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

RESPONSE/REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF THE ISSUES – RESPONSE BRIEF

1. Whether there was sufficient evidence to support the jury's verdict finding the defendant guilty of violating 18 U.S.C 875(c) and 18 U.S.C. 1512(b)(1), as charged in Counts 1, 3, and 5 of the indictment.

2. Whether this Court construes 18 U.S.C. 875(c) as a general intent crime.

3. Whether the defendant was found guilty on Counts 3 and 6 based solely upon facts alleged in the indictment and admissible, relevant evidence.

STATEMENT OF THE ISSUES – REPLY BRIEF

1. Whether there was sufficient evidence to support the jury's verdict finding the defendant guilty of violating 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 FACTS[1]

During all times relevant, the defendant, William White, was the "Commander" of the American Nationalist Socialist Workers Party (ANSWP), a white supremacist organization. J.A. 328-329.[2] The defendant regularly posted comments and material on the organization's website, Overthrow.com, and on other, similar websites, and also published the organization's monthly magazine. See J.A. 328-332. As set forth below, the defendant regularly threatened certain

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[1] The facts presented here pertain only to Counts 1, 3, and 5. The facts in support of Count 6 are set forth in the Opening Brief of the United States as Appellant (Br.). This brief incorporates by reference the statement of facts, as well as the jurisdictional statement and statement of the case, set forth in that opening brief.

[2] "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. "J.A.S." refers to the Joint Appendix (Sealed), which contains the presentence investigation report (PSR) and the United States' sentencing memorandum. "Def. Br." refers to the defendant's opening/response brief.

individuals with whom he disagreed by posting their personal information on such websites and also by contacting them directly by phone, email, or regular mail.

1. Count 1: Threat To Injure Jennifer Petsche

The defendant's threat to injure Jennifer Petsche stemmed from a legal dispute the defendant had with Citibank. See J.A. 209-210, 218-219. Counsel for each of the parties negotiated a settlement agreement in December of 2006 that required the defendant pay $14,000 to Citibank by March 15, 2007. See J.A. 209-211, 1004, 1008. The agreement also provided that, within 15 business days after the defendant paid the full amount, Citibank would send a request to the three credit bureaus to delete related "derogatories" from the defendant's credit history indicating that the defendant had defaulted on payment of his credit card balance. See J.A. 211-212, 1004-1005. The agreement stated that the defendant understood that it could take up to 45 days after receiving the request for the credit agencies to update the defendant's credit history. See J.A. 212, 1005. The agreement further stated that if, after 60 days, the defendant's credit history had not been updated by one or more credit agency, the defendant should notify Citibank's counsel in writing and that Citibank would respond within 30 days by resubmitting its request. See J.A. 213, 1005. In accordance with the terms of the agreement, the defendant completed payment on March 9, 2007, and on March 21, 2007, Citibank requested that the credit bureaus delete the related derogatories from the

defendant's credit history. See J.A. 214-216.

That same day, on March 21, 2007, the defendant "lost patience" and began calling Citibank repeatedly in an attempt to speak with somebody about the derogatories on his credit report. J.A. 1023-1024. During the next 24 hours, the defendant placed approximately 50 calls to Citibank's Kansas City office.[3] See J.A. 171-175, 1026. He eventually reached the voice mail of Jennifer Petsche, a Citibank employee who had never heard of the defendant and who was not involved in any way with his legal dispute or settlement. See J.A. 140, 159, 177, 219, 289-290. The defendant left a message for Petsche demanding that she fax to his attorney a copy of the letter Citibank sent to the credit bureaus regarding his credit history. See J.A. 290, 1016. He also said, "I now have your name and direct number so I will not hesitate to call you back should we not receive that in a prompt manner." J.A. 1016.

