IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 09-4862

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

WILLIAM WHITE,

Defendant-Appellee

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

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# UNITED STATES' MEMORANDUM BRIEF IN SUPPORT OF APPEAL FROM DISTRICT COURT'S ORDER OF RELEASE PENDING TRIAL

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Pursuant to Federal Rule of Appellate Procedure 9(a), Local Rule 9(a), and 18 U.S.C. 3145(c), the United States respectfully submits this Memorandum Brief In Support of Appeal From District Court's Order of Release Pending Trial. The defendant is charged with transmitting threatening and extortionate communications to various individuals under 18 U.S.C. 875, and with intimidating witnesses under 18 U.S.C. 1512. The government has sought to keep the defendant in custody pending trial because he is a danger to the community. The

evidence in support of detention includes the defendant's own writings expressing his desire to carry out violent acts. In those writings he has stated, among other things, that he has developed an intricate plot to murder numerous people in Roanoke, Virginia.

The district court's order of September 18, 2009, releases the defendant from custody for the first time in eleven months. As set forth more fully below, the defendant was first detained last October when he was arrested and indicted for soliciting another person to harm a federal jury foreperson in the Northern District of Illinois, in violation of 18 U.S.C. 373. The decision to keep the defendant in custody was upheld in four subsequent proceedings, including an appeal to the Seventh Circuit. Although the solicitation charge was ultimately dismissed on constitutional grounds, the defendant was ordered detained for transportation back to the Western District of Virginia to face charges in this case. The government's clear and convincing evidence that the defendant poses a danger to the community has not changed since the defendant was first arrested last October. The district court overlooked this evidence and instead, placed the decision whether the defendant should be detained or released completely in the hands of a court-appointed psychiatrist. For the reasons set forth below, the United States respectfully asks this Court to reverse the order of release.

## BACKGROUND

*1. The Defendant*

At all times relevant, the defendant, William White, lived in Roanoke, Virginia, where he served as the Commander of the American National Socialist Workers Party and maintained a white supremacist website, Overthrow.com. See Indictment 1.[1] The defendant regularly updated the website and also posted communications and information on other, similar websites, frequently read by people who shared his white supremacist views. See *id*. at 1-2. Many of the defendant's web postings expressed his desire to see violent acts committed against persons with whom he disagreed. See *id*. at 2. The following passages represent a few examples of such postings:

> Example #1: [Name of EW, elderly Jewish scholar who had been attacked by a white supremacist, redacted] should be afraid to walk out his front door but for the rightful vengeance of the white working people he and his Holocaust lies have exploited.
>
> * * * * *
>
> Insofar as my views may have played a role in motivating [name of man who attacked EW redacted], I can only say that I hope I inspire a hundred more young white people to sacrifice themselves for our collective racial whole. The only thing more noble than sacrifice is victory.

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[1] The indictment is attached hereto as Exhibit A. Personal information contained in the indictment was redacted for the district court. No additional information has been redacted in this brief.

> Heil Hitler.
>
> Example #2: For those who have not heard so much about our website, please realize that the American National Socialist Workers Party is not just a website but a real world organization. We do fun stuff like *start riots* and *kidnap famous Jews*.
>
> Example #3: I really don't have anything against people who go on shooting sprees like this [in reference to a mass-murderer who selected his victims based on race]. I'm not encouraging anyone to do so – law and order and all being necessary – but our decadent society refuses to punish so many people that are deserving of justice, that a little bit of private justice, when properly directed, as in this case, is not a bad thing at all.
>
> Example #4: We have no intention of removing [from an internet posting ** * the African-American journalist's] personal information. Frankly, if some loony took the info and killed him, I wouldn't shed a tear. That also goes for your whole news room.

Indictment 2-3.

The defendant also posted an article entitled, "Addresses of the Jena 6 Niggers – In Case Anyone Wants To Deliver Justice," which included the names and addresses of six individuals in Jena, Louisiana. See *United States* v. *White*, No. 08-851, 2009 WL 2244639, at *2 (N.D. Ill. July 21, 2009). The defendant justified his publication of their personal information by explaining that "[w]hen the courts start enforcing laws against Internet threats and actual violence against anti-racists and the mainstream, Jewish owned media which finances and

encourages, I will stop broadcasting people's names and address[es] *with the opinion they should be lynched*." *Id.* at *2-3 (emphasis added).

