Nos. 10-4241, 10-4452, 10-4597

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM WHITE,

Defendant-Appellee

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

OPENING BRIEF FOR THE UNITED STATES AS APPELLANT

THOMAS E. PEREZ
Assistant Attorney General

JESSICA DUNSAY SILVER
TOVAH R. CALDERON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4142

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

SENTENCING GUIDELINES:

SENTENCING GUIDELINES (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 10-4241, 10-4452, 10-4597

UNITED STATES OF AMERICA,

Appellant

v.

WILLIAM WHITE,

Defendant-Appellee

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

OPENING BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

A federal grand jury charged the defendant in a seven-count indictment under 18 U.S.C. 875 and 18 U.S.C. 1512(b)(1). The district court had jurisdiction under 18 U.S.C. 3231. A jury found the defendant guilty on Counts 1, 3, 5, and 6, and acquitted on Counts 2, 4, and 7. The district court overturned the jury's verdict on Count 6, and entered judgment of acquittal in an order entered on February 6, 2010. The court sentenced the defendant on the remaining counts of

conviction on April 14, 2010, and entered final judgment on April 19, 2010. The United States filed timely notices of appeal from the judgment of acquittal on March 4, 2010, and from the sentence portion of the final judgment on May 19, 2010. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether there was sufficient evidence to support the jury's verdict finding the defendant guilty of transmitting over the Internet a communication containing a threat to injure Canadian civil rights activist Richard Warman, in violation of 18 U.S.C. 875(c), as charged in Count 6 of the indictment.

2. Whether the district court erred in refusing to apply a two-level, vulnerable-victim sentencing adjustment, pursuant to U.S.S.G. 3A1.1(b)(1), in calculating the defendant's offense level for his conviction on Count 3.

STATEMENT OF THE CASE

On December 11, 2008, a federal grand jury in the Western District of Virginia returned a seven-count indictment charging the defendant, William White, with threatening and intimidating various individuals, in violation of 18 U.S.C. 875 and 1512(b)(1). See J.A. 19-37.[1] Counts 1 and 2 alleged that the defendant

[1] "J.A." refers to Volumes I and II of the Joint Appendix. Volume I contains pages 1-520, and Volume II contains pages 521-1154. "Supp. J.A." refers

(…continued)

transmitted threatening and extortionate email communications to a CitiBank employee, in violation of 18 U.S.C. 875(b) and (c). See J.A. 34-35. Count 3 alleged that he intimidated 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). See J.A. 35. Counts 4, 5, and 7 alleged that he threatened an African-American journalist in Miami, a university professor in Delaware, and an African-American mayor in New Jersey, respectively, by phone, email, and/or posting their personal information on the Internet, in violation of 18 U.S.C. 875(c). See J.A. 35-37. Finally, Count 6 alleged that in 2008, the defendant violated 18 U.S.C. 875(c) by posting on the Internet two communications containing a threat to injure Canadian civil rights activist Richard Warman. See J.A. 36.

The defendant moved to dismiss all counts of the indictment before trial, arguing that his speech was protected by the First Amendment to the Constitution. See J.A. 39-76. The district court denied the motion. See J.A. 123.

The defendant was tried before a jury from December 9-18, 2009. See J.A. 9-10. At the close of the United States' case and again at the close of all the

---

(…continued)
to the Supplemental Joint Appendix, which contains only the December 17, 2009, hearing transcript. "J.A.S." refers to the Joint Appendix (Sealed), which contains the presentence investigation report (PSR) and the United States' sentencing memorandum.

evidence, the defendant moved for judgment of acquittal on all counts, again arguing that his speech was protected by the First Amendment. See Supp. J.A. 2-9, 20. The court reserved its ruling, pursuant to Federal Rule of Criminal Procedure 29, and submitted the case to the jury. See Supp. J.A. 16-17, 20. The jury found the defendant guilty on Counts 1, 3, 5, and 6, and acquitted on Counts 2, 4, and 7. See J.A. 925-926.

Following the jury's verdict, the defendant renewed his motion for judgment of acquittal on the counts of conviction. See J.A. 931. In an order filed on February 4, 2010, the court denied the motion as to Counts 1, 3, and 5, but granted it as to Count 6. See J.A. 1127-1143. The United States filed a notice of appeal from the court's order on March 4, 2010. See J.A. 1150.

On April 14, 2010, the court sentenced the defendant to 30 months' imprisonment for his convictions on Counts 1, 3, and 5. See J.A. 994-996. The court denied the United States' request that it increase the defendant's offense level for Count 3 by two levels based on evidence that the defendant knew or should have known that two of the victims were vulnerable because they were minor children. See J.A. 995.

The court entered final judgment on April 19, 2010. See J.A. 1144. The defendant filed a notice of appeal on April 22, 2010, and the United States filed

one from the sentence portion of the final judgment on May 19, 2010. See J.A. 1151-1153.

STATEMENT OF FACTS[2]

The defendant, William White, is the "Commander" of the American Nationalist Socialist Workers Party (ANSWP) and, until his arrest in this case, lived in Roanoke, Virginia, where he published material on a white supremacist website, Overthrow.com, and regularly posted comments on other, similar websites, including the Vanguard News Network Forum. See J.A. 328-331, 529-530, 537, 562. Richard Warman is a Canadian government lawyer who, for the last 20 years, has dedicated his personal free time to civil rights work on a *pro bono* basis. See J.A. 525-526. This work focuses primarily on monitoring the Internet activities of neo-Nazi and other white-supremacist groups in Canada. See J.A. 527. Such groups often are aware that Warman and other civil rights activists monitor their websites, which is evident by comments made on those websites by their members. See J.A. 527.

In 2006, the defendant began a two-year "campaign of terror" against Warman, which culminated in 2008 with the defendant's publication on the Internet of two communications containing a threat to injure him. J.A. 548, 587.

[2] The facts presented here pertain only to Count 6.

Although Warman did not know the defendant, and never had communicated with him directly or indirectly, Warman received an email from the defendant in July of 2006. See J.A. 549-551. The email was sent to Warman's personal email address and to a reporter for the *London Free Press* who had written about Warman's civil rights work. See J.A. 549-555, 1073. The email referenced an American white supremacist named Alex Linder who, in response to a case in which Warman had once been involved, published materials stating that the murder of Warman and other civil rights activists would be an act of patriotism. See J.A. 551-553. The email stated, in pertinent part:

> I read with dismay the recent news that Alex Linder's Vanguard News Network has been shut down by the Canadian government. Alex and I have not been friends for three years, but he is correct when he says the assassination of Canadian Jews and the officials who bow to them would be an act of patriotism.

J.A. 1073.

About one month later, the defendant posted a flurry of articles and comments on the Internet identifying Warman as a Jew and expressing his desire that Warman be killed. See J.A. 1074-1084. For example, a blog entry on Overthrow.com entitled, "Richard Warman," stated, in pertinent part:

> Several people have asked where I wrote something saying people should kill Richard Warman. The truth of the matter is that I haven't actually written anything saying "Kill Richard Warman." I posted Richard Warman's address and said he was a real son of a bitch.

> Then, the Canadian Broadcasting Company called and said "Well, what if someone took that information and your anti-Jewish rhetoric and did something violent to him." And I replied "I hope someone does something violent to him. He deserves to be killed."

J.A. 1083-1084; see also J.A. 1074 ("I told them that I hope someone does kill Warman, because he has to be stopped somehow."). Other articles described Warman in a racially inflammatory manner by, for example, referring to him as a "Jewish hatemonger" who believes "that niggers who commit gang rapes should be 'understood' for their 'diversity' and given very light prison sentences before being released to commit additional crimes." J.A. 1077; see also J.A. 1080 (describing Warman as a "Jewish Canadian attorney" and stating that he should "meet his just fate – execution at the hands of a people's government").