Petsche thought the message was very odd, especially because she does not deal directly with card members and because the defendant's credit card account was not the type of account that her department normally would have handled. See J.A. 290-291. Petsche was concerned that the defendant sounded "irritated or

[3] Although Citibank's phone log system documented only about 50 calls from the defendant's phone number to the Kansas City office, the defendant bragged on his website that he placed about 100 to 150 calls to Citibank. See J.A. 335, 1023-1024.

upset," and was afraid that he would not stop contacting her until he got what he wanted. J.A. 294. She reported the message to the legal department, which advised her to ignore it on the ground that it was inappropriate for the defendant to contact Citibank directly where both parties were represented by counsel. See J.A. 250-256, 291-292, 1016-1017.

On March 22, 2007, Petsche received a message from the defendant on her home answering machine. See J.A. 140, 260, 295-296, 1020; Gov't Exh. 11.[4] In the message, the defendant told her that he had sent an email to her work address and that he wanted her to "review it, respond to it, and send over the necessary information as quickly as possible." Gov't Exh. 11. Petsche was "astonished" because in her "14 years at Citi, [she] never had a card member call [her] at home under any circumstances." J.A. 296. She was concerned because the defendant already had contacted her at work and then went out of his way to find her home phone number. See J.A. 297. She became "very scared" and immediately called her husband to find out what time he would be home. See J.A. 298. She also contacted one of the night supervisors at Citibank to report the call. See J.A. 298. She was very upset that night and unable to sleep well. See J.A. 298. She found

[4] Government Exhibit 11 is a CD that contains an audio recording of the message that the defendant left on Petsche's answering machine. It is attached to the second volume of the Joint Appendix.

the incident "very, very alarming." J.A. 298.[5]

The next morning when she arrived at work, Petsche saw the email that the defendant referenced in his phone message. See J.A. 299. The email was addressed to three different versions of Petsche's email address, which concerned Petsche because it appeared that the defendant was doing everything he could to get in touch with her and because it was not standard procedure for Citibank employees to provide their email addresses, especially to card members. See J.A. 300. As she began reading the email, Petsche became "very scared." J.A. 300. The email displayed Petsche's full name, her age, her date of birth, and her husband's full name. J.A. 300, 1018. It also displayed her current home address and phone number, along with three of her previous home addresses, and stated that the current home address was "confirmed" and that the current phone number was "connected." J.A. 301-302, 1018. The defendant's email requested that Petsche fax to his attorney the paperwork regarding clearance of the derogatories

[5] The defendant later posted an article on the Internet entitled, "I Answer The Magic Question: What It Takes To Get Citigroup To Give You Good Customer Service," in which he bragged about how he was able to track down a Citibank employee's name and personal contact information and claimed that he "sent someone to her house * * * to have a word with her." J.A. 1023-1024. He also claimed that "she was told that she either did what I've been trying to get her to do and stop obstructing me or I was going to release her name, address, phone number, family members * * * onto the internet and let anonymous have a whack at Citigroup's head debt collector." J.A. 1024.

on his credit report "within 24 hours." J.A. 1018. The email also stated:

> I understand you think you're very tough and you think that by dragging this process out you have created me a lot of misery; that is an incorrect assessment, but I must admit I have run out of patience with you and your smug attitude. I hope the fact that I've obviously paid someone to find you conveys the seriousness with which I take your current attitude.
>
> If you resolve this issue quickly and efficiently I can guarantee you will not hear from me again; if you don't, well, you will be well known to the Citibank customers you are currently in litigation with in [a] very short amount of time.
>
> * * * * *
>
> PS: I took the liberty of buying the Citicard * * * corporate phone directory and locating information on your outstanding disputed credit accounts from an internet dealer today, and can probably make you better known to your customers than the security measures you enact at your company indicate you would like. Consider this, as I'm sure, being in the collections business and having the attitude about it that you do, that you often make people upset. Lord knows that drawing too much publicity and making people upset is what did in Joan Lefkow:

J.A. 1018-1019. Beneath the last paragraph was a hyperlink for a Google search on Joan Lefkow, which led Petsche to a page from Wikipedia. See J.A. 306-307, 1019, 1030. She read the Wikipedia page and learned that Joan Lefkow was a United States district court judge who had been involved in a high-profile case and whose husband and mother were shot and killed in their home. J.A. 307, 1027-1029.

