson followed the common CB practice of using a "call sign" or "handle," rather than his own name. E.R. 254. In June 2005, Henderson mostly used the call sign "Slave Driver." E.R. 254. When Henderson, a junior pastor at the Church of God in Christ, first heard Smith on the radio, he told Smith that he would pray for Smith and his family after learning that Smith had a death in his family. E.R. 257.

The next time Henderson encountered Smith on CB radio, however, Smith started calling Henderson names like "nigger, "monkey," and "porch monkey," and continued this language whenever Henderson came on the radio. E.R. 259. Smith

also said he was going to run Henderson out of Modesto and back to Africa. E.R. 259.

Smith said on the radio that he was "the biggest nigger hater in the valley," and threatened to hang Henderson in a tree and to throw a "Mollytail [sic] cocktail." E.R. 260. Henderson recognized the threat to throw a "Molotov cocktail" as something that was done in the past against African-American churches and residences, but said he had never encountered such threats on CB radio. E.R. 261-262. Smith, who used the handle "Opie1," used Henderson's real name and address on the radio. E.R. 257, 262. Henderson believed that Smith had obtained his address by using equipment that shows where a CB radio signal originates. E.R. 263-264. Since Smith knew where Henderson lived and sometimes passed by Henderson's house, Henderson installed cameras around his house to monitor the area. E.R. 262.

Henderson said that "Opie1" stated on the radio that he was the Grand Wizard of the Ku Klux Klan (KKK) and threatened to have his KKK friends come with him to Henderson's house, tie him in a tree, hang him, and then rape and assault Henderson's wife. E.R. 264-265. Henderson stated that he took the threats very seriously, and that they made him feel "belittled" and "scared." E.R. 265, 268.

In the fall of 2005, Henderson and Smith made arrangements on the radio to meet in person at a gas station in Modesto to try to work out their differences. E.R. 270-271. Neither man got out of his vehicle, and they talked from cab to cab. E.R. 347. Henderson asked Smith to leave him alone and to stop making threats. E.R. 273. Smith said he would stop, and the threats stopped for about a week, but then started up again. E.R. 273-274.

Smith frequently said on the radio that he wanted to move closer to Henderson to stop Henderson from talking on the radio and to run Henderson out of Modesto. E.R. 303-304. Henderson heard Smith say on the radio that he was looking for a home a block away from Henderson's house. E.R. 304.

On the evening of October 28, 2005, Henderson, at home listening to CB radio, heard Smith say that he and his friends were coming to Henderson's house to burn a cross, hang Henderson in a tree, and rape his wife. E.R. 282-283. Although Henderson told Smith on the radio to "[c]ome on" because, he said, he was tired of all the harassment, he did not actually expect Smith and his friends to come over. E.R. 283. Because his wife had just gotten out of the hospital, Henderson did not want Smith and his friends to come into his house, so he went outside. E.R. 284. He brought his dog with him, but did not bring a weapon. E.R. 284. Henderson also called the police to tell them that Smith was coming to his

home after threatening to burn a cross on his lawn and to rape his wife. E.R. 289-290.

Smith arrived with six or seven white people in several vehicles with CB antennas. E.R. 284, 286. Smith exited his vehicle and walked towards Henderson, and about four of Smith's friends were getting out of their vehicles and coming towards Henderson. E.R. 358-360, 401-402. Smith and Henderson met in the middle of the street. E.R. 358. Smith called Henderson a "nigger" and a "spook" and told Henderson to hit him, but Henderson did not. E.R. 288-289. About four police cars arrived and stopped the altercation. E.R. 290.

Ryan Kiehn, a Modesto police officer who responded to Henderson's call, testified that Smith told him that he and some of his friends were just driving through the area with a vehicle strapped to a flat bed truck, and they stopped to secure it after the straps came loose. E.R. 408-409. Smith said he had never met Henderson and did not know him, and denied threatening Henderson. E.R. 409. Since Henderson told the officer only that he knew that it was Smith who threatened him because he recognized Smith's voice on the radio, the officer determined that he did not have probable cause to arrest Smith, so he let everyone leave. E.R. 409-410.

Subsequently, Henderson contacted the police and said that he had further information. E.R. 410. Henderson told Kiehn that he was able to identify Smith because he had met Smith. E.R. 410. A few days later, Kiehn interviewed Smith at Smith's house, and Smith stated that he had *never* met Henderson before, denied that "Opie1" was his radio handle, and suggested that someone may have recorded his voice and used a computer program to make it seem like he was making racist remarks on the radio. E.R. 411-412.

Henderson testified that after Smith and his friends came to his house, Henderson and his wife decided to move and ultimately moved to Keyes, California, in April 2006. E.R. 295, 308. Henderson testified that he was afraid because of Smith's threats and visit, and about repercussions from Smith's friends because of Smith's prosecution. He said that he had put day and night vision cameras around his new home, kept his pets inside more, and trained the pets to protect him and his wife. E.R. 308-309.

Smith also made accusations to the police concerning Henderson. On November 6, 2005, the police questioned Henderson in connection with Smith's claim that Henderson had vandalized his property. E.R. 297-298. After speaking to Henderson, E.R. 298, the police concluded their investigation without taking any action. E.R. 404. On January 16, 2006, the police questioned Henderson about

Smith's allegation that Henderson had brandished a firearm at Smith in a Walgreen's parking lot. E.R. 298. Henderson denied the allegation, E.R. 299-300, and the matter was dropped. E.R. 300-301.[2]

2. Testimony Of Other CB Radio Participants

Six people who regularly used CB radio in Modesto corroborated Henderson's account of the racial slurs and racially-motivated threats Smith made against Henderson.[3] According to these witnesses, starting in June 2005, Smith began calling Henderson "nigger," "black chicken," "black bastard," and "black son of a bitch" numerous times every day on the CB radio. E.R. 223 (Dennis Reineking); S.E.R. 4 (Manuel Terra), 17 (Jim Loyd), 30-31 (Corey Ayers), 40 (William Weiss), 50 (Joanna Weiss). Smith also called Henderson's wife a "cheetah" or "black cheetah that had just escaped from the zoo." S.E.R. 5 (Terra), 18 (Loyd), 31-32 (Ayers), 44 (William Weiss). In addition, they testified that Smith constantly threatened to sexually assault Henderson's wife. S.E.R. 5 (Terra) ("fist-fuck" her); E.R. 224 (Reineking) ("fist-fuck" or rape her).

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[2] The testimony of Officers Ramar and Campbell can be found at S.E.R. 57-60 and 53-56, respectively.

[3] These witnesses testified that they recognized both Smith's and Henderson's voices over the CB radio. S.E.R. 1-3 (Terra), 13-15 (Loyd), 27-29 (Ayers), 37-39 (William Weiss), and 48-50 (Joanna Weiss); E.R. 220-221 (Reineking).

Witnesses also said that Smith stated on the CB radio that he had built a 15-foot cross, soaked it in kerosene, and "was coming over to burn it on the nigger's lawn," S.E.R. 5 (Terra), and also stated that he would "cut [Henderson's] fucking head off, stuff it up his ass, hang him from a tree and burn the fucking nigger." S.E.R. 6 (Terra); see also E.R. 223-224 (Reineking); S.E.R. 20-21 (Loyd), 32-33 (Ayers), 40-41 (William Weiss) ("get his buddies in their white sheets and go over to [Henderson's] house and burn a cross in his yard and hang him from it"), 50-52 (Joanna Weiss) (drive by Henderson's house "with his white sheets and his posse, or whatever, his Klan, and * * * throw a Molotov cocktail, * * * burn a cross" and run Henderson out of town).

Even though other CB users would implore Smith to stop making such statements and threats, he did not stop. See S.E.R. 11 (Terra), 19 (Loyd), 31, 33 (Ayers), 42 (William Weiss) ("I'm Opie1, the only one. The law can't do nothing to me."), 52 (Joanna Weiss).

Many of Smith's threats were aimed specifically toward getting Henderson to leave Modesto. Smith said such things on the radio as "[w]hy don't you move back to Oakland, nigger, where you belong?" S.E.R. 10-11 (Terra); see also S.E.R. 18-20 (Loyd) ("Nigger, you need to go back to Oakland where the rest of the niggers are and live over there."), 34 (Ayers), 41-42 (William Weiss), 51-52

(Joanna Weiss); E.R. 224 (Reineking) (go back "to whatever land * * * he came from"). One plan Smith expressed repeatedly over the CB radio was that he would move closer to Henderson in order to drown out Henderson's radio signal and make Henderson's CB experience miserable so that he would leave Modesto. See S.E.R. 10 (Terra), 35-36 (Ayers), 41-43 (William Weiss).