Although he is not Jewish, these writings frightened Warman because he knew from his civil rights work that identifying a person as a Jew in the white supremacist movement was a way to demonize that person and, given the movement's history of violence, make that person a target. See J.A. 553-556. The combined effect of the July email with these other Internet postings was of "increasing concern" to Warman (J.A. 555), and his "alarm bells start[ed] going off" when the defendant called for him to be "killed," particularly "in the context of the white supremacist movement," J.A. 556. Warman perceived these communications as threats and reported them to the Canadian police, the Roanoke

Police Department, and the FBI. See J.A. 560. In addition, Warman hired a lawyer to petition the Canadian government to permit Canadian Internet service providers to block access to the defendant's websites, but the petition was denied. See J.A. 559. Warman also began monitoring Overthrow.com on a daily basis. See J.A. 637-638.

In October of 2006, the defendant mailed a package to Warman's home address. See J.A. 562-563, 1085-1097. Warman was "horrified" because he knew the defendant wanted him to be murdered and because he had read in the news about people receiving mail laced with anthrax. J.A. 563, 565. Warman immediately turned the package over to the police. See J.A. 563. The police determined that the package was safe and returned it to Warman a few weeks later. See J.A. 564. Inside the package was an ANSWP magazine, which displayed on the back cover a photograph of Warman with the caption "Yeah, We Beat This Prick." J.A. 1097. Printed beneath the caption was Warman's home address, the words "Tired of the Jews taking away your rights?," and a magazine subscription form. J.A. 1097. The magazine contained two articles about Warman that identified him as a Jew. See J.A. 1096. One of the articles was entitled "Canada Awake! Excerpts of Bill White's Call To Canadians." J.A. 1096. The article referred to Warman as a "Jew hatemonger" and described Jews as "demons,"

calling for their "extermination." J.A. 1096. Warman was frightened because the defendant, who he believed wanted him dead, had now shown his followers what he looked like and provided "a road map for somebody to kill [him]." J.A. 570.

In February of 2007, the defendant posted an article on Overthrow.com describing Warman as a "Jew attorney" who has directed others to "physically attack white activists" and "to attack white activists at their homes." J.A. 1098. The article stated that Warman "lives at [home address], and should be killed for crimes against humanity." J.A. 1098. That same day, in response to the article, a map of Warman's house appeared on the Vanguard News Network. See J.A. 572-573; see also J.A. 403-404, 1120-1121. When Warman saw this, he knew that the defendant "was not going to stop until I was dead, either he killed me or * * * got somebody else to kill me." J.A. 570.

Ten days later, the defendant published "a work of fiction" entitled "The Death of Robert Waxman In The Not Too Far Distant Future." J.A. 1106; see also J.A. 1101 (displaying the original title as the "The Death of Robert *Warman*") (emphasis added). The defendant included a note that said, "[s]ince it is illegal to publish material like this in Canada, we are publishing it here as a favor to our Canadian allies. May we all pray that this work becomes something more than just mere fiction." J.A. 1106. Although described as "fiction," the story contained

numerous references to real cases in which Warman had been involved. See J.A. 576-578. The story also graphically described a killing spree by "Marcenko," who murdered numerous people before approaching "the blood-splattered Waxman," who was "[c]owering in fear and begging for his life." J.A. 1109. He then "ordered Waxman to open his mouth. Putting the barrel of the shotgun between Waxman's teeth, Marcenko smiled briefly before pulling the trigger and taking off Waxman's head." J.A. 1109.

On April 23, 2007, the defendant posted on the Internet a comment that political change in Canada will not come without "the pressure of violence," including "the shooting of Richard Warman, who, by the way, lives [at home address]." J.A. 1124. The defendant continued to post comments about Warman in November 2007. See J.A. 584. During this period, Warman stayed in contact with local law enforcement in Canada and Roanoke and also with the FBI. See J.A. 584-587.

Finally, in 2008, the defendant posted on the Internet two communications containing a threat to injure Warman. First, on February 23, 2008, the defendant posted on the Vanguard News Network an article describing the firebombing of a Canadian civil rights activist's home by neo-Nazis. See J.A. 527-528, 1111. The article described how the firebomb torched a fence and patio set, just missing the

rear window of the house, while the activist and his wife were at home with their four sleeping children. See J.A. 528, 1111. The article was accompanied by a comment written by the defendant that said, "Good. Now someone do it to Warman." J.A. 1111. Then, on March 26, 2008, the defendant posted an entry on Overthrow.com entitled, "Kill Richard Warman, Man Behind Human Rights Tribunal's Abuses Should Be Executed." J.A. 1113. The entry began, "Richard Warman, the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's Human Rights Tribunal should be drug [sic] 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 [home address]." J.A. 1113; see also J.A. 1115 (republished in an ANSWP chat room). It closed with the statement, "Richard Warman 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: [home address]." J.A. 1113; accord J.A. 1115.

Following these two threats, on May 5, 2008, the defendant posted another entry entitled, "Kill Richard Warman," which said, "I do everything I can to make sure everyone knows where to find this scum, particularly because it makes him so mad: Kill Richard Warman! [Warman's home address]." J.A. 1119.

Of all of the defendant's writings, the 2008 Internet postings terrified

Warman the most because of their explicit and violent nature, and because they followed an act of actual violence – *i.e.*, the firebombing of a fellow civil rights activist's home in Canada. See J.A. 528-549, 587-588. They also concerned Warman because they occurred around the same time that his daughter was born and appeared to be distributed to the defendant's listserve in addition to being posted on the Internet. See J.A. 528, 540-541. Warman interpreted the defendant's communications as "death threats." J.A. 586, 605.

The defendant's repeated harassment and threats during this two-year period had a significant impact on Warman and his wife, Lise, and disrupted their lives in many respects. See J.A. 605-606, 661-673. At the advice of law enforcement, Warman and his family took a number of measures to ensure their personal safety. See J.A. 605-606, 661-673. For example, Warman varied his daily routine, maintained an unlisted number, and removed his contact information from public databases. See J.A. 605. Warman's interactions with the outside world changed because he did not feel safe talking to strangers or sharing personal information with other people. See J.A. 606. To protect Lise, Warman stopped meeting her for lunch during the day near her office. See J.A. 668. In addition, the Warmans accelerated a move to a new house by about three months and, to prevent the defendant from discovering their new home address, they removed Warman's

name from the title of the new house and put it in Lise's maiden name. See J.A. 605, 661-668. To further disassociate himself from Lise for her protection, Warman leased a post office box where only he would receive his mail, instead of at their new home. See J.A. 667. Finally, for the safety of their newborn daughter, Lise registered as a single mother when she gave birth and they did not give their daughter Warman's surname. See J.A. 606, 669-670.

SUMMARY OF THE ARGUMENT

The district court erred in granting judgment of acquittal on Count 6 because sufficient evidence supported the jury's finding that the defendant transmitted over the Internet two communications containing a threat to injure Richard Warman, in violation of 18 U.S.C. 875(c). The jury was properly instructed to consider all of the evidence introduced at trial, including Warman's testimony, and to evaluate the defendant's communications from the perspective of a reasonable recipient who is familiar with their context. In overturning the jury's verdict, however, the court failed to apply that standard by ignoring almost all of the evidence establishing the context in which the defendant's threats were made. Although the United States introduced 12 exhibits displaying the defendant's various communications toward Warman during the 18-month period that preceded the defendant's charged conduct, the court discussed only two of them in its opinion. The court ignored all

other evidence, including the escalating nature of the defendant's conduct, his repeated publication of Warman's home address along with comments expressing his desire that Warman be killed, and a story that graphically fantasized Warman's murder. The court also failed to take into account Warman's understanding of the defendant's references to past incidents of violence by like-minded individuals, as well as his familiarity with the white supremacist movement's history of violence. Most importantly, the court ignored all evidence of Warman's reaction to the defendant's conduct and the serious security measures that he took to protect himself and his family, such as contacting numerous law enforcement agencies, accelerating a move to the new house, changing his daily routine, and giving his newborn daughter a different surname. Moreover, in analyzing the limited evidence it did consider, the court failed to apply this Court's true-threats standard for evaluating communications. Instead, the court conflated First Amendment law on true threats with that on incitement and applied an erroneous legal standard from a 1976 Second Circuit case.