Petsche perceived the defendant's email "as a direct threat on not only

[her]self[,] but [also her] family." J.A. 307. She immediately notified her direct supervisor, Rachel Dixon, as well as a paralegal in the legal department who was familiar with the defendant's case, Terri Ryning. See J.A. 157, 257, 308. Ryning also perceived the email as a threat and immediately notified Citibank security. See J.A. 162, 263-265, 308. In addition, Ryning printed a photograph of the defendant that she found on the Internet and provided it to the security guards. See J.A. 265. She instructed them to be on the lookout for the defendant and to call 911 if they saw him. See J.A. 265-266. Meanwhile, Dixon sent an email to human resources, setting forth the timeline of events leading up to the defendant's email. See J.A. 157-158, 1020. Citibank's attorney, Robert Ballou, also perceived the email as a threat. J.A. 224-225. He immediately sent a letter to the defendant's attorney demanding that the defendant cease contact with Citibank and its employees. See J.A. 224-227, 1021-1022. Citibank's lead investigator also took the email very seriously. See J.A. 163-164. He conducted a full investigation and learned that the defendant was a neo-Nazi, which increased his concern for Pestche's safety because he knew that white supremacist organizations had a propensity for violence. See J.A. 169-171. He then turned the investigation over to the FBI. See J.A. 179.

The email caused a fearful reaction in Petsche and her co-workers. See J.A. 145, 262, 307. For example, Ryning became so upset that she broke out in hives

and had to go home. See J.A. 274-275. Petsche "went to pieces" and felt like she was "in a state of shock." J.A. 141, 308. She became very emotional because she was afraid that the defendant, who knew where she lived, would come to her house to hurt or kill her and her husband, just like someone did to Judge Lefkow's family. See J.A. 143-144, 262. Dixon and others advised her to go home, but she was too afraid. See J.A. 142, 265. Although Petsche remained at work, she was very upset and not very productive. See J.A. 309. Instead, she tried to learn more about the defendant. See J.A. 309-310. She conducted an Internet search and learned that he was the leader of an organization, which made her more afraid. See J.A. 311. That evening, she asked co-workers to accompany her to her car. See J.A. 312.

Petsche lived in fear for the next three years. See J.A. 314. She changed her home phone number to an unlisted number and screened all calls, but was unable to move due to the housing market. See J.A. 312-313. In addition, she lost confidence in Citibank's security and, as a result, her work performance suffered. See J.A. 143-144.

2. Count 5: Threat To Injure Kathleen Kerr

On October 31, 2007, the defendant called the office of Kathleen Kerr, the Director of Residence Life at the University of Delaware, after the media reported on a campus diversity program. See J.A. 706-708, 1064. The defendant identified

himself as "Commander Bill White of the American White Workers Party" and asked to speak with Kerr. J.A. 708. Kerr's assistant, Carol Bedgar, told the defendant that Kerr was not in the office. See J.A. 704, 708. The defendant responded that he knew that Kerr was at work because he had just spoken with "Chris" (Kerr's husband) at her home, and then recited Kerr's home phone number. See J.A. 708-709, 730. The defendant also recited a residential address, which Bedgar recognized as the home address of Kerr's father in New Jersey. See J.A. 709. Bedgar asked the defendant if he wanted to leave a message. See J.A. 709. In a "cold" and "dead sounding" tone of voice, the defendant replied, "Yes. Just tell her that people that think the way she thinks, we hunt down and shoot." J.A. 709-710. He immediately hung up. See J.A. 711.

Bedgar sensed "evil" and immediately began to pray for protection for herself, Kerr, Kerr's family, and everyone else at the office. See J.A. 711. Her other boss, Jim Tweedy, stepped out of his office to see if she was okay. See J.A. 711-712. Bedgar shared with Tweedy her notes from the defendant's call and then immediately attempted to reach Kerr, who was in a meeting in another building, to warn her about the threat that had been made to her and her family. See J.A. 712-713. Meanwhile, the police were called and Bedgar and the other staff assistants, recalling the recent massacre at Virginia Tech, began to discuss precautions they could take in the event the defendant was already on campus and on his way to

their office. See J.A. 714-715.