In this case, however, the defendant is charged with making direct threats to specific individuals. See Indictment 16-19. For example, on October 31, 2007, the defendant made a telephone call to the office of a University of Delaware professor who had recently administered a diversity training program. See Indictment 11. The defendant spoke with the professor's secretary and identified himself as a leader of a white supremacist group. See Indictment 11-12. He insisted on speaking with the professor and told the secretary that he would hunt down the professor, and that anyone who viewed racism the way she does should be shot. See Indictment 12. The defendant also posted information on Overthrow.com about the professor's training program and displayed her personal and business addresses and telephone numbers, as well as the personal address and telephone number of one of her family members. See Indictment 12-13. Along with this information, the defendant wrote, "We shot Marxists sixty years ago, we can shoot them again!" Indictment 13.

Similarly, on February 26, 2008, the defendant posted information on Overthrow.com that criticized a Canadian civil rights lawyer ("RW") under the headline "KILL [RW]" and displayed RW's home address. See Indictment 14.

The post also stated:

> Kill [RW]
> Man Behind Human Rights Tribunal's Abuses Should Be Executed
>
> Commentary – [RW], the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's Human Rights Tribunal should be drug out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. It won't be hard to do, he can be found, easily, at his home, at [address redacted].
>
> * * * * *
>
> We may no longer have the social cohesion and sense of purpose necessary to fight as a country, but those of us who have the social cohesion and sense of purpose necessary to unify as a race must take notice of an irreconcilable fact: *[RW] is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree: [address redacted]*.

Indictment 14-15 (emphasis added).

On March 8, 2008, the defendant telephoned the home of an African-American mayor's home in New Jersey and told the mayor's wife that he was the commander of a neo-Nazi organization and that he knew where they lived and that he was going to put a swastika on their front yard. See Indictment at 15. The defendant also sent an email to the mayor that stated "[u]nfortunately, the days when white men would simply burn the local newspaper and run nigger officials out with tar and feathers are past. However, your incidents give me hope that perhaps we shall see them again." Indictment 16. The email contained a

postscript stating "[w]e know you live at [addresses and telephone number redacted]. I just spoke to your wife [name redacted]. I hope you got my message." Indictment 16. The defendant also posted this email communication on the internet. See Indictment 16.

*2. Arrest And Indictment For Solicitation In The Chicago Case*

On October 17, 2008, the defendant was arrested in Roanoke after the United States Attorney's Office for the Northern District of Illinois (USAO) filed a criminal complaint against him in Chicago. See *United States* v. *White*, No. 7:08-mj-00483-mfu (W.D. Va.). On October 19, 2008, the defendant appeared before Judge Urbanski, a magistrate judge in the Western District of Virginia, who entered a temporary detention order. See *ibid*. On October 21, 2008, a federal grand jury in Chicago returned an indictment charging the defendant with violating 18 U.S.C. 373, by soliciting another person to harm the foreperson of the federal jury that convicted white supremacist leader Matthew Hale. See *White*, 2009 WL 2244639, at *1. Hale had been convicted in 2003 of soliciting the murder of a federal district court judge, Joan Lefkow, who had presided over a civil case involving Hale's organization. See *ibid*. (citing *TE-TA-MA Truth Foundation-Family of URI, Inc.* v. *World Church of the Creator*, 392 F.3d 248

(7th Cir. 2004)).[2]

*3. October 22, 2008, Hearing Before Judge Urbanski*

The defendant reappeared before Judge Urbanski on October 22, 2008, for a hearing to determine whether he should remain in custody while being transported from Roanoke to Chicago. See 10/22/08 Tr. 4-5.[3] Because the government did not allege that the defendant was likely to flee, the sole issue before Judge Urbanski was whether there was "clear and convincing evidence" to support a finding that "no condition or combination of conditions will reasonably assure the safety of any other person and the community." 18 U.S.C. 3142(f).

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[2] When Judge Lefkow's husband and mother were killed before Hale's sentencing, the defendant wrote:

> I do not mourn the assassination of Judge Lefkow's family, and I hope the killer wrecks more havoc among the enemies of humanity, and the killer is never found. I do not say that because I have personal animosity for Judge Lefkow, or because I * * * have a love of violence or death. What I love is justice, and this act of violence, publicized as it is to millions of those who passively engage in evil in the name of the Jew, sends a message of justice to those who thought they could be protected in the performance of evil.

*White*, 2009 WL 2244639, at *4.