The court also erred in refusing to increase the defendant's offense level for Count 3 by two levels, pursuant to U.S.S.G. 3A1.1(b)(1). The United States introduced evidence showing that the defendant knew or should have known that two of the Count 3 victims were minor children, and therefore unusually

vulnerable. The court, however, adopted without change the recommendation of the PSR, which incorrectly stated that, in order to apply the adjustment, the United States must show that the defendant "targeted" the victims because of their age. But the sentencing guidelines were amended in 1995 to eliminate proof of "targeting." Under the revised guideline, as applied by this Court, the United States needed only show that the defendant knew or should have know that the victims were unusually vulnerable. This requirement was satisfied.

Accordingly, this Court should reverse the district court's judgment of acquittal on Count 6 and the sentence portion of its final judgment and remand the case for resentencing.

ARGUMENT

I

THE DISTRICT COURT ERRED IN OVERTURNING THE VERDICT ON COUNT 6 BECAUSE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT THE DEFENDANT TRANSMITTED A TRUE THREAT AGAINST RICHARD WARMAN

As explained below, the district court erred in granting judgment of acquittal on Count 6 because sufficient evidence supported the jury's finding that the defendant transmitted over the Internet two communications containing a threat to injure Richard Warman, in violation of 18 U.S.C. 875(c). The court erred in two major respects. First, it failed to evaluate the communications from the perspective

of a reasonable recipient familiar with their context by ignoring almost all of the evidence regarding context. Second, in evaluating the evidence it did consider, the court used an incorrect legal standard.

A. Standard Of Review

"In reviewing a district court's grant of a post-verdict acquittal, this [C]ourt must decide 'whether, viewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant guilty beyond a reasonable doubt.'" *United States* v. *Campbell*, 977 F.2d 854, 856 (4th Cir. 1992) (citation omitted), cert. denied, 507 U.S. 938 (1993). "Because the question is a matter of law, [this Court] review[s] the issue *de novo* and need accord no deference to the district court's determination that the evidence is insufficient." *Ibid*. (citation omitted).

B. Section 875(c) Prohibits True Threats

Count 6 charged the defendant under 18 U.S.C. 875(c), which makes it a crime to "transmit[] in interstate or foreign commerce any communication containing any threat to * * * injure the person of another." Like other statutes that "make[] criminal a form of pure speech," Section 875(c) "must be interpreted with the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969). Accordingly, Section 875(c) prohibits only "true

threats," which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia* v. *Black*, 538 U.S. 343, 359 (2003) (citing *Watts*, 394 U.S. at 708); accord *United States* v. *Bly*, 510 F.3d 453, 458 (4th Cir. 2007). "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." *Black*, 538 U.S. at 359-360 (internal quotation marks, brackets, and citation omitted).

In *Watts*, the Supreme Court made clear that speech must be interpreted in context to determine whether it is a true threat. See 394 U.S. at 707-708. The defendant in that case made the following statement while attending a public rally at the Washington Monument:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.

Id. at 706 (internal quotation marks omitted). Both the defendant and the crowd laughed after the statement was made. See *id*. at 707. The defendant was arrested

and charged with threatening the life of the President. See *id*. at 705-706. The Supreme Court overturned his conviction, explaining that, "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners," the defendant's statement was nothing more than a "kind of very crude offensive method of stating a political opposition to the President," and thus protected under the First Amendment. *Id*. at 708.

To evaluate statements in context, courts consider many factors. Consistent with *Watts*, this Court considers whether the statement is expressly conditional; whether it was made in a public forum; whether it pertained to a topic of great public concern; and whether it was made in jest, as evidenced by the audience's reaction. See *Bly*, 510 F.3d at 459 (citing *Watts*, 394 U.S. at 707-708); *United States* v. *Lockhart*, 382 F.3d 447, 452 (4th Cir. 2004), cert. denied, 543 U.S. 1079 (2005). In addition, this Court and other courts consider factors such as "the reaction of the recipient, * * * whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker had a propensity to engage in violence." *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal*., 290 F.3d 1058, 1078 (9th Cir. 2002) (citing *United States* v. *Dinwiddie*, 76 F.3d 913, 925 (8th Cir.), cert. denied, 519 U.S. 1043 (1996)), cert.

denied, 539 U.S. 958 (2003).[3] However, "the list is not exhaustive and the presence or absence of any of these things is not dispositive." *Ibid.* (citing *Dinwiddie*, 76 F.3d at 925). Rather, courts must "consider the *whole factual context* and '*all of the circumstances*,' in order to determine whether a statement is a true threat." *Ibid.* (emphasis added) (citation omitted).

To prove a violation of Section 875(c) consistent with the First Amendment, therefore, "the government must establish that the defendant intended to transmit the interstate communication and that the communication contained a true threat." *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995). This Court, like most courts of appeals, construes this offense to be a general intent crime. See *ibid*. Thus, "[w]hether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context of the communication. The government does not have to prove that the defendant subjectively intended for the recipient to understand the

[3] See also *United States* v. *Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (concluding that evidence that both the recipient and the FBI took the letter "quite seriously" supported jury's finding that it was a true threat), cert. denied, 498 U.S. 1122 (1991); *United States* v. *Alaboud*, 347 F.3d 1293, 1298 (11th Cir. 2003) (agreeing with other circuits that "[t]he recipient's belief that the statements are a threat is relevant in the inquiry of whether a reasonable person would perceive the statements as a threat").

communication as a threat." *Ibid*.[4] Nor does the government have to prove that the defendant communicated, or intended to communicate, the threat *to* the recipient. See *ibid*.; *United States* v. *Spring*, 305 F.3d 276, 281 (4th Cir. 2002).

C. The Jury Correctly Concluded That The Defendant's 2008 Internet Postings Contained A True Threat

Applying these standards, the jury correctly concluded that the defendant transmitted in interstate commerce a true threat, as charged in Count 6. Count 6 alleged that on February 23, 2008, and on March 26, 2008, the defendant published on the Internet two communications containing a threat to injure Richard Warman. See J.A. 892. The first communication included the defendant's comments that someone should "firebomb" Warman's home, as other neo-Nazis recently did to the home of another Canadian civil rights activist while the activist's family slept

[4] As set forth above, see p. 16, *supra*, the Supreme Court in *Black* stated that "true threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. at 359. As the district court recognized (J.A. 1134 n.6), at least two courts of appeals have concluded that *Black* requires proof of specific intent to threaten (although the Ninth Circuit appears to be internally divided). Like most other circuits, however, this Court continues to employ an objective standard. See *United States* v. *Armel*, 585 F.3d 182, 185 (4th Cir. 2009) ("Statements constitute a 'true threat' if 'an ordinary reasonable recipient who is familiar with the[ir] context … would interpret [those statements] as a threat of injury.'") (citations omitted); see also *United States* v. *Parr*, 545 F.3d 491, 499-500 & n.2 (7th Cir. 2008) (discussing *Black* and subsequent circuit court cases), cert. denied, 129 S. Ct. 1984 (2009).

inside. J.A. 1111. The second communication was an article written by the defendant that was entitled, "Kill Richard Warman: Man Behind Human Rights Tribunal's Abuses Should Be Executed." J.A. 1113. The article stated that Warman "should be drug [sic] out into the street and shot" and that "he can be found, easily, at his home" and provided Warman's home address. J.A. 1113. The article closed by saying that "Warman 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," and again provided Warman's home address. J.A. 1113.