Kerr was pulled from her meeting with Michael Gilbert, the Vice President of Student Life. See J.A. 736-738, 842. She was told about the defendant's threatening phone call and also instructed to check her email. See J.A. 738, 843. The email, sent by Tweedy, summarized what the defendant told Bedgar and also contained a web link to the defendant's website, Overthrow.com. See J.A. 741-742, 844-845, 1058. As Kerr read the email, she began to cry. See J.A. 742. She was frightened to learn that the defendant had spoken to her husband, Chris, at their home where they live with their children, and that the defendant also knew her father's home address. See J.A. 743, 845. Kerr clicked on the link in the email and was directed to a website entitled, "University of Delaware's Marxist Thought Reform." J.A. 743-744, 845-846, 1054. Beneath the title were the words, "[r]ead about it here: University Forces All Students To Say That All Whites Are Racist." J.A. 1054.[6] The website identified Kerr and the university's President, Timothy Harker, as the appropriate contact people and instructed readers to "[g]o to their

[6] The defendant's website inaccurately characterized a campus diversity program, which recently had received attention in the media. See J.A. 758-761, 846, 874-875. The university received many emails and calls from parents, alumni, and others who had complaints about the program, but none except the defendant's call and web posting caused anyone to be concerned. See J.A. 707-708, 763-764, 867. The university also received a strongly worded email from a group known as "FIRE," but that email did not threaten to injure anyone. See J.A. 762, 876-877.

homes." J.A. 846, 1054. The website provided Harker's full name, email address, date of birth, spouse's name, spouse's date of birth, home address, vacation home address, and phone numbers. See J.A. 1054. In addition, it listed Kerr's full name, email address, date of birth, and home phone number, and noted that the phone number was "confirmed." J.A. 743-744, 848, 1054. The website also identified (mistakenly) Kerr's father, Kenneth Kerr, as Kerr's husband, and displayed his home address in New Jersey. See J.A. 744, 848, 1054. Beneath Kerr's information were the words, "We shot Marxists sixty years ago, we can shoot them again!" J.A. 750, 848, 1054.

Kerr was "terrified" upon reading this. See J.A. 751, 849. She immediately called her husband who confirmed that "someone creepy" had just called their home. J.A. 824-827, 849, 859-860, 1059, 1064. Kerr also attempted to contact her father, but was unable to reach him at that time. See J.A. 849. Gilbert told Kerr that he viewed the website as "the most serious of threats" and printed a copy of it and the email to share with other senior members of the university staff. See J.A. 751-752.

Kerr and Gilbert went to President Harker's office and convened an emergency meeting of all of the university's top administrators and law enforcement officials to discuss the threats and the security measures that would be taken in response. See J.A. 680-684, 752-754, 850. The tone of the meeting was

very serious. See J.A. 755, 851. President Harker was very concerned for Kerr's safety and also for the safety of his own wife, who was at their vacation home. See J.A. 684, 851. The university's Chief of Police, James Flatley, said that he would contact the FBI, as well as local law enforcement in Delaware and New Jersey, to request that patrols be sent to the addresses listed on the website. See J.A. 685, 851. Gilbert planned on instructing his staff on how to handle incoming calls and emails. See J.A. 756. Other senior administrators discussed who else on campus should be notified of the situation and what instructions they should be given. See J.A. 756. Everybody at the meeting insisted that the police escort Kerr back to her office and also to class later that day. See J.A. 688, 716, 851, 855-856.

After the meeting, Flatley instructed his officers to patrol the area around Kerr's office and to keep a marked police car parked outside her building at varied times. See J.A. 689, 716. He then conducted an Internet search on the defendant and uncovered another web page entitled, "Smash The University Of Delaware," which again included Kerr's and Harker's personal information along with the instruction, "[y]ou know what to do. Get to work!" J.A. 690, 1055-1057. Flatley became very concerned by the defendant's association with white supremacist websites because, as a law enforcement officer, he knew that white supremacist groups often perpetrated violent acts. See J.A. 692-693. He later met with the FBI and turned his investigation over to them. See J.A. 693.