These CB radio users stated that they never heard Henderson provoke such racial slurs and threats from Smith, or respond with foul language or cursing. S.E.R. 6 (Terra), 21 (Loyd); E.R. 225 (Reineking). In addition, they stated that the racial threats were not common on Modesto CB radio. S.E.R. 12 (Terra), 22-23 (Loyd), 36 (Ayers), 45-46 (William Weiss); E.R. 232, 247-248 (Reineking).

Two witnesses testified that each heard Smith express racial hatred toward other African-Americans. Manuel Terra testified that, during the period covered by the charges in the indictment, he heard Smith say to an African-American man who came to Smith's door, "Why don't you get the fuck out of here nigger and go back to your house?" S.E.R. 7-8. Dennis Reineking testified that Smith used the word "nigger" to refer to an African-American who was broadcasting on the CB radio and told the African-American man that he belonged in Africa. E.R. 226-227. Smith would also call individuals who came to Henderson's or other African-Americans' defense "nigger-lovers." S.E.R. 11 (Terra); E.R. 228 (Reineking).

3. Testimony Of FBI Agent Kenneth Tam

FBI agent Kenneth Tam, the primary case agent in this case, first met Smith on May 15, 2006, when Smith arrived at the home of a witness Tam was questioning. E.R. 417-418. Smith, who was aware that Tam was an FBI agent, asked whether Tam was going to talk to him. E.R. 418. Tam gave Smith his business card. E.R. 418. When Tam returned to his office, Smith called Tam and asked Tam if he wanted to talk to him. Tam and another agent met Smith at Smith's residence later that day. E.R. 419. Tam advised Smith of his rights, and Smith said he understood those rights but still wanted to talk to Tam. E.R. 419-420. Tam told Smith to be truthful, because it was a violation of federal law to lie to a federal agent. E.R. 420.

Tam testified that Smith told him that he spoke to Henderson on CB radio during the summer of 2004, and met Henderson in August or September of 2005 at a gas station after they had had an argument over the CB radio. E.R. 420-421. Smith admitted that he called Henderson a "nigger" over the radio and made fun of him because he used the CB handle "Slave Driver." E.R. 421. Smith also said he had called Henderson a "black chicken" at least once. E.R. 421.

Smith told Tam that he had reported to the police that Henderson drove up just as Smith was exiting a Walgreen's store, pointed a gun at Smith, and said a

few words. E.R. 421-422. Smith said there was a second incident in which a black Cadillac drove up to his residence and a black male in the vehicle, who Smith thought was Henderson's son, threw bricks at Smith's vehicle. E.R. 421-422. Smith said he was attempting to move closer to Henderson in order to drown out Henderson or "step on" his transmissions, but Henderson showed the landlord of the property police reports relating to Henderson's problems with Smith, and the landlord did not rent to Smith. E.R. 423.

Tam stated that he "asked [Smith] if he had ever made the statement on the CB radio that he was building a cross, that he was soaking it in kerosene, that he was bringing the cross over to Henderson's lawn and setting it on fire on Henderson's lawn," and Smith said, "No." E.R. 423.[4] Tam said Smith then said something to the effect that he was going to make a cross and give it to Henderson. E.R. 423-424. Smith told Tam that he had identified himself as "KKK 007," and that one of his friends had transmitted a message from Smith's house that he was wearing his white cape and that Henderson was lucky that he was not going to send his white-caped friends over to Henderson's house. E.R. 424. Smith admitted going over to Henderson's house because he wanted to talk to him "man to man" and that he wanted to get Henderson out of town. E.R. 425-426.

[4] This statement formed the basis for Count Two of the indictment.

Smith then called Tam on May 22, 2006, and told Tam that he wanted another interview and wanted to give Tam a tape. E.R. 427. Tam went to Smith's residence the following day and again advised Smith of his rights. E.R. 427. Smith gave Tam a cassette of recordings made between May 16, 2006, and May 18, 2006, among Smith, Henderson, Greg Loyd, and Jim Loyd. E.R. 428. Smith said he was concerned that he was the only person being targeted in the investigation because others also used racist terms against Henderson. E.R. 429. Smith admitted that it was his idea to bring several friends to Henderson's house on October 28, 2005. E.R. 429. He gave Tam the names of some of the people who were with him that night, stated that there were three vehicles, and they were going there for a confrontation. E.R. 430.

Tam also interviewed Smith on February 28, 2007, at the FBI office in Salida, California. E.R. 430. Tam again advised Smith of his rights and confirmed with Smith that Smith was there voluntarily. E.R. 431-432. Smith told Tam that he knew Henderson was black because he had met Henderson at a gas station prior to Smith confronting Henderson in front of his house. E.R. 433. Smith admitted calling Henderson a "stupid nigger" and said, "Why are you being a nigger," over the CB, but stated that he did not mean to call Henderson a "nigger" over the CB. E.R. 433.

Tam testified that Smith said that prior to going to Henderson's house on October 28, 2005, a man named John Dykstra transmitted from a radio at Smith's house, "I'm going to burn a cross on your [Henderson's] lawn." E.R. 434. Smith said he did not remember, but he "could have made statements to that effect as well." E.R. 434. He said it was his idea to go to Henderson's house and have a confrontation, and that someone made a statement on the CB about "having ourselves a hanging." E.R. 434. Smith stated that everybody who was with him was transmitting threats to Henderson. E.R. 434.

Tam interviewed Smith again on August 3, 2007, after advising Smith of his rights and determining that Smith wanted to talk to him. E.R. 437. Smith admitted that the word "nigger" "does sting a black person." E.R. 438. And concerning his conflict with Henderson, Smith said, "I'm not saying that I haven't done anything wrong." E.R. 438.

Tam also became aware of some sworn testimony that Smith had given in an unrelated court proceeding in Stanislaus County Superior Court concerning an incident that occurred in early October 2005. E.R. 439. In that testimony, Smith admitted that he had stated during an incident at issue in that proceeding "words to the effect, 'Get out of here, niggers.'" S.E.R. 74, 75.[5] Smith admitted at the state

[5] Portions of the transcript of the state court proceeding were marked as Government's Exhibit 1 and were read into the record in this case at page 650 of

(continued...)

court hearing that he had initially lied to officers investigating that incident about using the word "nigger." S.E.R. 76-77.

4. Grand Jury Testimony

After learning that several other CB users had testified before the federal grand jury that was investigating allegations of racially threatening transmissions against Henderson, Smith called Agent Tam and asked if he could testify before the grand jury to tell his side of the story. E.R. 643 (Tam declaration). The attorneys assigned to the investigation agreed to grant Smith's request, and the night before Smith was scheduled to testify he met with Tam and some of the government attorneys. E.R, 644. During that interview, Smith inquired whether he could have an attorney appointed to represent him. E.R. 644. He was told that, at that time, he "had no right to an attorney because he was not charged with a crime," but that he might be eligible for a public defender in the future. E.R. 644. Smith said that he still wanted to testify the following day. E.R. 644.

During Agent Tam's trial testimony, a few portions of Smith's testimony before the federal grand jury were read to the jury. E.R. 440-441, 451-512

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[5](...continued)
the transcript (E.R. 556). Since the portions read at trial were not transcribed, the only evidence of what the jury heard is the exhibit itself. The district court sustained defendant's objection to allowing this transcript to go into the jury room. S.E.R. 61.

(redacted transcript).[6] The jury heard that, in response to some questions, Smith gave equivocal answers about his actions. See, *e.g.*, E.R. 470 (did not remember saying he would harm Henderson's house), 474-475 (did not remember but would not dismiss the possibility of saying anything to Henderson about building a cross), 480-481 (did not remember but thought it was possible that he told Henderson he would run him out of town), and 498 (could not say that he was not one of the people who used racial slurs on the CB radio on the same night when he and others went to Henderson's house). The jury also heard Smith's statements that he had used the terms "nigger" in reference to Henderson on CB radio (E.R. 467, 469), that he tried to move closer to Henderson in order to make it harder for Henderson to transmit via CB radio (E.R. 491), and that he went to Henderson's house with six or seven of his friends after having announced his intention on CB radio to do so (E.R. 495, 498-499).

5. Smith's Proposed Expert Testimony

Before trial, Smith notified government counsel that he intended to present expert testimony from Christopher S. Lindley concerning the "sub-culture"

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[6] The full transcript of Smith's grand jury testimony appears at E.R. 654-727. Parenthetical references in this brief to "redacted transcript" refer to the copy of the transcript with redactions blackened out, showing only the excerpts read to the jury. The redacted transcript appears at E.R. 448-512.

of CB radio. E.R. 609-614. The government argued that there was an insufficient basis for the court to hold that Lindley was an "expert." E.R. 518. The government also argued that even if Lindley was an expert, his proposed testimony would violate the prohibition in Rule 704(b) of the Federal Rules of Evidence against an expert witness in a criminal case testifying about an ultimate issue, *i.e.*, whether the defendant had "the mental state or condition constituting an element of the crime charged." E.R. 518-519. Smith's written submissions stated that Lindley would testify that Smith's remarks were not "serious threats," and "in CB culture the words do not convey an intention to actually carry out the 'threats.'" E.R. 614.