To place these communications in context, the United States introduced 12 exhibits displaying many of the defendant's other communications made between 2006 and 2008, which included: (1) an email sent to Warman's personal email address in July of 2006, expressing agreement with another white supremacist who once said that the murder of Warman would be an act of patriotism; (2) four different Internet posts made in August of 2006, identifying Warman as a Jew and expressing his desire that Warman be killed; (3) a package mailed to Warman's home address in October of 2006, which contained an ANSWP magazine displaying Warman's photograph and home address on the back cover along with the caption, "Yeah, We Beat This Prick"; (4) an Internet post made in February of 2007, describing Warman as a "Jew attorney" who "should be killed for his crimes

against humanity," along with Warman's home address and maps displaying where he lived; (5) a "work of fiction," published on the Internet in February of 2007, which described the graphic murder of a character modeled after Warman; and (6) an Internet post made in April of 2007, that advocated for "the shooting of Richard Warman," and provided Warman's home address. See J.A. 1073-1110, 1120-1126.

The United States also introduced the testimony of Richard Warman and his wife, Lise. See J.A. 524-606, 659-673. Warman told the jury that he interpreted the defendant's two-year course of conduct as a "campaign of terror" against him and described how the defendant's conduct escalated over time. J.A. 548. For example, Warman explained that, in his earlier Internet postings, the defendant commented that he "hope[d]" Warman would be killed, but that the language became more explicit and violent over time and by 2008, the defendant simply stated "Kill Richard Warman," which Warman perceived as a direct threat to his personal safety. See J.A. 546-548. Warman testified that he was particularly frightened by the defendant's 2008 Internet postings because they coincided with an act of actual violence – *i.e.*, the firebombing of another civil rights activist's home in Canada by neo-Nazis like the defendant. See J.A. 549. Warman also testified that he took the defendant's threats very seriously because he was familiar

with the history of violence associated with the white supremacist movement. See J.A. 538-539, 555-556. Warman and Lise told the jury that they reported the defendant's conduct to law enforcement and took numerous measures to protect their safety, which included changes in their daily routines, accelerating a move to a new home, and giving their newborn daughter a different surname. See J.A. 560, 585, 605-606, 660-669.

All of this evidence – of Warman's reaction, of the defendant's past statements, and of Warman's knowledge that the defendant was a leader in a movement with a history of violence – was more than sufficient for a reasonable jury to conclude that the defendant's Internet communications made on February 23, 2008, and on March 26, 2008, were true threats. Consistent with *Watts*, they were not expressly conditional; nor were they were made in jest. Although the defendant posted the statements on the Internet, the jury could have reasonably concluded that the defendant intended to communicate them directly to Warman, given Warman's testimony that most white-supremacist groups were aware that Warman and others were monitoring their websites, and that Warman was, in fact, monitoring Overthrow.com on a regular basis. See J.A. 527, 537. Indeed, some of the defendant's own statements indicate that he intended for Warman to read them. See, *e.g.*, J.A. 1119 (publishing Warman's home address along with the comment

that he does "everything [he] can to make sure everyone knows where to find this scum, particularly because it makes [Warman] so mad").[5] The fact that the defendant's statements were, on occasion, accompanied by a political or social message does not undermine the jury's conclusion that they were true threats. See *United States* v. *Daughenbaugh*, 49 F.3d 171, 174 (5th Cir.) ("The political rhetoric accompanying the threats furnishes no constitutional shield. Rather, the violent tone of the rhetoric amplifies the threats."), cert. denied, 516 U.S. 900 (1995).[6] Indeed, Warman testified that he never engaged in a political debate with the defendant. See J.A. 604. The jury, therefore, correctly concluded that the defendant's statements were true threats.

---

[5] The district court's finding that such statements were "easily susceptible to characterization as mean-spirited ridicule and harassment, reminiscent of grade school bullying," contradicts not only Warman's perception of them, but also the court's own statement that they were "not directed or communicated directly to Warman." J.A. 1139. In any event, although "whether a threat was communicated to the victim may affect whether the threat could reasonably be perceived as an expression of genuine intent to inflict injury," *Spring*, 305 F.3d at 281, it "is [not] dispositive," *Parr*, 545 F.3d at 497. On the contrary, a "threat doesn't need to be communicated directly to its victim or specify when it will be carried out." *Ibid.*; see also, *e.g.*, *United States* v. *Sutcliffe*, 505 F.3d 944, 960-961 (9th Cir. 2007) (concluding that defendant's statements posted on the Internet were true threats).

[6] See also *United States* v. *Viefhaus*, 168 F.3d 392, 396 (10th Cir.) ("The fact that a specific threat accompanies pure political speech does not shield a defendant from culpability."), cert. denied, 527 U.S. 1050 (1999); *United States* v. *Bellrichard*, 994 F.2d 1318, 1322 (8th Cir. 1993) ("[A] person may not escape prosecution for uttering threatening language merely by combining the threatening language with issues of public concern.").

In *Lockhart*, this Court held that a letter written by the defendant was a true threat to injure the President, even though the letter was not delivered to the President and even though it contained political rhetoric. See 382 F.3d at 452. The defendant in that case delivered a letter to the manager of a Food Lion grocery store in Stafford County, Virginia. See *id*. at 448-449. The letter contained numerous complaints against the United States government, including criticism of the war in Iraq. See *id*. at 449. The letter ended with the statement, "[i]f George Bush refuses to see the truth and uphold the Constitution[,] I will personally put a bullet in his head." *Ibid*. Like Warman in this case, the grocery store manager in *Lockhart* took the letter seriously and reported it to the police. See *ibid*. And like the defendant's history of threatening Warman in this case, the defendant in *Lockhart* had a history of mailing letters to various corporations that contained threats against the President and was aware that the letters likely would end up in the hands of the Secret Service. See *ibid*. This Court concluded that the letter, "when examined in * * * context," was a true threat under *Watts* because there was nothing in the letter's contents or the manner in which it was delivered to indicate that it was joke; because the defendant did not suggest that she wanted to engage in political discourse with the Food Lion manager; and because it was not expressly conditional. *Id*. at 452.

And in *Planned Parenthood*, the court held that certain "GUILTY" posters displaying the faces and names of abortion providers were true threats even though they were "publicly distributed," 290 F.3d at 1086, and did not contain any language that was "overtly threatening." *Id*. at 1085. The court held that the posters, when viewed in context, constituted true threats because: (1) they named specific abortion providers; (2) they resembled prior "WANTED" posters, which had resulted in the deaths of other abortion providers; (3) the named abortion providers were aware of the history of violence associated with the "WANTED" posters; and (4) in response to the "GUILTY" posters, the named abortion providers wore bullet-proof vests and took other security measures to protect themselves and their families. See *id*. at 1085-1086. Similarly, here, the defendant's Internet postings were "publicly distributed, but personally targeted." *Id*. at 1086. Moreover, they were made within the context of a violent white supremacist movement, of which Warman was well aware, and which he responded to in a serious manner by taking security measures to protect himself and his family.