[3] The hearing transcripts from October 22, 2008, December 5, 2008, July 31, 2009, and September 10, 2009, as well as the hearing exhibits, are all attached to the United States' Emergency Motion To Stay District's Order Granting Pretrial Release, filed in this Court on September 18, 2009.

The hearing before Judge Urbanski lasted five hours and included testimony from the defendant, the FBI agent assigned to investigate the case, a probation officer, the defendant's wife, and several other witnesses. See 10/22/08 Tr. 164. Special Agent Thomas Church testified to the defendant's criminal history, which included a prior conviction for resisting arrest. See 10/22/08 Tr. 22-23. Special Agent Church also testified to blog posts in which the defendant recounted, happily, other violent encounters he has experienced, including "choking [a] nigger." See 10/22/08 Tr. 21-22. The probation officer, Kenneth Wingfield, testified that he would recommend that the defendant be detained, emphasizing that the defendant "had, by his own words, developed an intricate plan to kill a score of folks in the Roanoke area." 10/22/08 Tr. 53. Finally, the defendant testified that his "general outlook on the world" is that "you could kill a whole lot of people and you still wouldn't be killing very many who had any value." 10/22/08 Tr. 97.

Based on this evidence, the government argued that the defendant posed a danger to the community, and should remain in custody. See 10/22/08 Tr. 159-161. In response, the defendant argued that the conduct charged in the indictment was constitutionally protected, an argument which Judge Urbanski repeatedly rejected because it was not relevant to the issue of pretrial detention. See, *e.g.*,

10/22/08 Tr. 5, 16-17, 142, 156.

Judge Urbanski concluded that the defendant should remain in custody. See 10/22/08 Tr. 164-168. In so concluding, Judge Urbanski, as required by the statute, 18 U.S.C. 3142(g), thoroughly considered (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release. See 10/22/08 Tr. 164-168.

First, Judge Urbanski determined that the indictment charged the defendant with a crime of violence. See 10/22/08 Tr. 164. Second, in light of the grand jury's probable cause finding, Judge Urbanski found that the "weight of the evidence here is strong." 10/22/08 Tr. 165. Third, Judge Urbanski noted that the evidence of the defendant's history and characteristics was a "mixed bag," which presented "two Mr. Whites," that is, a successful business man who is dedicated to his family on the one hand, and then "the other Mr. White * * * who talks incessantly about killing people and that people should be lynched, and that if people are killed, that you wouldn't shed a tear, and laughing when people's families are murdered. That's a different Mr. White, and that is coming from [his] own words." 10/22/08 Tr. 165-167.

Finally, Judge Urbanski considered the fourth and most important factor and found that the defendant posed a significant danger to the community. See 10/22/08 Tr. 167-168. He explained that the most compelling evidence was "the defendant's own words" expressing a strong desire to carry out violent acts. 10/22/08 Tr. 168. Judge Urbanski emphasized:

> On May 5th, 2008, Mr. White said: "I had placed White Homes and Land up for sale in February, and I made the decision today to close the company and sell all of its assets at auction in the near future. This is something I've been planning for well over a year, though the market crash did not allow me to wrap things up quite the way I wanted to.
>
> "However, I no longer have the patience to continue to govern over white trash and niggers and the scum of the earth. *And if I'm going to go on a murder rampage in the area, I hope to unwind my company and my investments first*."
>
> * * * * *
>
> In the May 22 blog, some of the portions of it are: "Things have become progressively worse day by day, and *I have woke up more and more often feeling the need to kill, kill, kill*, and I have tried to get through my day while ignoring the need to destroy the wicked. It has not been easy."
>
> "The other week my wife asked me if I had become depressed since the baby was born. I told her depressed people feel something. Several friends have described me as morose. One joked the other day that they were worried I was about to 'go Joseph Paul Franklin.'

> They've been close.[4]
>
> "Since my wife was hospitalized until today, *my feelings have ranged from completely dead to occasional outbursts of literally murderous anger*."
>
> Later on in this passage: "Combined with this dead feeling, *I realized the other day that I have, almost without realizing it, though that may seem a bit strange, developed a very intricate plot for the murder of about a score of Roanoke City's negro nuisances and their annoying counterparts at the Roanoke Times*.
>
> "I know everything about these assholes, where they live, who they live with, what they look like, where they go, when they go there. *I estimate I could probably in the course of a few hours kill 15 out of the 20 easy if I picked the right day and time, and still live long enough to travel the country and begin picking off the ridiculous independent journalists that staff the Southern Poverty Law Center's Intelligence Report. I have a list of those as well*."
>
> Later on: "The other day I drew a gun and was ready to kill one of my tenants, based mostly on behavior from the tenant that, while violent and disruptive, would usually have rolled off my back. As I've thought about things the past few days, I've realized that I have been avoiding confrontations solely to avoid killing people. *As my list of people to kill has grown, it has become rather paralyzing*. Somewhat scary stuff, I guess, not normal or healthy."