In accordance with Rule 702 of the Federal Rules of Evidence and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court held an evidentiary hearing in which Lindley testified outside the presence of the jury. E.R. 516-549.[7] Lindley testified that he had listened to about 15,000 hours of CB

[7] Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form or an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of

(continued...)

radio transmissions in the course of his employment, including working as an over-the-road truck driver. E.R. 524. He admitted that he had listened, at most, to five hours of radio in Modesto between 1998 and 2002, and did not listen to it again until Smith consulted him about testifying. E.R. 531-532. Lindley testified that in highly-populated, diverse areas such as the area around Modesto, CB radio conversations tend to be aggressive and participants engage in "name-calling, bragging, swaggering, baiting, taunting" and use "a lot of vulgar language." E.R. 525.

The district court refused to allow Lindley to testify as an expert. The court held that Lindley's "specialized knowledge" was not sufficient to permit him to testify about "the psychological aspects" of CB radio communication and how CB radio users would have interpreted Smith's interactions with Henderson. E.R. 547-549. Further, the court found that the jury would not be assisted by Lindley's proposed testimony, because "it should be clear to any reasonable hearer of the evidence what is being said and what is being meant by the various speakers on the CB radio." E.R. 548. The court also found that Lindley's proposed testimony was neither based on sufficient facts or data, nor the product of reliable principles and methods. E.R. 549.

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[7](...continued)
the case.

6. Facts Relevant To Sentencing

a. Recommendations In The Presentence Report

The Presentence Report (PSR) calculated Smith's total offense level at 22. PSR 9-10.[8] For Count One, involving a violation of 42 U.S.C. 3631(a), the applicable guideline is U.S.S.G. 2H1.1. The base offense level is derived from the offense level applicable to any underlying offense. U.S.S.G. 2H1.1(a)(1). The PSR used the guideline applicable to threatening or harassing communications, *i.e.*, U.S.S.G. 2A6.1, to arrive at a base offense level of 12. PSR 8. The PSR added six levels because the offense involved conduct evidencing an intent to carry out the threats of physical violence. U.S.S.G. 2A6.1(b)(1). PSR 8. An additional two levels were added because the offense involved more than two threats, see U.S.S.G. 2A6.1(b)(2), and two levels were added pursuant to U.S.S.G. 3B1.1(a), because Smith exercised a leadership role. PSR 8-9. The PSR stated that the district court was in the best position to determine applicability of the three-level adjustment for hate crime motivation pursuant to U.S.S.G. 3A1.1. PSR 8-9.

For Count Two, violation of 18 U.S.C. 1001(a)(2), the base offense level for the applicable guideline is six. U.S.S.G. 2B1.1(a)(2). No enhancements were applied. Applying the multiple-count adjustment rules for Counts One and Two

[8] The PSR is under seal.

resulted in a combined adjusted offense level of 22. U.S.S.G. 3D1.4(c); PSR 10. Given Smith's criminal history category of III, the guidelines advisory sentencing range for both counts was between 51 to 63 months' imprisonment. U.S.S.G. Ch.5 Pt. A; PSR 12, 18.

b. The Sentencing Decision

The government asked the probation officer to consider adding (1) the three-level enhancement for a hate crime pursuant to U.S.S.G. 3A1.1(a), because the jury determined that the defendant intentionally selected the victim because of his race (E.R. 186); (2) two additional levels, pursuant to U.S.S.G. 3B1.1(b), because the defendant was an organizer or leader of criminal activity involving five or more participants (E.R. 186-187); and (3) a two-level enhancement for obstruction of justice, pursuant to U.S.S.G. 3C1.1, comment. (n.8) (E.R. 187-192). The government argued that the total offense level should be 29, resulting in a sentencing range of 108-135 months. E.R. 193; see also E.R. 73-95.

Smith argued in his objections to the PSR that (1) there was insufficient evidence of an intent to carry out the threats Smith made on CB radio (E.R. 104-107); and (2) a three-level enhancement for hate crime motivation was not warranted because the jury was instructed that it could convict if it found that Henderson's race was a *substantial* motivating factor for the offense, but the

background notes to the Guidelines require the jury to find that race was a *primary* motivation for the offense (E.R. 107-108). See also E.R. 65-71.

Smith also argued that the court should take into account the CB radio culture, Henderson's taunts of Smith, and evidence concerning Smith's family background and neuropsychological evaluation. E.R. 108-111. He also argued that the sentencing range suggested by the PSR would result in an unwarranted sentence disparity, in contravention of 18 U.S.C. 3553(a)(6). E.R. 111-114, 121-183 (Exhibits B & C).

The court found that there was sufficient evidence of Smith's intent to carry out the threats to warrant a six-level enhancement pursuant to U.S.S.G. 2A6.1, and because there were more than two threats, a two-level enhancement should be applied under U.S.S.G. 2A6.1(b)(2). E.R. 50. The court also applied a three-level adjustment for hate crime motivation, E.R. 49-50, and accepted the two-level enhancement the PSR recommended for Smith's leadership role. E.R. 41, 51-52. The court rejected the government's argument for an additional two-level enhancement under U.S.S.G. 3B1.1(b) for leading or organizing an offense involving five or more participants, E.R. 50, and Smith's request for a downward adjustment for acceptance of responsibility. E.R. 49-50. Accordingly, the court

found that the applicable offense level is 25, which, at Criminal History level III, results in an advisory guideline range of 70-87 months imprisonment. E.R. 52.

With regard to the factors enumerated in 18 U.S.C. 3553(a), the court took into account the "history of irresponsibility in Mr. Smith's life," and the "serious factual circumstances" of this case, including the "horrendous" facts that Henderson related in his testimony. E.R. 50-51. The court stated that absent the psychological report in the record about Smith's serious neuro-psychological issues, it would consider this to be "an aggravated case." E.R. 51. The court found, however, that the "facts of this case are so aggravated that [it was] not going to the mitigated level of the guideline range either" because that would not be "fair to the victim." E.R. 52-53. The court therefore ordered a sentence of 78 months imprisonment, toward the middle of the applicable advisory guideline range, and determined that the sentence on Counts One and Two should be served concurrently. E.R. 53.

SUMMARY OF ARGUMENT

1. The main focus of Smith's argument on his Fifth Amendment issue concerns the government's attorneys' statement to him, the night before his grand jury appearance, that he did not have a right to have a lawyer appointed before his testimony and did not further advise Smith that, under the Criminal Justice Act (CJA) Plan for the Eastern District of California, he could ask the court to exercise its discretion to appoint counsel for him. This was an inadvertent omission that, as discussed below, did not violate Smith's constitutional rights or undermine the voluntariness of his testimony.

As a matter of law, Smith's appearance at the grand jury quite clearly did not violate his rights under the Fifth Amendment; his testimony was not coerced and his decision to testify was not involuntary. Despite his very late inquiry about appointed counsel, he was repeatedly told both before and after the issue came up that he did not have to appear at the grand jury, and that if he did appear, he did not have to answer questions that might incriminate him. Nonetheless he did appear and in fact declined to answer some questions.

And equally importantly, it is impossible to read this record and conclude that the few portions of his grand jury testimony that were read to the jury had a truly significant effect on the verdict. The portions of his grand jury testimony that

were read at the trial were either non-committal or reflected the testimony of many other witnesses about Smith's use of racial epithets and his desire for Henderson to leave Modesto. Even without those statements, the record contains overwhelming and consistent evidence that Smith continuously made the race-based and repulsive threats that were alleged in the indictment, and organized a group of people to go to Henderson's house after threatening him with violence, because of his race and in order to get him to leave Modesto.

2. The district court did not err in refusing to permit testimony proposed expert witness. After conducting a hearing, the district court properly found that the proposed testimony did not meet the standards of Rule 702 of the Federal Rules of Evidence because the witness had no expertise that would assist the trier of fact to understand the evidence.