Finally, in *United States* v. *Schneider*, 910 F.2d 1569, 1569-1571 (7th Cir. 1990), the court upheld a jury's determination that a letter written by the defendant contained a true threat, even though it was not sent to the person targeted, and even

though it did not state that the defendant would carry out the threat himself. The defendant in that case mailed a letter to several justices of the Supreme Court of Illinois complaining about a circuit court judge who had entered a default judgment against him. See *id*. at 1570. The letter referred to the circuit judge as an "Idiota Persona Non Grata" and stated, in part, that "he will be executed as the pending [warning?] to others as enemies of the Constitution and Nation by his act of War." *Ibid*. The court explained that, although the threat was "ambiguous, * * * the task of interpretation was for the jury." *Ibid*. The court emphasized that the circuit judge's testimony that he took the letter seriously was especially relevant to determining whether a reasonable jury could find that the letter contained a true threat:

> That the judge was sufficiently alarmed to request and receive protection from the local sheriff was corroborative evidence of the meaning of the letter. It did not, perhaps illuminate the state of mind of the threatener, but * * * [t]he test for whether a statement *is* a threat is an objective one; it is not what the defendant intended but whether the recipient could reasonably have regarded the defendant's statement as a threat. * * * The fact that the victim acts as if he believed the threat is evidence that he did believe it, and the fact that he believed it is evidence that it could reasonably be believed and therefore that it *is* a threat. By this chain of inference, the relevance of the judge's testimony is established. We add that the high level of violence in this country, some of it directed against public officials, warrants juries in taking such threats deadly seriously.

Id. at 1570-1571 (citations omitted).

Accordingly, the jury's verdict should have been upheld. Consistent with First Amendment law on true threats, the district court had instructed the jury that it "may find that a particular statement is a true threat if you find that the statement was made under such circumstances that an ordinary, reasonable person, who is familiar with the context of the communication, would interpret it as an expression of an intent to injure the recipient or injure another person." J.A. 919.[7] The court also had instructed the jury that it should "carefully scrutinize *all* of the evidence given in the case" (J.A. 888) (emphasis added), including "the reaction of [the] recipient in determining whether a reasonable person would consider the message a true threat." J.A. 918. Because the jury was properly instructed and the evidence was more than sufficient, the verdict should have been upheld. See *United States* v. *Maisonet*, 484 F.2d 1356, 1359 (4th Cir. 1973) (concluding that verdict should be upheld where defendant's speech was susceptible to more than one

[7] The court further instructed the jury that a true threat is *not* "mere idle or careless talk, exaggeration, or something said in a joking manner"; "political hyperbole * * * or vehement, caustic, and unpleasantly sharp political attacks or crude, offensive, and abusive methods of stating political opposition"; or "[t]he mere advocacy o[f] the use of force or violence." J.A. 918-919. The court thus improperly invaded the province of the jury when it characterized the defendant's threats to injure Warman as "mean-spirited ridicule and harassment," "advoca[cy] for his assassination and execution," and "merely 'vehement, caustic and . . . unpleasantly sharp attacks on government and public officials.'" J.A. 1139-1140 (citation omitted).

interpretation if jury was properly instructed on First Amendment law on true threats), cert. denied, 415 U.S. 933 (1974); *United States* v. *Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (concluding that evidence, taken in light most favorable to the government, was sufficient to support the verdict finding defendant guilty of communicating a true threat because "the twelve jurors certainly consist of the requisite reasonable people"), cert. denied, 498 U.S. 1122 (1991); accord *United States* v. *Armel*, 585 F.3d 182, 185 (4th Cir. 2009); see also *United States* v. *Floyd*, 458 F.3d 844, 849 (8th Cir. 2006) ("[T]he district court does not decide that a particular communication *is* a threat as a matter of law, but whether there is sufficient evidence for a jury to decide that a reasonable recipient would interpret it as a threat."), cert. denied, 549 U.S. 1236 (2007).

D. The District Court Failed To Consider The Context In Which The Defendant's Threats Were Made

The district court failed to evaluate the defendant's Internet postings published on February 23, 2008, and on March 26, 2008, from the perspective of a reasonable recipient familiar with their context. In its opinion granting judgment of acquittal on Count 6, the court ignored almost all of the evidence admitted to show the context of the defendant's two charged communications. Although the United States introduced 12 exhibits displaying many of the defendant's other communications during the 18-month period preceding the charged conduct, as

well as the testimony of Warman and his wife, the court considered only the email that the defendant sent to Warman in July of 2006 and the ANSWP magazine that he mailed to him in October of 2006. See J.A. 1138. And although the court stated that it viewed the evidence "in its cumulative context" (J.A. 1139), it in fact considered the email and magazine separate and apart from the charged communications. See J.A. 1139-1140 (discussing the 2008 Internet postings), and J.A. 1141-1143 (discussing the 2006 email and magazine).[8] Moreover, the court evaluated only excerpts of each communication and did not consider any other evidence of context.

Importantly, the court failed to take into account Warman's understanding of the defendant's various writings, which often referenced other threats or acts of violence. For example, Warman testified that he interpreted as a threat the defendant's February 23, 2008, Internet posting stating that somebody should

[8] In evaluating each piece of evidence separately, rather than cumulatively, the district court observed that the jury "may have convicted [the defendant] based on the communications that [the defendant] made directly to Richard Warman, *i.e.*, the email of July 2006 or the [ANSWP magazine] of October 2006." J.A. 1141. The indictment, however, did not charge the defendant with that 2006 conduct. Rather, as the court instructed the jury, "Count 6 charge[d] that on or about February the 23rd, 2008, and on or about March 26th, 2008, * * * the defendant * * * knowingly transmitted in interstate commerce, by Internet, a posting directed at [Warman], a Canadian lawyer, containing a threat to injure [Warman]." J.A. 892.

firebomb his house because it followed an incident of actual violence by like-minded individuals – *i.e.*, the recent firebombing of a fellow Canadian civil rights activist's home by neo-Nazis. See J.A. 528-533, 549. Similarly, Warman testified that the defendant's 2006 email concerned him because it referenced Alex Linder, who Warman knew was a white supremacist who once said that Warman should be murdered. See J.A. 551-553. Warman also testified that he was frightened when he received the package containing the defendant's ANSWP magazine at his home address because it arrived in the wake of recent anthrax attacks and shortly after the defendant posted a flurry of articles and comments on the Internet identifying Warman as a Jew and expressing his desire that Warman be killed. See J.A. 563, 565. In addition, Warman testified extensively regarding his familiarity with the white supremacist movement's history of violence and understanding that identifying him as a Jew within that movement would make him a target. See, *e.g.*, J.A. 553-556.

In analyzing the defendant's communications, however, the court ignored all of this testimony, which was highly relevant to understanding the context of the defendant's threats. See, *e.g.*, *Dinwiddie*, 76 F.3d at 925 (defendant's reference to abortion provider who had been killed was true threat in light of victim's knowledge that defendant supported the use of lethal force against doctors, like the

victim, who perform abortions); *United States* v. *Morales*, 272 F.3d 284, 288 (5th Cir. 2001) (defendant's statement that he would kill students and teachers was a true threat in light of his reference to one of the perpetrators of the Columbine High School killings); *Floyd*, 458 F.3d at 849 (defendant's letter to judges was a true threat in light of its reference to the murder of Judge Lefkow's family); *Viefhaus*, 168 F.3d at 394-396 (defendant's statement that "bombs will be activated in 15 pre-selected major U.S. cities" and that "innocent people must be considered expendable if necessary" was a true threat in light of his reference to the Oklahoma City bombing); *United States* v. *Fullmer*, 584 F.3d 132, 156 (3d Cir. 2009) (defendants' use of past incidents to instill fear in future targets was a true threat).