The incident disrupted the lives of Kerr and her family. See J.A. 816, 818, 834, 868. Kerr broke down as soon she returned to her office that morning. See J.A. 715, 852. She could not understand why the defendant would threaten her or her family and was very concerned for their safety. See J.A. 715-716. Meanwhile, Kerr's husband immediately began the process of changing their home phone number to an unlisted number. See J.A. 828, 867. The couple did not feel safe taking their four children trick-or-treating in their own neighborhood that Halloween evening, but because they did not want to disrupt their children's lives more than necessary, they took them trick-or-treating in a different neighborhood across town. See J.A. 831, 857. When they returned home, a patrol car was parked outside their home, and they did not allow the children to answer the phone or the door or play outside for several weeks. See J.A. 831-833, 858-859, 866-867. Similarly, Kerr's father was advised by police not to leave his house for several days, to secure all doors and cover all windows, and to cancel plans he had to participate in a community Halloween event. See J.A. 808. A patrol car remained parked outside his home for several days, which terrified him and his wife because it served as a constant reminder of the threat. See J.A. 813.

3. Count 3: Use Of Intimidation To Interfere With Complainants' Testimony In Housing Discrimination Case

In May of 2007, the defendant mailed packages to Tiese Mitchell, Tasha Reddick, and several other tenants of a Virginia Beach apartment complex who

were pursuing a housing discrimination claim against their landlord. See J.A. 343, 432-435, 482-486. The packages were addressed to each of the adult tenants or simply to "Resident," except the one received by Reddick, which was addressed to her two minor children. See J.A. 338-340, 487, 1032-1036. Inside each package was a letter addressed to "Whiny Section 8 Nigger." J.A. 341, 443, 488, 1037. The letter, which was printed on swastika letterhead, stated:

> I read today of your complaint against James Crocket Henry and Henry LLC. I do not know Mr[.] Henry, but I do know your type of slum nigger, and I wanted you to know that your actions have not been missed by the white community.
>
> For too long, niggers like you have been allowed to get one over on the white man. You won't work. You won't produce. You breed and eat and turn the world around you into a filthy hole, but you won't do anything to earn or deserve the life you live. Niggers like you are nothing new. All of Africa behaves as you do – with the difference that, there, there is no white man to exploit, only brutal nigger[] dictators to give the lot of you the kind of government you deserve.
>
> You may get one over on your landlord this time, and you may not. But know that the white community has noticed you, and we know that you are and will never be anything other than a dirty parasite – and that our patience with you and the government that coddles you runs thin.

J.A. 1037. The letter was signed by "Bill White, Commander [of the] American National Socialist Workers' Party." J.A. 1037. Each package also contained a magazine from the defendant's organization. See J.A. 341-342. The cover of the magazine displayed a swastika, along with the words "THE NEGRO BEAST." J.A. 341, 1038. Page 12 of the magazine displayed ANSWP's organizational

structure and listed contact information for each of its 14 state units. See J.A. 342-343, 1052.

Mitchell and Reddick understood the letter to mean that they should stop pursuing their lawsuit against their landlord and that if they did not, the defendant would react. See J.A. 445-446, 491-492. They believed that the defendant was somehow connected to their landlord because their landlord also used racial slurs and because the landlord had told Mitchell after she joined the lawsuit that he "knows people that know[] people" and that she could not do anything to do him. See J.A. 444, 455-457, 488-489. The swastika on the letter and on the cover of the magazine, along with the words "THE NEGRO BEAST," frightened Mitchell and Reddick because they understood it to signify racial hatred. See J.A. 437-439, 487-488. Their fears were compounded by page 12 of the magazine, which indicated that the defendant was the leader of a large organization that had chapters in various states, including Virginia. See J.A. 439-442, 492-494. They believed somebody might be watching them, and Reddick was alarmed that the defendant knew her children's names. See J.A. 442, 494, 496.