3. Nor did the district court commit any errors in computing Smith's sentence.

a. The fact that Smith came to Henderson's house with a group of friends after making racially-based threats on the CB radio was "conduct evidencing an intent to carry out" Smith's threats of violence, justifying a six-level enhancement pursuant to U.S.S.G. 2A1.6(b)(1).

b. The jury's finding that Henderson's race was a substantial motivation for

Smith's conduct is sufficient to support a three-level adjustment to his offense level under U.S.S.G. 3A1.1(a) where the statute authorizing that guideline requires only that the defendant intentionally select a victim because of his race.

c. The court did not commit plain error in applying a two-level adjustment for Smith's leadership role in the offense, pursuant to U.S.S.G. 3B1.1(c), where the evidence demonstrated that Smith led a group of his friends to Henderson's house to confront him after threatening Henderson on the CB radio, and the group involved at least one individual who qualified as a "participant" in the offense within the meaning of the guideline commentary.

d. The fact that the court did not specifically discuss Smith's contention that the sentence recommended in the PSR created an unwarranted disparity does not demonstrate that it abused its discretion, where the court stated that it reviewed all of the arguments made by the parties, and its decision demonstrates that it took into account both the aggravated nature of the offense and the mitigating factors based on Smith's particular circumstances before pronouncing the sentence.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY REFUSED TO SUPPRESS PORTIONS OF SMITH'S GRAND JURY TESTIMONY

A. Standard Of Review

This Court reviews *de novo* a district court's ruling on a claim of Fifth Amendment privilege, which involves mixed questions of law and fact. *United States* v. *Anderson*, 79 F.3d 1522, 1525 (9th Cir. 1996). Any violations of the Fifth Amendment are reviewed for harmless error. *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *United States* v. *Lopez*, 500 F.3d 840, 844 (9th Cir. 2007), cert. denied, 128 S. Ct. 950 (2008). To find an error harmless is to find it "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." *United States* v. *Khan*, 993 F.2d 1368, 1376 (9th Cir. 1993) (quoting *Yates* v. *Evatt*, 500 U.S. 391, 403 (1991)).

B. Smith Was Adequately Informed Of His Fifth Amendment Rights And Was Not Compelled To Testify Before The Grand Jury

Smith complains (Br. 35) that the jury verdict should be reversed because the district court failed to suppress incriminating statements that he made in the portions of the grand jury transcript that was read to the jury. Smith, though, must show for Fifth Amendment purposes that, *inter alia*, his statements were

incriminating and compelled; he must demonstrate that his waiver of his right not to testify was not a knowing and informed waiver. As we have acknowledged, see pp. 23-24, *supra*, government counsel's statement to Smith the night before his grand jury appearance regarding appointment of counsel did not address the possibility that the court might exercise its discretionary authority under its local CJA plan to appoint counsel. This omission, however, was inadvertent, is not of constitutional dimension, and did not compel or trick Smith to appear at the grand jury.

1. Smith Was Not Compelled To Testify Before The Grand Jury

The Fifth Amendment prohibits compelled self-incrimination. While it is well settled that the Fifth Amendment privilege against self-incrimination extends to grand jury proceedings, *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), "it is also axiomatic that the Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions put by government officials." *United States* v. *Washington*, 431 U.S. 181, 186 (1977). The Fifth Amendment "does not preclude a witness from testifying voluntarily in matters which may incriminate him," *Id*. at 186-187 (quoting *United States* v. *Monia*, 317 U.S. 424, 427 (1943)), but rather "proscribes only self-incrimination obtained by a 'genuine *compulsion* of testimony.'" *Id.* at 187 (emphasis added) (quoting

Michigan v. *Tucker*, 417 U.S. 433 (1974)). "Accordingly, unless the record reveals some *compulsion*, [a defendant's] incriminating testimony cannot conflict with any constitutional guarantees of the privilege." *Ibid*. (emphasis added).

Smith asserts (Br. 30) that the circumstances under which he appeared at the grand jury put him under "significant pressure to talk" and created the compulsion that the Fifth Amendment prohibits. In other words, Smith alleges his waiver of his right not to testify was not a "knowing or informed" waiver. This claim is without merit. To determine whether testimony is compelled, the "test is whether, considering the totality of the circumstances, the free will of the witness was overborne." *Washington*, 431 U.S. at 188 (citing *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961)). In this case, Smith's statements to investigators and to the grand jury clearly were not the product of compulsion.

In *Washington*, the Supreme Court determined that testimony given by a grand jury witness suspected of wrongdoing could be used in a subsequent prosecution for criminal offenses about which he testified. The Court found that, prior to giving self-incriminating statements to the grand jury, the witness (who unlike Smith had been subpoenaed) had been given comprehensive warnings about his right to remain silent and other constitutional rights before he testified before the grand jury. The Court held that "[a]bsent some officially coerced self-

accusation, the Fifth Amendment privilege is not violated by even the most damning admissions." *Washington*, 431 U.S. at 187. As in *Washington*, the totality of circumstances must show that Smith's statements to the grand jury were not the product of coercion. The grand jury testimony reveals that Smith was not compelled to appear at the grand jury; the prosecutors gave Smith ample warnings that he did not have to appear and, if he did, he did not have to incriminate himself. Even before his grand jury appearance, the record shows that Smith sought out FBI Agent Tam during the course of Tam's investigation of circumstances surrounding the racial harassment of Henderson. See E.R. 418-419, 427, 429, 431-432. Smith stated to the grand jury that when he first met FBI Agent Tam in May 2006, he told Tam that he wanted to speak with him.

> A (Smith): I asked – I think – I think I asked him there, "Well, are you going to talk to me?" And he says yeah, he's going to talk to me. And he got my number and stuff like that. So he called me, and then he met at my house with another FBI agent.
>
> Q (Counsel for the United States): When you first met him, just so I'm clear, did you express to him at that time that you'd be interested in talking to him?
>
> A (Smith): Yes, sir.

E.R. 485. Smith testified that after his initial statements to Agent Tam, Smith called Tam back to give him more information. E.R. 486. Smith stated that the times he spoke with Agent Tam, he did so voluntarily.

> Q (Counsel for the United States): Okay. But just so we're clear, in the times that you've spoken to Agent Tamm (sic), those are voluntary statements, correct? You chose to tell him what was on your mind?
>
> A (Smith): Yes, sir.
>
> Q (Counsel for the United States): Now, when you spoke to Agent Tamm [sic], did Agent Tamm [sic] make it clear to you that the statements were voluntary and that you were not obliged to tell him anything that you didn't want to?
>
> A (Smith): Well, whenever he came to my house the first time, he told me that.

E.R. 486-487; see also E.R. 456.

The record clearly reveals that Smith was not coerced to testify at the grand jury. Smith called Agent Tam and asked if he could speak to the grand jury to tell his side of the story. E.R. 643. Accordingly, Smith did not appear pursuant a subpoena, E.R. 452, but rather, as his counsel told the district court, he "voluntarily appeared." E.R. 3.

The portions of the grand jury transcript that were redacted, and were therefore *not* read to the jury in the criminal trial, reveal that Smith's rights with respect to testifying before the grand jury, which included his right not to testify at

all and his Fifth Amendment privilege not to incriminate himself, were fully explained. Smith agreed that investigators explained his rights to him the day before the grand jury hearing. E.R. 659. Smith stated that he understood those rights and agreed to speak to the grand jury even though he did not have an attorney. E.R. 659. Smith stated that he understood that even if he had an attorney, the attorney could not be present in the grand jury room during his testimony. E.R. 661.

The full, unredacted transcript further reveals that Smith was told that he had an obligation to tell the truth to the grand jury, but that he was not obliged to answer any questions that might incriminate him. E.R. 660. Smith responded that he was aware of these rights. E.R. 660. Smith was also instructed that if he was asked a question that might incriminate him, he could indicate by saying "anything to the effect of 'Fifth Amendment' * * * so we can pause the proceedings and prevent anything bad from happening." E.R. 660. Smith responded "Yes, sir." E.R. 660. Smith indicated that he understood that the grand jury was investigating possible racial harassment of Alfred Henderson, and that he was considered a target of the investigation. E.R. 661-662. Smith indicated that he was under no pressure to testify before the grand jury:

> Q (Counsel for United States): Just so we're clear, has anyone made any kind of threat to you to compel you to participate in this proceeding?

A (Smith): No, sir.

Q (Counsel for United States): Have you been coerced or pressured in any way to participate in this proceeding?

A (Smith): No, sir.

E.R. 662-663 (partially redacted); see E.R. 455-456.

After reviewing his rights with counsel for the United States, Smith was *again* asked whether he wanted to testify:

Q (Counsel for United States): Okay. Are you satisfied that you understand what the scope of the investigation is?

A (Smith): Yes, sir.

Q (Counsel for United States): Okay. And, finally, you said something about yesterday we talked about potentially having an attorney appointed at some point. Do you want to continue to testify before the grand jury knowing that you don't have an attorney and that one isn't going to be appointed for you?

A (Smith): Yes, sir.

Q (Counsel for United States): So this is something you want to do?

A (Smith): Yes, sir.

E.R. 664.