By considering only the 2006 email and magazine, the court also ignored evidence that the defendant continued to threaten Warman between 2006 and 2008. The United States introduced numerous exhibits and testimony showing that in 2006 and throughout 2007, the defendant wrote on the Internet that Warman "deserves to be killed"; commented that he "hope[s] someone does something violent to him"; opined that that Warman "should be killed"; displayed Warman's home address along with a map showing where he lived; and published a "work of fiction" that graphically described the violent murder of a character modeled after Warman, along with a comment stating "[m]ay we all pray that this work becomes

something more than just mere fiction." J.A. 1084, 1098, 1101-1110, 1119-1121. Such evidence shows the escalating nature of the defendant's conduct during the two-year period and is relevant to understanding the context in which the defendant's 2008 threats were made. See, *e.g.*, *Dinwiddie*, 76 F.3d at 925 (fact that defendant repeated her threats about 50 times between mid-1994 and early 1995 was relevant to true-threats analysis); *United States* v. *Alaboud*, 347 F.3d 1293, 1297 (11th Cir. 2003) ("Also, the number of calls made to Blake and his firm, 89 in all, would give a reasonable person apprehension that [the defendant] may have a serious intention to inflict physical harm upon him."); *Morales*, 272 F.3d at 288 (repeated nature of threat was relevant); *Fullmer*, 584 F.3d at 157 (same).

Finally, the court ignored the best evidence of how the defendant's charged communications would be viewed by a reasonable person familiar with their context – evidence of the Warmans' reaction, including the extensive measures they took to protect their family. For example, the Warmans testified that they repeatedly reported the threats to the police; accelerated a move to a new house; gave their newborn daughter a different surname; varied their daily routines; kept an unlisted number and removed their information from all public databases; and limited contact with strangers. See J.A. 605-606, 661-673. Although the Warmans' reaction was highly relevant, the court's opinion omits any reference to

their testimony. See, *e.g.*, *Roberts*, 915 F.2d at 891 (Evidence that "both Justice O'Connor's secretary and the Supreme Court police took the letter quite seriously as did the FBI" supported jury's determination that letter to Justice O'Connor was a true threat); *Alaboud*, 347 F.3d at 1297-1298 (reaction of victim who, in response to defendant's threatening phone calls, contacted FBI, installed surveillance cameras, instituted an electronic entry system, barricaded his windows, and renewed his license to carry a concealed weapon, was relevant to true-threats analysis); *Daughenbaugh*, 49 F.3d at 174 ("The reaction of the recipients is probative – the three judges who testified took extra security measures."); *Schneider*, 910 F.2d at 1570-1571 (same).

The court thus erred in granting judgment of acquittal on Count 6 because it failed to consider almost all of the evidence admitted at trial showing the context in which the defendant's threats were made. See *United States* v. *Mackins*, 32 F.3d 134, 138 (4th Cir. 1994) ("Further, the Supreme Court has held that sufficiency of the evidence review requires the district court to consider *all* of the evidence admitted at trial."); *Campbell*, 977 F.2d at 859 (reversing judgment of acquittal where court "downplayed" relevant evidence, failed to "weigh the evidence in the light most favorable to the Government," and drew "inferences from the evidence which, while possibly well-founded, are not the only inferences that can be

drawn").

E. The District Court Failed To Apply This Court's True-Threats Standard

The district court also erred by applying the wrong legal standard. Instead of applying this Court's true-threats standard, see *Darby*, 37 F.3d at 1066, the district court applied a standard used by the Second Circuit in *United States* v. *Kelner*, 534 F.2d 1020, 1027 (2d Cir.), cert. denied, 429 U.S. 1022 (1976), which held that speech was not protected by the First Amendment if it was "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." J.A. 1140; accord J.A. 1143.

The defendant in *Kelner* was charged and convicted under Section 875(c) for threatening the life of former Palestinian leader Yasser Arafat, who had just arrived in New York. See 534 F.2d at 1020-1021. In response to questions from a reporter at a televised press conference, the defendant stated, among other things, that "[w]e have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave the country alive"; "[w]e are planning to assassinate Mr. Arafat"; and that, "[e]verything is planned in detail." *Id*. at 1021. On appeal, he argued that his statements were not true threats under *Watts*, and that the United States should have been required to prove specific

intent to threaten. See 534 F.2d at 1024. The court rejected both arguments and held that "[e]ven where the threat is made in the midst of what may be other protected political expression, such as appellant's reference to 'justice' and 'equal rights under law,' the threat itself may affront such important social interests that it is punishable absent proof of specific intent to carry it into action." *Id*. at 1027.

The court, however, went on to state that "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied." *Kelner*, 534 F.2d at 1027. In a separate concurring opinion, Judge Mulligan rejected this language as "obiter dicta," noting that there was "no reason to set forth a test for future cases which may well involve threats within the statute and not protected by the First Amendment, but which would not fall within the proposed rubric." *Id*. at 1029 (Mulligan, J., concurring). He explained that "the proposed requirement that the threat be of immediate, imminent and unconditional injury seems * * * to be required neither by the statute nor the First Amendment." *Ibid*.

The district court's reliance on *Kelner* was error. The language used by the majority in that case conflicts with this Court's longstanding interpretation of

Section 875(c), which requires that the government "establish that the defendant intended to transmit the interstate communication and that the communication contained a true threat," as "determined by the interpretation of a reasonable recipient familiar with the context of the communication." *Darby*, 37 F.3d at 1066. Other courts have rejected the majority opinion in *Kelner* as inconsistent with this standard. See *United States* v. *Landham*, 251 F.3d 1072, 1080 (6th Cir. 2001); *United States* v. *Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997); cf. *Planned Parenthood*, 290 F.3d at 1078 (explaining that *Kelner* simply stands for the proposition that a threatening statement should be considered in context to determine whether it is a true threat or not). Moreover, neither *Watts* nor circuit precedent on true threats requires that a threat be immediate or imminent.[9]

The district court seemed to believe that reliance on *Kelner* was justified because, in its view, the case against the defendant with respect to Warman resembled an incitement case more than a true threats case, see J.A. 1142 (opining that the evidence presented "clearly implicates the contrary and distinct concepts of

[9] Although conditionality of a threat is one factor that may be considered under *Watts*, this Court and other courts have made clear that conditionality is not dispositive and that there is a relevant difference between threats that are expressly conditional and those that are only grammatically conditional. See *Lockhart*, 382 F.3d at 452; *Sutcliffe*, 505 F.3d at 961; *United States* v. *Hoffman*, 806 F.2d 703, 711 (7th Cir. 1986), cert. denied, 481 U.S. 1005 (1987).

advocating and inciting violence"), and that *Kelner* applies to cases like this one where "the line between advocacy and threats was blurred," J.A. 1142; see also J.A. 1140 (citing *Kelner* for the proposition that "[t]here are circumstances where advocacy of violence may be expressed in such a way as to also be a 'true threat'"). The court was mistaken.

The Supreme Court has held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). That rule, however, applies only to "laws that forbid inciting someone to use violence against a third party," not to statutes, like Section 875(c), "that prohibit someone from threatening another." *Dinwiddie*, 76 F.3d at 922 n.5; see also *Fullmer*, 584 F.3d at 154 (explaining that advocacy of violence may be protected if it does not incite imminent lawless action unless it is a "true threat" under *Watts*); *United States* v. *White*, 610 F.3d 956, 961-962 (7th Cir. 2010) (rejecting this defendant's argument that "*Brandenburg*-protected advocacy" encompasses "threats of violence"). As already explained, First Amendment law on true threats does not require any

showing of imminence or immediacy.[10] The court thus confused First Amendment law on incitement with that on true threats.