10/22/08 Tr. 168-170 (emphasis added).

Given the lack of any evidence suggesting that the defendant's mental state was anything different than it was when he authored those writings, Judge

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[4] Joseph Paul Franklin is a serial killer who was convicted of shooting people outside of a synagogue in Missouri. See 10/22/08 Tr. 171-172.

Urbanski concluded that the defendant presented a danger to the community. See 10/22/08 Tr. 170-171. Judge Urbanski further concluded that, based on the evidence, there were no conditions that could be imposed to reasonably assure the safety of the community. See 10/22/08 Tr. 171-172. As he explained, "[y]ou can't put conditions on someone who expresses that they want to go on a murderous rage. There are no conditions or combination of conditions that I can imagine, much less fashion, to assure that members of the community would be safe." 10/22/08 Tr. 171.

The defendant appealed Judge Urbanski's order. See *United States* v. *White*, No. 08-cr-00049-jct (W.D. Va.). On October 30, 3008, District Court Judge Turk dismissed the defendant's appeal, affirming the order of detention. See *ibid*.

*4. December 4, 2008, Hearing Before Judge Hibbler*

The defendant was transported to Chicago and on December 5, 2008, he appeared before Judge Hibbler of the Northern District of Illinois for another detention hearing. See 12/5/08 Tr. 1-60. Judge Hibbler relied on the transcripts from the hearing before Judge Urbanski and also heard testimony from the defendant's expert witness, Dr. James Corcoran, a forensic psychiatrist. See 12/5/08 Tr. 2-26.

Dr. Corcoran testified that, after conducting a non-confidential interview with the defendant at the jail, he was unable to diagnose any major psychiatric illness, but concluded that the defendant suffered from a personality disorder with histrionic and narcissistic features. See 12/5/08 Tr. 15. Dr. Corcoran testified that individuals who suffer from histrionic features "enjoy drawing attention to themselves," "can create disturbances among others that involve excessive emotionality and attention seeking," and "often place themselves in dangerous situations." 12/5/08 Tr. 15-16. Dr. Corcoran testified that individuals who suffer from narcissistic features exhibit a "pervasive pattern or need for grandiosity, as exemplified by his writings; a need for admiration by other people that is above and beyond what the average person is seeking; and sometimes a lack of true empathy for other people." 12/5/08 Tr. 16. Dr. Corcoran further testified that the defendant's personality disorder was at one time exacerbated by a state of depression triggered by his wife's illness, which caused him to write violent blog entries. See 12/5/08 Tr. 18-21. Dr. Corcoran concluded, however, that the defendant did not exhibit signs of depression during their interview and as a result, he would not present a danger to the community if released. See 12/5/08 Tr. 22-23. Finally, Dr. Corcoran testified that this conclusion was based solely upon his psychiatric diagnosis and did take into account any other factors or considerations.

See 12/5/08 Tr. 24-25.

Judge Hibbler entered an order of detention. See 12/5/08 Tr. 56-57. Judge Hibbler explained that he was not persuaded by Dr. Corcoran's "state of depression" explanation for the defendant's writings expressing an intent to harm other people because many of those writings preceded his wife's illness. See 12/5/08 Tr. 56. Judge Hibbler also declined to consider at that time the defendant's constitutional challenge to the indictment. See 12/5/08 Tr. 31-34. Judge Hibbler, therefore, concurred with Judge Urbanski's prior ruling and concluded that no set of conditions existed that he could impose to control the defendant's ability to engage in the type of violent behavior that was at issue in that case. See 12/5/08 Tr. 57.

*5. Seventh Circuit Appeal*

The defendant appealed Judge Hibbler's order to the Seventh Circuit. See *United States* v. *White*, No. 08-4133 (7th Cir.). In his brief, the defendant argued that detention was improper because the indictment violated his First Amendment rights, and because Dr. Corcoran testified that he was not a danger to the community. See 12/05/08 Defendant's Motion to Review District Court Order of Detention Pending Trial at 4-9, No. 08-4133. On December 17, 2008, a three-judge panel comprised of Judges Easterbrook, Evans, and Tinder unanimously

upheld Judge Hibbler's detention order. See 12/17/08 Order, No. 08-4133. The court stated: "We are in agreement with the district court that there are no conditions or combinations thereof that would reasonably assure the safety of the community and that Mr. White should be detained pending trial." *Ibid*.