2. The Grand Jury Room Is Not A Custodial Setting

Although Smith argues (Br. 29-30) that the fact that he was "facing the grand jury" created a coercive environment, the Supreme Court disposed of that argument in *Washington*, where it held that a grand jury room does not, in and of itself, create coercive conditions that violate the Fifth Amendment. The Court explained that while "[o]f course, for many witnesses the grand jury room engenders an atmosphere conducive to truth telling, * * * it is likely that upon being brought before such a body of neighbors and fellow citizens, and having been placed under a solemn oath to tell the truth, many witnesses will feel obliged to do just that[] [b]ut it does not offend the guarantees of the Fifth Amendment if in that setting a witness is more likely to tell the truth than in less solemn surroundings." *Washington*, 431 U.S. at 187-188. Further, in holding that the self-incriminating statements were admissible at the criminal trial, the Court in *Washington* explained that "far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are *inherently desirable*." *Id*. at 187 (emphasis added).

This Court in *United States* v. *Swacker*, 628 F.2d 1250 (9th Cir. 1980), considered an analogous situation and, applying the Supreme Court's holding in *Washington*, held that admitting a defendant's grand jury testimony did not violate

the defendant's privilege against self-incrimination because the statements were not compelled. The defendant in *Swacker*, in fact, received fewer warnings than Smith. In *Swacker*, the defendant was "not advised that he was a target of the grand jury investigation," although he was advised of his rights prior to testifying. 628 F.2d at 1253. After testifying before the grand jury the defendant in *Swacker* "was indicted and his grand jury testimony was used against him as substantive evidence at trial." *Ibid*. This Court, relying on *Washington*, determined that Swacker's "fifth amendment privilege had not been violated by admission of his grand jury testimony." *Ibid*.; see also *United States* v. *Goodwin*, 57 F.3d 815, 817 (9th Cir. 1995) ("key" to defendant's "Fifth Amendment protection is that he not feel compelled to testify").

Not only is there no evidence showing that Smith was coerced into or compelled to testify, there is also no evidence of circumstances that would have precluded him from asserting his Fifth Amendment privilege during the course of his testimony. Prosecutors here gave Smith ample warning that he could, at any time, exercise his Fifth Amendment privilege and refuse to answer any questions that he believed might incriminate him, and Smith exercised that right on two occasions before the grand jury. E.R. 681, 697.

Smith argues (Br. 29-35) that both his statements to federal prosecutors and his grand jury testimony were involuntary because the government falsely advised him that he could not have a court-appointed counsel at the grand jury.[9] Smith argues (Br. 33-34) that, under *Smith* v. *United States*, 337 U.S. 137 (1949), and *Empsak* v. *United States*, 349 U.S. 190 (1955), the government must prove, in certain circumstances, that an individual has waived his Fifth Amendment privilege.

These cases are factually distinguishable from this case. Both *Smith* and *Empsak* involved witnesses who claimed a Fifth Amendment privilege against self-incrimination and either answered questions and sought to receive immunity from subsequent suit (*Smith*, in testifying before a hearing examiner at a federal agency),

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[9] From a constitutional standpoint, Smith was not in a custodial setting and thus had no constitutional right to counsel. The Sixth Amendment right to counsel does not attach until after the initiation of formal charges. *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972); *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984) ("[T]he right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."); *United States* v. *Hayes*, 231 F.3d 663, 667 (9th Cir. 2000), cert. denied, 532 U.S. 935 (2001). The Sixth Amendment, "[b]y its very terms, * * * becomes applicable only when the government's role shifts from investigation to accusation." *Id*. at 671. In *United States* v. *Mandujano*, 425 U.S. 564, 579-580 (1976), the Supreme Court distinguished the grand jury setting from a custodial interrogation that would trigger rights set out in *Miranda*. Because Smith was not charged with an offense, his grand jury appearance was not a custodial setting under the Sixth Amendment. See *In re Grand Jury Investigation*, 182 F.3d 668, 670-671 (9th Cir. 1999); *United States* v. *Kelly*, 540 F.2d 990 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

or expressly refused to answer questions to avoid self-incrimination (*Empsak*, in testifying before a congressional committee). Here, after having been given ample warnings of his right both not to appear at the grand jury, and to exercise his Fifth Amendment privilege not to provide incriminating answers, and having indicated repeatedly that he understood his rights, Smith appeared voluntarily and in fact exercised his right twice, refusing to answer two questions posed to him during the grand jury proceeding. See E.R. 681, 697. Smith's exercise of his Fifth Amendment privilege was honored in both instances. See E.R. 681, 697.

C. The Criminal Justice Act Plan Does Not Create Any Legally Protected Right To An Appointed Attorney For A Grand Jury Witness

Smith's assertion (Br. 32, 38) that he was *entitled* to the assistance of court-appointed counsel under the CJA Plan is incorrect. The CJA Plan does not mandate appointment of counsel. The CJA Plan for the Eastern District of California, General Order No. 323, Section IV, mandates the appointment of attorneys to financially eligible persons only in certain circumstances, set out in subsection A.1. Smith's case does not fall within the mandatory circumstances of subsection A.1. Smith's situation more appropriately falls within subsection A.2., which sets out the criteria for the *discretionary* appointment of attorneys to financially eligible persons and states as follows:

> Whenever a district judge or United States magistrate judge determines that the interest of justice so require, representation *may* be provided for [a] * * * person who * * * has been called as a witness before a grand jury.

CJA Plan, Sec. IV.2.d.

As explained, pp. 12-16, *supra*, Smith had voluntarily spoken to investigators at least three times prior to his appearance before the grand jury on March 1, 2007. Smith's last conversation with investigators before his grand jury appearance occurred the evening of February 28, 2007, the night before he was scheduled to speak to the grand jury. It was at this meeting that Smith indicated *for the first time* that he wanted an attorney for his March 1 appearance. E.R. 643-645 (Declaration of Agent Tam).

The CJA Plan "is not a statement of what the Constitution requires." *Steele* v. *United States*, 518 F.3d 986, 988 (8th Cir. 2008). "[T]he source of the duty in [the] Plan is a legislative policy judgment rather than a constitutional command." *Ibid*. Even at the hearing on the motion to suppress, defense counsel admitted that Smith had no legally enforceable right to an attorney prior to his grand jury appearance. E.R. 4 (Mr. Ament: "[T]he Government is correct, that the Criminal Justice Act does not in so many words give a Grand Jury target a right to an

appointed attorney."). As counsel stated, Smith may have at most "ha[d] a right to request counsel." E.R. 5.[10]

D. The Evidence Against Smith Was Overwhelming

In any event, even if Smith should have been told the night before his grand jury appearance that he could ask for appointed counsel, the mistake was harmless. The few portions of the grand jury testimony read into the trial record were merely cumulative of other overwhelming evidence prosecutors presented at Smith's criminal trial.

The bulk of Smith's grand jury testimony was *redacted* and was *not* read into the trial record. See E.R. 448-512. Among the few pages that were read to the jury, there are only three instances in which Smith arguably made somewhat incriminating statements. In one instance, Smith acknowleged that he used the word "nigger" in reference to Henderson. E.R. 467, 469. In a second instance,

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[10] Smith argues (Br. 36-38) that the government attorney's failure to notify him that the district court had the discretion under the CJA Plan to appoint counsel deprived him of due process under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Smith, however, fails to cite any case showing that the *Mathews* due process analysis would apply here. Indeed, the facts show that (1) Smith spoke to Agent Tam voluntarily several times prior to his grand jury appearance, (2) prior to Smith's statements to the grand jury, his rights under the Fifth Amendment were explained to him, and (3) Smith indicated that he fully understood his rights and stated at the grand jury proceeding that he was appearing voluntarily and without coercion. Since the CJA Plan creates no legally protected right to an appointed attorney, Smith's appearance before the grand jury presents no due process violation.

Smith was asked whether he talked to Henderson "about a hanging" and Smith responded "yes, I did." E.R. 469. In a third instance, Smith answered questions about getting six or seven of his friends to go with him to Henderson's house. E.R. 495, 499.

In the other portions of Smith's grand jury testimony that were read at the trial, Smith did not admit harassing Henderson. For instance, when government counsel at the grand jury proceeding asked Smith whether he remembered making statements over the CB radio about harming Henderson's house, he responded, "No sir. * * * I – I don't remember if I said that." E.R. 470. Smith was asked whether he remembered telling Henderson about building a cross, and Smith responded, "No." E.R. 474. When he was asked whether it was "possible [he] said something like that," Smith responded, "I won't dismiss it." E.R. 475. Smith was also asked whether he told Henderson he would run him out of town, and he responded, "How would I run him out of town?" E.R. 480. Smith also responded that he "[could] not * * * remember saying anything like that" but that it was "possible * * * [a]nything is possible." E.R. 481.