The district court also was confused when it stated that the defendant's conduct in this case was "more similar to the advocacy that abortion opponents have engaged in, advocacy evaluated by the Ninth Circuit in *Planned Parenthood*," which included "a website comparing abortion providers with Nazis and future

---

[10] Nor does it require that the defendant express an intent to personally carry out the threat himself. See, *e.g.*, *Viefhaus*, 168 F.3d at 394-396 (concluding that telephone message left on neo-Nazi hotline stating that "bombs will be activated in 15 pre-selected major U.S. cities * * * one week from today" was a true threat because "a defendant who repeats a third party's threat may be subjected to criminal liability"); *Alaboud*, 347 F.3d at 1297 (rejecting defendant's argument that his phone messages were not true threats because he "never specifically asserted that he would personally carry out the promised vengeance"); *Dinwiddie*, 76 F.3d at 925 n.9 ("The fact that Mrs. Dinwiddie did not specifically say to Dr. Crist that *she* would injure him does not mean that Mrs. Dinwiddie's comments were not 'threats of force'"); *Bellrichard*, 994 F.2d at 1319-1324 (concluding that a number of letters warning their addressees that God or a third party would kill them were true threats); *Floyd*, 458 F.3d at 846-849 (concluding that the mailing of an article about the murder of Judge Lefkow's murdered family to a lawyer, two judges, and Iowa state court, along with the words, "Be Aware Be Fair," was a true threat). In any event, Warman testified that he interpreted the defendant's communications as "death threats" (J.A. 586), and that he believed that the defendant would not stop "until [the defendant] either kills me or succeeds in convincing somebody else to kill me" (J.A. 587). Warman also testified that he was familiar with the white supremacist movement's history of violence, which shows that Warman "had reason to believe that the [defendant] had a propensity to engage in violence." *Planned Parenthood*, 290 F.3d at 1078. As already explained, Warman's perception of the defendant's statements is relevant to whether a reasonable recipient, familiar with their context, would interpret them as true threats.

trials of abortion providers and government officials with the Nuremberg trials." J.A. 1140. The Ninth Circuit in *Planned Parenthood* actually rejected the defendants' attempt to analyze their conduct pursuant to law governing incitement cases because the statute at issue was a threats statute. See 290 F.3d at 1072-1075. Instead, it applied an objective test similar to the one used by this Court: "a true threat is * * * a statement which, in the entire context and under all the circumstances, a reasonable person would foresee would be interpreted by those to whom the statement is communicated as a serious expression of intent to inflict bodily harm upon that person." *Id*. at 1077.

Moreover, applying that objective standard, the Ninth Circuit concluded that listing the names of specific abortion providers in the defendants' "Nuremberg Files" website was a true threat when viewed in context of past violence perpetrated by like-minded individuals. See *Planned Parenthood*, 290 F.3d at 1081. As the district court here noted:

> The Ninth Circuit determined that some of the Nuremberg files went too far because names of abortion providers who had been previously murdered had been struck-through with a black line, while those who had been previously wounded were struck-through in grey. Additionally, they were viewing the Nuremberg files in connection with several 'WANTED' posters which also highlighted and struck-through the names and faces of those abortion providers who had been murdered by like-minded individuals.

J.A. 1140-1141 n.12 (citing *Planned Parenthood*, 290 F.3d at 1080). The court

then stated that "[t]hese aggravating factors are entirely absent from the evidence presented by the government in this case." J.A. 1141 n.12. The court was incorrect. As set forth above, the United States presented evidence that the defendant's communications toward Warman were made in the context of a violent white supremacist movement, of which Warman was well-aware, that included the recent firebombing of a fellow Canadian civil rights activist's home by neo-Nazis like the defendant. Like the inclusion of specific abortion providers in the Nuremberg Files, the defendant's communications targeting Warman were true threats from the viewpoint of a reasonable recipient familiar with their context, not "purely protected, political expression." *Planned Parenthood*, 290 F.3d at 1081. Accordingly, the judgment of acquittal on Count 6 should be reversed.

II

THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE TWO-LEVEL VULNERABLE-VICTIM ADJUSTMENT UNDER U.S.S.G. 3A1.1(b)(1) TO THE DEFENDANT'S OFFENSE LEVEL FOR COUNT 3

The district court erred in calculating the defendant's offense level for Count 3 because it relied on an outdated legal standard in denying the United States' request for a two-level, vulnerable-victim adjustment under U.S.S.G. 3A1.1(b)(1). This error resulted in a combined offense level of 16, and a guideline range of 24-30 months' imprisonment. See J.A.S. 19. Had the adjustment been applied, the

offense level would have been 18, and the guideline range would have been 30-37 months' imprisonment. See U.S.S.G. Ch. 5, Pt. A.[11]

A. Standard Of Review

"In assessing whether a sentencing court has properly applied the Guidelines, [this Court] review[s] factual findings for clear error and legal conclusions de novo." *United States* v. *Llamas*, 599 F.3d 381, 387 (4th Cir. 2010) (citation omitted).

B. Sentencing On Count 3

At the sentencing hearing held on April 14, 2010, the district court stated that it was adopting without change the findings and recommendation of the PSR. See J.A. 995. The PSR applied an offense level of 12 for the defendant's two violations of 18 U.S.C. 875(c), charged in Counts 1 and 5, pursuant to U.S.S.G.

[11] The United States notes on appeal that the PSR, in fact, miscalculated the offense level for Count 3, even without the vulnerable-victim adjustment. Pursuant to U.S.S.G. 3D1.4, three units should have been added to the base offense level of 14 because the defendant was convicted of three counts. The combined offense level, therefore, should have been 17, with a guideline range of 27-33 months' imprisonment due to the defendant's category II criminal history. See U.S.S.G. Ch. 5, Pt. A. The PSR, however, only added two units, resulting in a combined offense level of 16, with a guideline range of 24-30 months' imprisonment. See J.A.S. 13, 19. If the defendant's conviction on Count 6 is reinstated and the sentence is vacated, the United States will advise the district court that the new combined offense level should be 18, and then increased to 20 with the vulnerable-victim adjustment, resulting in a guideline range of 37-46 months' imprisonment. See U.S.S.G. 3D1.4 & Ch. 5, Pt. A.

2A6.1, and an offense level of 14 for the defendant's violation of 18 U.S.C. 1512(b)(1), charged in Count 3, pursuant to U.S.S.G. 2J1.2(a), resulting in a combined adjusted offense level of 16. See J.A.S. 12-13. Because the defendant had a category II criminal history, the applicable guideline range was 24 to 30 months.[12] See J.A.S. 19. The court stated that a sentence at the high end of the range was warranted because the defendant "caused a lot of mental anguish and fright to a lot of people." J.A. 999.

The United States objected to the PSR's calculation of the offense level for Count 3. See J.A.S. 25-28. Count 3 charged the defendant with witness intimidation, in violation of 18 U.S.C. 1512(b)(1). See J.A. 35. As summarized in the PSR, the United States presented evidence that the defendant mailed letters and an ANSWP magazine to African-American tenants residing in Virginia Beach who had filed a housing discrimination complaint against their landlord. See J.A.S. 6-7. Both the magazine and the letters displayed swastikas and espoused extreme white-supremacist views. See J.A.S. 6-7. In the letters, the defendant referred to the tenants as "Whiny Section 8 Nigger[s]" and stated, among other things, that he "wanted [them] to know that [their] actions have not been missed by the white

[12] As already explained, this guideline range was incorrectly calculated. See note 11, *supra*.

community." J.A.S. 6. One of the tenants, Tasha Reddick, testified at the sentencing hearing that the letter she received was in fact addressed to her two children, who were six and eight years-old at the time. See J.A. 953-955. Reddick testified that the letter and magazine caused her to be scared for her safety and that of her children, and that it forced her to take numerous precautions to protect them. See J.A. 952-959.