*6. Indictment In This Case*

On December 10, 2008, one week before the Seventh Circuit issued its decision affirming Judge Hibbler's pretrial detention order, a federal grand jury in the Western District of Virginia returned a seven-count indictment in the instant case. Counts 1 and 2 charge the defendant with transmitting threatening and extortionate email communications to a CitiBank employee, in violation of 18 U.S.C. 875(b) and (c). Count 3 charges him with intimidating African-American tenants in Virginia Beach who were pursuing a housing discrimination claim against their landlord, in violation of 18 U.S.C. 1512(b)(1). The remaining five counts charged violations of 18 U.S.C. 875(c) for threatening an African-American journalist in Maryland, a university professor in Delaware, a civil rights lawyer in Canada, and an African-American mayor in New Jersey by phone, by email, and/or by posting their personal information on the internet. Trial on these charges is scheduled to begin in December 2009.

*7. Dismissal Of Chicago Case*

On July 21, 2009, the solicitation charge pending in Chicago was dismissed on constitutional grounds. See *White*, 2009 WL 2244639, at *21. The defendant initially presented his motion to dismiss to Judge Hibbler, who denied it. See *id*. at *3. The case was reassigned to Judge Adelman of the Eastern District of Wisconsin after all judges in the Northern District of Illinois were recused. See *id*. at *5. Judge Adelman concluded that "the defendant's speech, as alleged in the indictment, is protected by the First Amendment and does not state a violation of [18 U.S.C.] 373." *Id*. at *8.

The government appealed Judge Adelman's decision to the Seventh Circuit. See *United States* v. *White*, No. 09-2916 (7th Cir.). The appeal is currently pending.

*8. July 31, 2009, Hearing Before Judge Denlow*

On July 31, 2009, the defendant appeared before Judge Denlow, a magistrate judge in Chicago, to determine whether he should remain in custody for his return trip to Roanoke. See 7/31/09 Tr. 3. Judge Denlow upheld the previous detention orders, pointing out that "[t]o date five judges at least have found the defendant to be a danger to the community such that he should be kept in jail while the other case and the other charges were pending." 7/31/09 Tr. 35. Judge

Denlow explained that "the decision[s] of Judge Urbanski and Judge Hibbler were well-reasoned, thorough, and complete," and he adopted their findings. 7/31/09 Tr. 35. Judge Denlow also conducted an independent assessment of the record and found that (1) the defendant remained a danger to the community; and (2) Dr. Corcoran's psychiatric evaluation supported further detention given his diagnosis of a condition that, if exacerbated, could jeopardize the safety of others and the community. See 7/31/09 Tr. 36.

*9. September 10, 2009, Hearing Before Judge Urbanski*

On September 10, 2009, the defendant appeared once again before Judge Urbanski. See 9/10/09 Tr. 3. Judge Urbanski first heard from a probation officer, who recommended that the defendant remain detained pending trial. See 9/10/09 Tr. 17. After extensive argument, Judge Urbanski overruled his prior order and concluded that the defendant should be released on bond. See 9/10/09 Tr. 80-92. Judge Urbanski conceded that most of the evidence in support of detention remained the same, but noted that three circumstances had changed since last year's hearing: (1) the defendant had served ten months in jail without having been convicted of anything; (2) Dr. Corcoran testified in Chicago that the defendant was not a danger to the community; and (3) Judge Adelman had dismissed the solicitation charge. See 9/10/09 Tr. 82-83. Judge Urbanski was

particularly concerned about the dismissal of the solicitation charge, explaining that he was "much more disturbed and concerned with the threat to a federal juror than some of the charges in this indictment." 9/10/09 Tr. 83.