The jury heard numerous witnesses who testified in great detail about Smith's continuing racial harassment of Henderson. See E.R. 220-229, 232, 241, 247-248 (Reineking), 251-274, 278, 282-310 (Henderson); S.E.R. 1-6, 7-12

(Terra), 13-21, 22-23 (Loyd), 26-36 (Ayers), 37-46 (Weiss). These witnesses consistently and uniformly testified at trial that Smith regularly used racially-offensive remarks towards Henderson beginning in June 2005, that Smith made constant threats of violent, sexual assaults against Henderson's wife, that Smith stated that he had built a 15-foot cross that he intended to soak in kerosene and burn on Henderson's lawn, that Smith wanted to cut off Henderson's head, hang him from a tree and burn him, and that Smith's intent was to get Henderson to move out of his home in Modesto. See pp. 9-11, *supra*. Agent Tam also testified that Smith told him it was his idea to bring several of his friends to Henderson's house on October 28, 2005, after one of those friends transmitted on CB radio, from Smith's house, that he was going to burn a cross on Henderson's lawn, and someone else broadcast a statement about having a hanging. See p. 15, *supra*.

Even without the reading of the grand jury excerpts, the case against Smith here is overwhelming and therefore a reversal of the conviction is unwarranted. See, *e.g.*, *United States* v. *McKoy*, 129 F. App'x 815, 826 (4th Cir.) (admission of defendant's grand jury testimony was harmless error because it was "largely cumulative of the abundant quantum of other evidence presented at trial that establishes, beyond a reasonable doubt, that [defendant] was a member of the conspiracy, the existence of which also was established beyond a reasonable

doubt"), cert. denied, 546 U.S. 910 (2005); *Brown* v. *United States*, 411 U.S. 223, 231 (1973) (admission of defendant's statements to police was harmless error because it was "cumulative of other * * * evidence before the jury"). Accordingly, any error was harmless.

II

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF SMITH'S PROPOSED EXPERT WITNESS

A. Standard Of Review

A district court's decision to exclude expert testimony is reviewed for abuse of discretion and "will not be reversed unless 'manifestly erroneous.'" *United States* v. *Hermanek*, 289 F.3d 1076, 1092 (9th Cir. 2002) (quoting *United States* v. *Hankey*, 203 F.3d 1160, 1167 (9th Cir.), cert. denied, 530 U.S. 1268 (2000)), cert. denied, 537 U.S. 1223 (2003).

B. Lindley's Proposed Expert Testimony Did Not Meet The Test Established By Rule 702 Of The Federal Rules Of Evidence

Rule 702 of the Federal Rules of Evidence reflects the Supreme Court's holding in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that trial judges have the duty to exclude unreliable expert testimony. That responsibility exists not only with respect to scientific experts but also as to

proposed "expert testimony" based on technical or other specialized knowledge. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 141 (1999).

The district court held a *Daubert* hearing in which Smith proffered Lindley as an expert witness based on Lindley's "specialized knowledge" of CB radio communications. Lindley's testimony demonstrated that his "expertise" consisted only of his general impressions of "CB radio culture," and he conceded that he had done no research regarding the correlation between intentions expressed on CB radio and intentions that were fulfilled. E.R. 542-543. While Smith is correct in arguing (Br. 42-43) that "[t]he *Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to * * * testimony[] whose reliability depends heavily on the knowledge and experience of the expert, rather than the methodology or theory behind it," *Hankey*, 203 F.3d at 1169, the district court did not focus on those *Daubert* factors.

Rather, the court expressed concern that there were *no* principles or methodology for Lindley to apply, since Lindley's testimony would be based on "subjective listening and analysis and conclusions" that were "[t]otally untested." E.R. 549. Indeed, Lindley acknowledged that his methodology for determining the intent of the individuals in the audio tapes he reviewed was "simply countering it

against [his] experience" which would "have to [involve] a degree of subjectivity." E.R. 535. Basically, Lindley had no scientific or otherwise demonstrable expertise.

Moreover, Smith was not prevented from pursuing his theory that CB radio users would not have taken his racial threats seriously. The district court permitted Smith to ask the witnesses who were CB radio participants whether they took Smith's threats against Henderson seriously. S.E.R. 24-25.[11] Thus, the court permitted Smith to argue that part of the contextual aspect of determining whether the threats were "true threats" was that they were made on CB radio. S.E.R. 24-25.

C. Lindley's Proposed Testimony Would Have Violated Rule 704(b) Of The Federal Rules Of Evidence By Stating An Opinion Or Inference As To Whether Smith Had The Mental State Necessary To Commit The Offense

Rule 704(b) of the Federal Rules of Evidence prohibits expert testimony in a criminal case that states an opinion or inference with respect to whether the defendant had the mental state to commit the crime charged. As the court correctly held, Lindley's proposed testimony would invade the jury's function.

The district court instructed the jury that, in order to convict Smith on Count One, it must find that he uttered "true threats" against Henderson. The court defined "true threat" as follows (E.R. 619):

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[11] Indeed, one of the government's witnesses testified on direct examination concerning whether he thought Smith was joking. E.R. 232-233.

> A "true threat" is one where the speaker subjectively means to communicate a serious expression of an intent to commit an act of unlawful violence against the listener. To be a true threat, the speaker must have intended to express a serious statement of intention to inflict physical harm to the recipient. In other words, he must have intended that the listener would believe that he would carry out the threat. The government need not show that the defendant actually intended to carry out the threat.

As the cases Smith cites (Br. 41) illustrate, this Court has permitted witnesses whose expertise was based on specialized knowledge in the culture of gangs, and the jargon used by those in the narcotics trade, to testify as experts under Rule 702. In those instances, the expert could assist the jury in interpreting the coded terms used by drug dealers in recorded conversations - terms that would not be familiar to jurors - thereby providing a context for the jury to understand why a gang "code of silence" would induce a witness to lie about another gang member's activities (*Hankey*, *supra*). Here, however, Smith sought to have Lindley testify, not to assist the jury in understanding obscure or confusing CB radio jargon, but to express his opinion on an issue that the jury would need to reach in order to find Smith guilty on Count One, *i.e.*, whether the threats made by Smith on CB radio against Henderson were actual threats proscribed by 42 U.S.C. 3631.

In *United States* v. *Hanna*, 293 F.3d 1080 (9th Cir. 2002), this Court found that the district court, in a prosecution under 18 U.S.C. 871(a) for making threats

against the President of the United States, abused its discretion by permitting "expert" testimony of law enforcement witnesses that they believed the defendant's writings were serious threats against the President. This Court held that, "[w]ithout additional assistance, the average layperson is qualified to determine what a 'reasonable person' would foresee under the circumstances." *Id.* at 1086. See also *United States* v. *Romo*, 413 F.3d 1044, 1049-1050 (9th Cir. 2005), cert. denied, 547 U.S. 1048 (2006). Here, the court quite properly denied Lindley the opportunity to opine as an expert on a quesiton the "average layperson" can assess – whether Smith subjectively meant to communicate a serious expression of an intent to commit an act of unlawful violence against Henderson. Accordingly, the district court's decision to exclude Lindley's testimony was not "manifestly erroneous." *Hermanek*, 289 F.3d at 1092.

III

THE DISTRICT COURT DID NOT CLEARLY ERR IN FINDING THAT SMITH'S CONDUCT EVIDENCED AN INTENT TO CARRY OUT HIS THREATS AGAINST HENDERSON, JUSTIFYING A SIX-LEVEL ENHANCEMENT, PURSUANT TO U.S.S.G. 2A6.1(b)(1)

A. Standard Of Review

This Court reviews for clear error a district court's factual findings supporting application of the sentencing guidelines. *United States* v. *Lambert*, 498 F.3d 963, 966 (9th Cir. 2007).

B. The District Court Did Not Clearly Err In Finding That Smith Evidenced An Intent To Carry Out His Threats Against Henderson

Smith argues (Br. 47-52) that there was not sufficient evidence to support the district court's finding that he engaged in conduct evidencing an intent to carry out his threats against Henderson. That finding justified a six-level enhancement of his base offense level, pursuant to U.S.S.G. 2A1.6(b)(1).

The PSR recommended this six-level enhancement based on the fact that "after having made physical threats of violence toward [Henderson] over the CB radio," Smith "arrived at [Henderson's] residence with five other individuals." PSR 8, ¶ 23.[12] At sentencing, the district court stated (E.R. 23):

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[12] The PSR appears to contain a typographical error in that it states that "[t]he defendant arrived at the defendant's residence," rather than at the victim's residence.