The United States requested a two-level adjustment under U.S.S.G. 3A1.1(b)(1) on the ground that the defendant knew or should have known that Reddick and her two children were unusually vulnerable due to age, physical, or mental condition. See J.A.S. 25. The PSR acknowledged that the defendant knew from the tenants' housing complaint that Reddick had minor children, but denied the adjustment because it found that the defendant did not "target" Reddick's children because of their age, or that he even knew their ages. See J.A.S. 34-35. It explained:

> In order to apply an enhancement for vulnerable victim the court must make two findings. First, the court must conclude that the victim was unusually vulnerable, and second, that the defendant targeted the victim because of the victim's unusual vulnerability. In most cases, a minor – someone under the age of 18 years, may be considered a vulnerable victim, depending on the exact age of the minor and the circumstances of the offense. There is no evidence that White knew the ages of the minor children of Tasha Reddick, whether they were infants or 17 years of age, or somewhere in between, only that they were minors as identified in the suit filed by the U.S. Department of

> Housing and Urban Development (HUD). However, the second prong of the test, that the defendant targeted the victim because of the victim's age cannot be met, even by a preponderance of the evidence. The facts of the case suggest that White targeted the victim, not because of their age, but because of their race and the fact that they were listed as a charging party in the HUD discrimination suit.

J.A.S. 34-35.[13]

C. The District Court Improperly Relied On An Outdated Legal Standard

The district court erred by adopting the PSR's recommendation that it deny the United States' request for a two-level vulnerable-victim adjustment because the PSR incorrectly required that the United States show that the defendant targeted Reddick's minor children because of their age, and because it incorrectly found that there was no evidence that the defendant knew the children's ages.

The defendant was sentenced pursuant to the 2009 edition of the Federal Sentencing Guidelines Manual (J.A.S. 12), which provides that an offense level should be increased by two levels "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim." U.S.S.G. 3A1.1(b)(1). The application notes explain that a "vulnerable victim" is a person "who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct," and that the adjustment "applies

[13] The PSR did not address whether Reddick was a vulnerable victim.

to offenses involving an unusually vulnerable victim in which the defendant knows or should have known of the victim's unusual vulnerability." U.S.S.G. 3A1.1, cmt. n.2. Until 1995, the application notes stated that the adjustment applied "to offenses where an unusually vulnerable victim is made a target of criminal activity by the defendant." U.S.S.G. 3A.1.1, cmt. n.1 (1994 ed.). But this language was deleted in 1995 to clarify the Sentencing Commission's position that a court need not find that a defendant specifically targeted his victim because of the victim's vulnerability. See *United States* v. *Bolden*, 325 F.3d 471, 500 n.35 (4th Cir. 2003) (explaining that, starting in 1995, it became "unnecessary for a sentencing court to find that a defendant had specifically targeted his victim").[14] The PSR relied on the pre-1995 standard when it required, incorrectly, that the United States prove that the defendant targeted his victims because of their unusual vulnerability. See J.A.S. 35.

The adjustment should have been applied because the United States' evidence with respect to Count 3 satisfied this Court's current test for applying

[14] See also *United States* v. *Cruz*, 106 F.3d 1134, 1137-1138 (3d Cir. 1997) (explaining that the 1995 federal sentencing guidelines eliminated the "targeting" requirement for the vulnerable-victim adjustment); *United States* v. *Curly*, 167 F.3d 316, 319 (6th Cir. 1999) (overruling prior precedent requiring proof of "targeting" under vulnerable-victim adjustment following 1995 amendment); *United States* v. *Stover*, 93 F.3d 1379, 1385 (8th Cir. 1996) (same).

U.S.S.G. 3A1.1(b)(1), which does not require proof of targeting: "First, a sentencing court must determine that a victim was unusually vulnerable. Second, the court must then assess whether the defendant knew or should have known of such unusual vulnerability." *Llamas*, 599 F.3d at 388 (citations omitted). Reddick testified that her children were only six and eight years-old when she received the defendant's letter, which was addressed to the children. See J.A. 953-955. Although "broad generalizations about victims based on their membership in a class are discouraged," it is well-settled that children generally are considered "unusually vulnerable" under U.S.S.G. 3A1.1(b)(1). *United States* v. *Crispo*, 306 F.3d 71, 83 (2d Cir. 2002); see, *e.g.*, *United States* v. *Depew*, 932 F.2d 324, 330 (4th Cir.) (concluding that 12-year-boy was vulnerable victim in kidnapping conspiracy), cert. denied, 502 U.S. 873 (1991).[15]

In addition, the United States submitted a copy of the defendant's deposition from the civil housing case, in which he admitted that he learned the names of the individuals to whom he mailed the letters from the tenants' housing complaint,

---

[15] See also, *e.g.*, *United States* v. *Pospisil*, 186 F.3d 1023, 1030 (8th Cir. 1999) (concluding that children, ages 7, 11, and 13, were vulnerable victims of cross burning), cert. denied, 529 U.S. 1089 (2000); *Cruz*, 106 F.3d at 1139 (concluding that 12-year-old passenger was vulnerable victim of carjacking); *Crispo*, 306 F.3d at 83-84 (concluding that toddler, the daughter of the defendant's bankruptcy attorney, was vulnerable victim of attempted extortion plot where defendant threatened to have her kidnaped).

which he obtained from HUD's website. See J.A.S. 43-45. The complaint makes numerous references to Reddick's "minor children" and describes how they were called "nigger children" by Reddick's landlord while they "were playing outside." This allegation indicates that the children were young, as opposed to older teenagers, and therefore unusually vulnerable. J.A.S. 46, 48. In any event, the exact age is not a significant factor because U.S.S.G. 3A1.1(b)(1) generally applies to "the young," no matter if they are "six weeks old," or "eighteen years old." *United States* v. *Salemi*, 26 F.3d 1084, 1088 (11th Cir.) (citations omitted), cert. denied, 513 U.S. 1032 (1994). The evidence thus shows that the defendant "knew or should have known" that Reddick's children were unusually vulnerable.

Accordingly, the district court erred when it denied the United States' request that it apply the two-level vulnerable-victim adjustment based on the recommendation of the PSR. The court's error should be reversed, and the case should be remanded for resentencing. See *United States* v. *Wilkinson*, 590 F.3d 259, 269 (4th Cir. 2010) (explaining that "improper calculation of [the guideline] range as well as selecting a sentence based on a clearly erroneous factual finding are procedural errors that require correction before [the Court] can review [a] sentence for substantive reasonableness").

CONCLUSION

This Court should reverse the district court's grant of judgment of acquittal on Count 6 and the sentence portion of the final judgment and remand the case for resentencing.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Tovah R. Calderón
JESSICA DUNSAY SILVER
TOVAH R. CALDERON
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-4142

STATEMENT REGARDING ORAL ARGUMENT

This appeal involves a large record and raises important issues regarding the proper application of this Court's standard for assessing true threats under the First Amendment. The United States believes that argument would be helpful to the Court in understanding the facts and legal issues presented herein.

RESET FORM

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-4241 **Caption:** United States of America v. William White

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

[Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type]

☑ this brief contains 11,717 [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains _____ [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[14-point font must be used with proportional typeface, such as Times New Roman or CG Times; 12-point font must be used with monospaced typeface, such as Courier or Courier New]

☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 [*state name and version of word processing program*] in 14-point Times New Roman [*state font size and name of the type style*]; *or*

☐ this brief has been prepared in a monospaced typeface using _____ [*state name and version of word processing program*] with _____ [*state number of characters per inch and name of type style*].

(s) Tovah R. Calderon

Attorney for United States of America

Dated: 8/27/2010

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2010, eight copies of the foregoing OPENING BRIEF FOR THE UNITED STATES AS APPELLANT were delivered by first-class, certified mail to the Clerk of the Court. I also certify that the foregoing brief was filed with the Clerk of the Court and served on the following counsel of record through the CM/ECF system:

Melissa Warner Scoggins, Esq.
Law Office of Melissa W. Scoggins
40 Autumn Hills Drive
Weaverville, NC 28787
mwsappeals@aol.com

s/ Tovah R. Calderón
TOVAH R. CALDERON
Attorney