Judge Urbanski next considered the pretrial detention factors under 18 U.S.C. 3142(g). See 9/10/09 Tr. 83-92. First, he considered the nature of the offenses charged and concluded that they were crimes of violence. See 9/10/09 Tr. 83. Second, he considered the weight of the evidence. See 9/10/09 Tr. 83-84. Judge Urbanski stated his belief that the government's case was weakened by Judge Adelman's decision, acknowledging that the two cases involve different statutes but opining that the "constitutional overlay" was the same. 9/10/09 Tr. 84-88. Third, Judge Urbanski considered the defendant's history and characteristics and concluded that his writings, although "repugnant," must be read "in context." 9/10/09 Tr. 89. He also acknowledged Dr. Corcoran's psychiatric evaluation, as well as the defendant's limited criminal history. See 9/10/09 Tr. 89. Without discussing the fourth factor, Judge Urbanski concluded that the defendant should be released on a $25,000 bond with numerous terms and conditions, including home detention and prohibiting access to the internet and firearms. See 9/10/09 Tr. 92-97. Judge Urbanski stayed his order pending appeal by the government to the district court. See 9/10/09 Tr. 104.

*10. Appeal To The District Court*

On September 15, 2009, Judge Turk held a hearing on the government's motion to revoke the release order. See 9/15/09 Tr. 3.[5] Judge Turk indicated that he was concerned solely with the psychiatric evidence, and expressed his inclination to affirm the release order in light of Dr. Corcoran's evaluation. See 9/15/09 Tr. 7, 19-20, 23. Judge Turk ordered that the hearing be continued until the defendant could be examined by another psychiatrist. See 9/15/09 Tr. 24-25. He explained:

> Let me say out of an abundance of precaution, I believe the Court would like to have Mr. White examined by a local psychiatrist, and the result of this will depend on what the psychiatrist says. If the psychiatrist says he is not a danger to the community, or if he is a danger but that it can be eliminated under certain conditions, then the Court is going to let him out on bond. If the psychiatrist says he is a danger to the community and there's no set of circumstances to alleviate this, I'm going to order that he be held.

9/15/09 Tr. 25.

The hearing continued on September 18, 2009. See 9/18/09 Tr. 1.[6] On behalf of the court, Dr. Conrad Daum, an expert in forensic psychiatry, testified

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[5] The hearing transcript from September 15, 2009, is attached hereto is Exhibit B.

[6] The hearing transcript from September 18, 2009, is attached hereto is Exhibit C.

that the defendant "did not have any imminent dangerousness to himself or others," and that "[t]he imminent dangerousness criteria is over the period of a few days." 9/18/09 Tr. 5. Dr. Daum testified that his conclusion was based on a 75-minute, non-confidential interview with the defendant, and that he was aware that the defendant was selective in the information he shared with him. See 9/18/09 Tr. 6-7. Dr. Daum also testified that he performed no personality testing or actuarial evaluation, which he acknowledged is a more accurate test than the clinical evaluation that he performed in the jail. See 9/18/09 Tr. 9-10. Dr. Daum further testified that he disagreed with Dr. Corcoran's diagnosis, but when asked about the criteria of histrionic and narcissistic personality disorder, Dr. Daum could not respond. See 9/18/09 Tr. 10-11. When asked about numerous studies correlating narcissism and violent behavior, Dr. Daum stated that he was unaware of such studies, but that he was not surprised by them, either. See 9/18/09 Tr. 16-22. Dr. Daum was also unaware that, in a study conducted by the Secret Service, 75% of all mass murderers in the school setting had disclosed their intent to kill ahead of time. See 9/18/09 Tr. 21. Finally, Dr. Daum agreed with the American Psychiatric Association's finding that mental health experts are wrong more than they are right in predicting future behavior, see 9/18/09 Tr. 9, explaining that such predictions are like those of "weathermen," 9/18/09 Tr. 28.

Judge Turk acknowledged that Dr. Daum's evaluation "was limited," 9/18/09 Tr. 31, but nonetheless ordered that the defendant be released according to the terms and conditions set by Judge Urbanski, see 9/18/09 Tr. 33. Judge Turk did not explain the basis for his ruling. See 9/18/09 Tr. 33. He did not discuss any of the pretrial detention factors under 18 U.S.C. 3142(g), made no findings of fact, issued no conclusions of law, and provided no statement of reasons. See 9/18/09 Tr. 33. Judge Turk denied the government's request for a stay pending appeal, stating that the release order should be "executed immediately." 9/18/09 Tr. 34.

The government appealed. On September 23, 2009, this Court stayed the order of release.