> [E]ven though [Smith] walked up * * * to Mr. Henderson alone in the sense that his group didn't come side by side, there was still a group * * * [a]nd it was obvious to Mr. Henderson, based on the testimony, that these people were there. And what other reason other than to say 'We're here and we're ready, what else,' why else would you ever go? I mean, that's why they went. They went to say 'We're here, we're capable and we're ready.' That's what showing up after rallying a group to come over to somebody's house under those circumstances with threats, that's what it is.

Contrary to Smith's argument (Br. 48), this Court is not limited to considering whether Smith came prepared for a lynching simply because that particular threat was mentioned in a colloquy between the government and the district court judge at sentencing. Indeed, the district court noted that one of the more disgusting threats Smith made to Henderson involved the sexual assault of Henderson's wife, E.R. 28, and Henderson had testified that he was particularly worried about Smith and the others doing harm to his wife that night because she had recently come home from the hospital, was confined to bed, and was thus unable to defend herself. E.R. 278, 282-284. In addition, Manuel Terra testified that he heard Smith state on the radio that he and six or seven of his friends "were getting in the car and they were going to go to Mr. Henderson's house, kind of roughing him up." S.E.R. 9. Had the police not arrived in response to Henderson's call and broken up the altercation in the street, any of those things could have occurred. The fact that Smith and his friends showed up at

Henderson's house seeking a confrontation within a very short time of having made serious threats of physical harm to Henderson provides a more than sufficient basis for the district court to find conduct evidencing an intent to carry out those threats.

The Eleventh Circuit's decision in *United States* v. *Scott*, 441 F.3d 1322 (2006), does not support Smith's argument (Br. 50-51). In *Scott*, the defendant sent several letters to the judge who had sentenced him in a prior criminal trial threatening to kill the judge, kidnap his children, blow up his car, and blow up the federal building in which he worked, thus killing "all feds, judges." 441 F.3d at 1324. After the final threatening letter, the judge's staff notified the FBI, and FBI agents interviewed the defendant, who gave an ambiguous answer to questions about whether he really intended to kill the judge when he was released from prison and then smiled and refused to further clarify his answer. *Ibid.* Based on Scott's statements to the FBI, the district court added a six-level enhancement to Scott's base offense level, pursuant to U.S.S.G. 2A6.1(b)(1).

The court of appeals in *Scott* found that the statement made to FBI agents did not amount to "serious conduct committed before or during the offense [that] indicate[d] an intent to carry out the threat," U.S.S.G. 2A6.1, comment. (n.1), because it was made "after the crime had been completed." 441 F.3d at 1329.

Here, in contrast, Smith's orchestration of the visit to Henderson's home with several of his friends occurred *during* commission of the offense, and within a very short time after broadcast of serious racially-based threats over the CB radio aimed specifically at Henderson and his wife. Moreover, Smith had earlier taken action to follow through on his threat to move closer to Henderson, in order to force him to leave the Modesto area, by attempting to rent a house within a block of Henderson's home.

Accordingly, the district court judge, who was present at trial and heard all of the evidence, did not commit clear error in finding that Smith's conduct evidenced an intent to carry out his threats against Henderson to justify the six-level enhancement under U.S.S.G. 2A6.1(b)(1).

IV

THE DISTRICT COURT DID NOT COMMIT LEGAL ERROR IN APPLYING A THREE-LEVEL ADJUSTMENT, PURSUANT TO U.S.S.G. 3A1.1, WHERE THE JURY FOUND BEYOND A REASONABLE DOUBT THAT SMITH INTENTIONALLY SELECTED HENDERSON AS A VICTIM BECAUSE OF HIS RACE

A. Standard Of Review

This Court reviews *de novo* the district court's interpretation and application of the Sentencing Guidelines. *United States* v. *Ankeny*, 502 F.3d 829, 841 (9th Cir. 2007).

B. The Guideline Commentary On Which Smith Relies Should Not Be Given Controlling Weight Because It Sets A Higher Standard Than Is Required By The Statute Authorizing The Guideline

Section 3A1.1(a) of the Guidelines provides, in relevant part, that a court at sentencing should increase the defendant's base offense level by three levels

> [i]f the finder of fact at trial * * * determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race * * * of any person.

Smith argues (Br. 52-55) that the district court committed legal error in enhancing his base offense level by three levels under Section 3A1.1(a) of the Guidelines. He argues that language in the Background commentary to the Guidelines requires the jury to have found that "the *primary* motivation for the offense was the race * * * of the victim." U.S.S.G. 3A1.1, comment. (backg'd).

At trial, the jury was instructed that it must find that race was a *substantial* motivation for Smith's actions in order to convict (E.R. 621):

> The third element of Count One requires the government to prove beyond a reasonable doubt that the defendant acted because of the race, color, or national origin of Alfred Henderson. This means that the government must prove that Mr. Henderson's race, color, or national origin was a substantial motivating factor in the defendant's actions.

Although Smith argues (Br. 53) that this instruction "was a watered down version of th[e] Guideline test," the instruction was similar to the one he proposed below. S.E.R. 78. The Background notes to Section 3A1.1, on which Smith relies in arguing that race must be the *primary* motivation for the offense, state that subsection (a) of the Guideline derives from Congress's directive in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 103rd Cong., 2d Sess. (1994) (VCCLEA). Section 280003(a) defines a "hate crime" as a crime in which the defendant intentionally selects a victim because of the race of any person, and Section 280003(b) directs the Commission to provide a three-level sentencing enhancement "for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes." The statute does not, however, specify a standard of proof regarding the *motivation* of the defendant. Thus, while the Background notes state that Congress directed that the enhancement be added "when the finder of fact at trial determines beyond a

reasonable doubt that the defendant had a hate crime motivation (*i.e.*, a primary motivation for the offense was the race * * * of the victim)," the parenthetical purporting to require proof that the motivation was the "primary" motivation is not required either by the statute authorizing the enhancement or the guideline itself.

In *United States* v. *Anderson*, 942 F.2d 606, 609 (9th Cir. 1991) (en banc), this Court addressed "how much weight courts must give to the commentary when interpreting the guidelines." Following a thorough review of the process used by the Sentencing Commission in formulating commentary, the Commission's own view of the weight to be given to the commentary, and relevant case law on the issue, this Court concluded that "because the commentary is not equal to the guidelines, in the unusual case in which the commentary and a guideline cannot be construed consistently, the text of the guideline must prevail." *Id*. at 613 (citing cases).

Subsequent to this Court's en banc decision in *Anderson*, the Supreme Court also considered the issue of the weight to be accorded commentary to the guidelines. In *Stinson* v. *United States*, 508 U.S. 36, 45 (1993), the Court held that the commentary is "akin to an agency's interpretation of its own legislative rules," and therefore must be given "controlling weight unless it is plainly erroneous or

inconsistent with" the guideline it interprets. See also *United States* v. *Lambert*, 498 F.3d 963, 966 (9th Cir. 2007).

In this case, the Guideline tracks Congress's language in Section 280003 of VCCLEA, directing the Commission to promulgate an enhancement for hate crimes. The Commission's parenthetical in the background notes, however, establishes a more stringent standard of proof for intention to select a victim because of his race than any of the case law interpreting the standard of proof for hate crime motivation under 42 U.S.C. 3631. Therefore, the parenthetical should not be considered of controlling weight in determining whether an enhancement is appropriate under Section 3A1.1(a).

Here, the jury necessarily found beyond a reasonable doubt that race was a substantial factor behind Smith's action, and therefore convicted him of a hate crime. Under the applicable Guideline, the jury's finding is legally sufficient to support the three-level enhancement.

V

THE DISTRICT COURT DID NOT COMMIT PLAIN ERROR IN APPLYING A TWO-LEVEL ADJUSTMENT, PURSUANT TO U.S.S.G. 3B1.1(c), BASED UPON SMITH'S ROLE IN THE OFFENSE AS THE LEADER OF THE GROUP OF INDIVIDUALS WHO WENT TO HENDERSON'S HOME ON OCTOBER 28, 2005

A. Standard Of Review

Because Smith did not challenge below the PSR's recommendation that a two-level adjustment be made to his base offense level, pursuant to U.S.S.G. 3B1.1(c), for his leadership role in the offense, this Court should review the district court's decision adopting the recommendation of the PSR for plain error. *United States* v. *Rendon-Duarte*, 490 F.3d 1142, 1146 (9th Cir. 2007).

In his initial objections to the PSR (E.R. 96-116), Smith did not raise any objection to the two-level aggravated role enhancement the PSR recommended. Subsequently, while Smith argued there was not sufficient evidence to support the Government's request for a *four-level* adjustment, pursuant to U.S.S.G. 3B1.1(a), E.R. 67-68, he did not argue, as he now does here, that a two-level adjustment pursuant to Section 3B1.1(c) for leadership role would constitute legal error. Nor did he object during the sentencing hearing to the district court's determination that the two-level adjustment the PSR recommended was appropriate. Since Smith failed to object below on the basis he now raises on appeal, plain error is the proper

standard of review. *United States* v. *Ortiz*, 362 F.3d 1274, 1278 (9th Cir. 2004). In order for this Court to find plain error, "[t]here must be an 'error,' that is 'plain' and that 'affect[s] substantial rights.'" *Rendon-Duarte*, 490 F.3d at 1146 (citing *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). This Court should not exercise its discretion under Federal Rule of Criminal Procedure 52(b) to correct a forfeited error unless it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. Smith bears the burden on that issue.

B. The District Court Did Not Plainly Err In Finding That Smith Was A Leader Or Organizer Of At Least One Other Person

Section 3B1.1(c) of the Guidelines provides for a two-level enhancement when the defendant has acted as "an organizer, leader, manager, or supervisor" in the offense. The PSR recommended a two-level enhancement based on the fact that Smith "told the FBI agent that he called the 'other' individuals and suggested they travel to Henderson's residence to confront him." PSR 9 ¶ 26.

The court indicated twice that it agreed with the Probation Office that a two-level adjustment was warranted because of Smith's leadership role in the racial harassment offense. E.R. 41, 51-52. The court stated that it was not applying the four-level enhancement in Section 3B1.1(a) of the Guidelines "because of the definition of 'participant' 3B1.1, Comment 1." E.R. 50. The government had

argued that the testimony showed that there were more than five individuals who came with Smith to Henderson's home on the night of October 28, 2005, "who were either going to participate in something bad happening to Mr. Henderson or intended to aid and abet it," that "multiple individuals of that entire group were on the CB radio making statements of racial violence that were directed towards Mr. Henderson," they "were almost certainly aware that Mr. Smith was saying comparable things," and "they elected to come with Mr. Smith anyway." E.R. 42. The court then asked how the government knew that they were the same people. E.R. 42. Although the government admitted that it did not know for certain that all were, counsel stated that "[i]t seems preposterously unlikely that Mr. Smith could have rounded up an entirely different set of people given the comparatively compressed time frame we're talking about between the 'come on over' and when everybody showed up at Mr. Henderson's home." E.R. 42-43.

The court apparently determined, however, that the evidence supported solely the two-level enhancement contained in Section 3B1.1(c). E.R. 52. Contrary to Smith's argument (Br. 56), it does not necessary follow that, by rejecting the government's request for a four-level enhancement - which requires leadership of criminal activity involving five or more participants - the court necessarily "found that there were no other participants." Because the court had

expressed doubts about whether the individuals who Smith brought along to Henderson's house all were the same people who had participated in making racial threats that evening on the radio (E.R. 42), the court's remarks are also consistent with its having found that Smith was the "organizer [or] leader * * * of one of more other participants," U.S.S.G. 3B1.1, comment. (n.2), but was not an organizer or leader of a criminal activity involving five or more other criminally responsible "participants." See also the court's comments at p. 47, *supra*.

Indeed, the record is more than sufficient for the court to make a finding, by a preponderance of the evidence, that Smith organized at least one other "participant," as defined by the Guidelines' commentary, to go with him to Henderson's house for a confrontation. FBI Agent Tam testified that Smith stated during an interview that, prior to going to Henderson's house on October 28, 2005, a man named John Dykstra had transmitted from a radio at Smith's house, "I'm going to burn a cross on your [Henderson's] lawn." E.R. 434. Smith stated in a redacted portion of his grand jury testimony that Dykstra was one of the individuals who came with him to Henderson's that night. E.R. 700. Based on that testimony, the district court did not commit plain error in finding that Smith was a leader of criminal activity that included at least one other criminally culpable participant.

VI

THE DISTRICT COURT WAS NOT REQUIRED TO ADDRESS SPECIFICALLY EACH OF THE FACTORS ENUMERATED IN 18 U.S.C. 3553(a), AND ITS FAILURE TO DISCUSS UNWARRANTED SENTENCING DISPARITY, 18 U.S.C. 3553(a)(6), DOES NOT MEAN THAT IT FAILED TO CONSIDER THAT FACTOR

A. Standard Of Review

An argument that a district court has failed to consider the Section 3553(a) factors raises an issue of procedural error as to which this Court applies an abuse of discretion standard. *United States* v. *Carty*, 520 F.3d 984, 993 (9th Cir.) (en banc) (citing *Gall* v. *United States*, 128 S. Ct. 586, 597 (2007)), cert. denied, 128 S. Ct. 2491 (2008).

B. The District Court Did Not Abuse Its Discretion In Its Consideration Of The Factors Enumerated In 18 U.S.C. 3553(a)

In its en banc decision in *Carty*, 520 F.3d at 991-992, this Court recognized that a district court should consider the factors listed in 18 U.S.C. 3553(a) "to decide if they support the sentence suggested by the parties." This Court then held that "a district court need not tick off each of the § 3553(a) factors to show that it has considered them." *Id.* at 992.

Here, the district court stated that it had considered the PSR, defendant's sentencing memorandum and his objection to the PSR, the government's formal objections to the PSR, the government's sentencing memorandum and the

defendant's response, and the Probation Office's response to the parties' sentencing memoranda. E.R. 17-18. Thus, it was clear that, before making its decision, the district court was aware of and had considered Smith's argument that the sentence recommended by the PSR created an unwarranted sentencing disparity. See *United States* v. *Daniels*, 541 F.3d 915, 922 (9th Cir. 2008) (quoting *Carty*, 520 F.3d at 996) (when a sentencing judge "stated that he reviewed the papers" and "the papers discussed the applicability of § 3553(a) factors," the court of appeals can assume that the judge considered the relevant factors).

The court also stated that it had considered the Section 3553(a) factors, and discussed in detail what it considered to be the most important factors. See *United States* v. *Becerril-Lopez*, 541 F.3d 881, 894 (9th Cir. 2008) (not an abuse of discretion for court to discuss in detail only what it considered the "most salient feature" of the defendant's circumstances), cert. denied, 2009 WL 56557 (Jan. 12, 2009).

The court's discussion of the Section 3553(a) factors in fact reflected what defense counsel emphasized during the sentencing hearing. Defense counsel did not even mention the disparity issue during the sentencing hearing. Rather, he emphasized Smith's mental and emotional background, including statements in a letter from Smith's brother about the circumstances in the brothers' house while

they were growing up. E.R. 32-33. Counsel also emphasized parts of the report of Dr. Robert A. Allen, a neuropsychiatrist, concerning Smith's "deteriorated functioning" and impairment in "his ability to cope and interpret social information," and the medications Smith was taking that affected his "cognitive functioning and apparent judgment and also caus[ed] a difficulty in sustaining concentration and remembering." E.R. 33. Defense counsel also asked the court to "consider the painful place that Mr. Smith came from in a way that perhaps explains, to some degree and may resonate to some degree how he could come to saying the things that he did." E.R. 34.

In *Becerril-Lopez*, this Court noted that "in the absence of any compelling argument about [the defendant's] particular circumstances, we have trouble imagining why a sentence within the Guidelines range would create a disparity, since it represents the sentence that most similarly situated defendants are likely to receive." 541 F.3d at 895 (citing *Carty*, 520 F.3d at 988 ("[W]e recognize that a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal.")). In this case, the district court clearly considered all the evidence Smith submitted and took Smith's "particular circumstances" into account. The court stated that it was going to "pay attention" to the "medical[/]neuro matter that was addressed by Dr. Allen in his report," because it is a "significant issue here,"

and was "well reasoned, which is why [the court was] not going to go above the guideline range" or to "the aggravated guideline range." E.R. 51-52. The court then said that "this would be an aggravated case, absent the Dr. Allen report," E.R. 51, but that it would not sentence Smith on "the mitigated level of the guideline range either," because that would not be fair to the victim. E.R. 52-53. The court stated that it had "balanc[ed] and weigh[ed]" both Henderson's "circumstances, which were beyond description, and the facts specifically found in Dr. Allen's report" in reaching its sentencing decision (78 months from a suggested guideline range of 70-87 months). E.R. 52-53.

Accordingly, the fact that the court did not address specifically in its sentencing decision Smith's argument that the PSR's recommended sentencing guideline range created an unwarranted disparity was not an abuse of its discretion and certainly does not suggest that the court failed to consider all relevant factors.

CONCLUSION

For the foregoing reasons, this Court should affirm Smith's conviction and sentence.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any other cases that are related to this appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 13,791 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

s/ Marie K. McElderry
MARIE K. McELDERRY
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DATED: February 13, 2009

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2009, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Marie K. McElderry
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