## ARGUMENT

## THE DISTRICT COURT'S ORDER OF RELEASE WAS ERRONEOUS AND SHOULD BE REVERSED

The Bail Reform Act of 1984 was Congress's "response to the 'alarming problem' of crimes committed by persons on release." *United States* v. *Williams*, 753 F.2d 329, 332 (4th Cir. 1985) (citing S. Rep. No. 225, 98th Cong., 1st Sess. 3-30 (1983)). The Act authorizes the court to withhold bail pending trial "[i]f, after a hearing * * * the judicial officer finds that no condition or combination of conditions will reasonably assure * * * the safety of any other person and the

community." 18 U.S.C. 3142(e).[7] As set forth above, the government repeatedly provided clear and convincing evidence that the defendant poses a significant danger to the community. The district court overlooked this evidence and instead relied exclusively on an inconclusive psychiatric evaluation conducted one day before the hearing. Because the court failed to address the record evidence and to consider all of the statutory factors governing pretrial release, this Court should reverse the order of release.

*A. The District Court Improperly Delegated Its Decision-Making Authority To Dr. Daum*

The Bail Reform Act clearly states that the decision to detain or release a defendant pending trial must be made by "a judicial officer." 18 U.S.C. 3142(a). Although Judge Turk entered an order of release in this case, it is clear from the record that he allowed that decision to be made by his court-appointed forensic psychiatrist, Dr. Daum. Even before hearing Dr. Daum's testimony, Judge Turk stated that he would release the defendant if Dr. Daum opined that the defendant was not a danger to the community. See 9/15/09 Tr. 25 ("If the psychiatrist says he is not a danger to the community, or if he is a danger but that it can be

[7] The government does not allege that the defendant is a flight risk.

eliminated under certain conditions, then the Court is going to let him out on bond.").

It is clear that Judge Turk relied exclusively on Dr. Daum's opinion because he did not provide any other explanation for his ruling. Indeed, following Dr. Daum's testimony that the defendant "did not have any imminent dangerousness to himself or others," 9/18/09 Tr. 5, Judge Turk ordered the defendant's immediate release. He did not issue any findings of fact or statement of reasons in support of this decision. Judge Turk's failure to independently assess the record evidence and provide a basis for his ruling was error. See *United States* v. *Williams*, 753 F.2d 329, 333 (4th Cir. 1984) (finding clear error where the court's review is "plagued by the absence of detailed factual findings by the district court"); *United States* v. *Tortora*, 922 F.2d 880, 883-890 (1st Cir. 1990) (finding error where the district court failed to set forth a statement of reasons in support of its pretrial release order and where the evidence sustained a determination of dangerousness); see also Fed. R. App. P. 9(a)(1) ("The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case.").

*B. The District Court Erred In Relying On Dr. Daum's Testimony Because That Testimony Was Inconclusive*

Judge Turk not only allowed Dr. Daum to decide whether the defendant should be released, but he did so knowing that Dr. Daum's opinion was inconclusive. Dr. Daum testified that the defendant "did not have any imminent dangerousness to himself or others," emphasizing that "imminent" meant that he could not predict the defendant's future conduct beyond "a few days." 9/18/09 Tr. 5. He explained that his "predictive ability gets less and less accurate the further out we go, just like weathermen." 9/18/09 Tr. 28. Dr. Daum's opinion was based on a single, non-confidential interview with the defendant that lasted 75 minutes. He did not perform an actuarial evaluation or any other tests, which he agreed could have been more accurate in predicting future violence. Dr. Daum also lacked knowledge about histrionic and narcissistic personality disorder, a diagnosis that supported Judge Denlow's order of detention. Dr. Daum further testified that he was unaware of numerous studies correlating narcissism and violent behavior, or with a government study showing that 75% of mass murderers in the school setting had disclosed their intent to kill ahead of time. Accordingly, the district court's complete reliance on Dr. Daum's testimony, which Judge Turk acknowledged was "limited," 9/18/09 Tr. 31, constitutes clear error.

*C. Judge Turk Failed To Consider All Of The Pretrial Release Factors And The Record Evidence, Which Support Detention*

The Bail Reform Act states that the court "shall" consider four factors: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. See 18 U.S.C. 3142(g).

These factors, which Judge Turk failed to consider, support continued detention of the defendant. First, there is no dispute in this case that the charged offenses are crimes of violence. Second, the weight of the evidence against the defendant is strong because a federal grand jury has found probable cause to support the charges, which include allegations of threatening and intimidating behavior in violation of 18 U.S.C. 875 and 18 U.S.C. 1512. The evidence in support of these charges includes the defendant's own writings.

Third, the government presented compelling evidence of the defendant's history and characteristics through the most reliable source available – the defendant himself. The record is replete with the defendant's own words expressing his interest and pleasure in committing violent acts. At his first detention hearing before Judge Urbanski, the defendant testified that "you could

kill a whole lot of people and you still wouldn't be killing very many who had any value. That's my general outlook on the world." 10/22/08 Tr. 97. Nearly one year later, Judge Urbanski recalled the defendant's testimony as "one of the most chilling moments that I've experienced sitting on this bench." 9/10/09 Tr. 24. In addition, the government presented evidence of the defendant's past conduct and criminal history, including a prior conviction for resisting arrest; a prior arrest for assault and battery; and a pattern of uncharged, assaultive behavior. Judge Turk, however, repeatedly stated that he was concerned solely with the psychiatric evidence, which is relevant only to the third factor. Psychiatric evidence, however, is not the only evidence that should be considered in support of that factor. The statute provides that the court "shall" take into account "*all* available information," including, in addition to mental condition, such things as the defendant's character, physical condition, past conduct, and criminal history. 18 U.S.C. 3142(g)(3)(A) (emphasis added).

Finally, with respect to the fourth factor, the evidence that the defendant, if released, would pose a significant danger to the community is also strong because, as expressed in his own words, the defendant feels "the need to kill, kill, kill" and has "developed a very intricate plot for the murder of about a score of [individuals

in Roanoke]." 10/22/08 Tr. 169. Judge Turk's exclusive reliance on the results of an inconclusive psychiatric evaluation was error.

*D. Judge Urbanski Also Erred Because He Improperly Relied On Judge Adelman's Opinion In The Chicago Case*

Judge Turk did not adopt or rely on Judge Urbanski's findings. To the extent those findings are relevant here, however, they should be rejected because they were erroneous.

Like Judge Turk, Judge Urbanski in the September hearing also overlooked the evidence of the defendant's dangerousness. The primary basis for Judge Urbanski's decision to release the defendant before trial in this case was Judge Adelman's dismissal of the solicitation charge in the Chicago case. Judge Urbanski concluded, incorrectly, that Judge Adelman's opinion regarding the constitutionality of the Chicago charge somehow affected the weight of the evidence against the defendant in this case. In so doing, Judge Urbanski misapplied the second pretrial factor, 18 U.S.C. 3142(g)(2). "Section 3142 neither requires nor permits a pretrial determination that the person is guilty; the evidence of guilt is relevant only in terms of the likelihood that the person will fail to appear or will pose a danger to the community." *United States* v. *Winsor*, 785 F.2d 755, 757 (9th Cir. 1986) (citations omitted). Most of the government's evidence that

the defendant would pose a danger to the community if released was based largely on the defendant's own words expressing his desire to kill people. Although Judge Urbanski recognized that such evidence had not changed since the defendant's initial detention hearing last October, he ignored that evidence and relied instead on Judge Adelman's opinion addressing the merits of a case involving different facts, a different statute, and in a different jurisdiction.[8] The constitutionality of the charges in the Chicago case have no bearing on the dangerousness of the defendant. Accordingly, Judge Urbanski erred in concluding that the weight of the evidence relevant to pretrial detention was affected by Judge Adelman's opinion.

Finally, to the extent that either Judge Turk or Judge Urbanksi credited Dr. Corcoran's psychiatric evaluation, that was also error. The judge who heard Dr.

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[8] Even if the legal merits of the government's case were relevant to the issue of pretrial detention, Judge Adelman's decision does not control this case. Judge Adelman held that the conduct alleged in the Chicago indictment did not state a violation of the solicitation statute, 18 U.S.C. 373, because it was protected by the First Amendment. See *United States* v. *White*, No. 08-851, 2009 WL 2244639, at *21 (N.D. Ill. July 21, 2009). The indictment in this case, however, alleges different facts concerning different victims and charges violations of 18 U.S.C. 875 (interstate threats and extortion) and 1512 (witness intimidation), not solicitation. Accordingly, Judge Adelman's decision, even if relevant to the issue of pretrial detention, does not control here. In any event, the government believes that Judge Adelman erred and has appealed that decision. The appeal remains pending in the Seventh Circuit.

Corcoran's testimony, Judge Hibbler, rejected it, and that ruling was affirmed by the Seventh Circuit. Furthermore, Judge Denlow, who ordered that the defendant remain in custody after the Chicago case was dismissed, found that Dr. Corcoran's diagnosis of the defendant's personality order supported detention, not release. Accordingly, Judge Urbanski's findings were also erroneous.

## CONCLUSION

This Court should reverse the district court's order of release pending trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth 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/ Tovah R. Calderon
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