They felt so scared and threatened that they immediately packed up some belongings for their children and went to stay with relatives. See J.A. 447, 495-496. Mitchell stayed away for five days (but would have stayed away longer if her sister's house had not been overcrowded), and Reddick stayed away for about a

week. See J.A. 447-448, 496. When they returned home, they both took measures to protect themselves. See J.A. 449-450, 496. Mitchell boarded up her windows and placed furniture near her front door, and Reddick began accompanying her children to school every day. See J.A. 449-450, 496. Other tenants instituted in a neighborhood watch program. See J.A. 450. Reddick considered dropping her lawsuit but decided against it because she felt it was necessary to protect her children from the landlord. See J.A. 497. She moved from the apartment complex as soon as she had enough money. See J.A. 498-499. Similarly, Mitchell met with her attorney to discuss dropping the lawsuit. See J.A. 458. Although Mitchell no longer lives at the same address, she still does not feel completely safe and continues to take security measures such as placing extra supports behind her doors. See J.A. 461.

About two weeks after the defendant mailed the letters to Mitchell, Reddick, and the other African-American tenants in Virginia Beach, he bragged on his radio show that he had given them "a little bit of spooking with the haints." Gov't Exh. 86.[7] The defendant explained that in the Old South, when "negroes would get out of hand," Klansmen would appear with their horses in robes and that African

[7] Government Exhibit 86 is a CD that contains an audio recording of the defendant's radio show. The relevant portions may be heard within the first seven minutes. It is attached to the second volume of the Joint Appendix. In its discussion of the radio show in its opinion, the district court mistakenly cites to Exhibit 33. See J.A. 1132.

Americans would believe that they were the ghosts of Confederate soldiers, known as "haints." Gov't Exh. 86. The defendant explained that "the niggers got so terrified that they wouldn't vote, they wouldn't do anything," and "that's kind of what we've done here." Gov't Exh. 86.

SUMMARY OF THE ARGUMENT

The evidence was sufficient to prove that the defendant violated Section 875(c) by transmitting in interstate commerce a communication containing a threat to injure Jennifer Petsche and Kathleen Kerr, as alleged in Counts 1 and 5 of the indictment. The evidence showed that communications contained true threats, unprotected by the First Amendment. The jury learned that the defendant told Petsche that what happened to Joan Lefkow (the judge whose mother and husband were shot and killed in their home) could happen to her if she did not do what he asked, and that he told Kerr that he "hunt[s] down and shoot[s]" people who think like she thinks, and then compared her thinking to Marxism, stating "We shot Marxists 60 years ago, we can shoot them again!" The jury also heard evidence placing these communications in context. For example, the evidence showed that the defendant used past incidents of violence to instill fear in Petsche and Kerr; contacted them at their homes and made their personal contact information available on the Internet; and engaged in obsessive behavior, such as placing about 50 phone calls to Petsche's office in a 24-hour period and posting Kerr's

information on multiple websites. Finally, the evidence showed that law enforcement and each of the recipients took the threats very seriously, and that their concerns increased when they learned that the defendant was the leader of a white supremacist organization, given the history of violence associated with such organizations. The evidence was thus sufficient to support the jury's determination that a reasonable recipient, familiar with the context of the communications, would interpret them as threats of physical injury.

The evidence also was sufficient to prove that the defendant violated Section 1512(b)(1) by knowingly using intimidation with intent to influence, delay, or prevent the testimony of African-American tenants who were pursuing a housing discrimination claim against their landlord. The district court correctly construed Section 1512(b)(1) as a prohibition on witness tampering, not speech. Thus, contrary to the defendant's argument, it was unnecessary for the United States to prove that the intimidation used to interfere with the tenants' testimony rose to the level of a true threat. In any event, the evidence clearly showed that the tenants perceived the defendant's letter as a threat of injury, and that perception was reasonable in light of the language used in the letter; the private manner in which the letters were delivered to the tenants and addressed to the minor children of one of the tenants; and the fact that the letter came from the leader of a large organization that promoted racial hatred.

The defendant's argument that Counts 3 and 6 of the indictment were constructively amended lacks merit. The magazine that was admitted in support of Count 3 did not broaden the bases for conviction because the magazine was included in the allegations set forth in the indictment and because it was relevant and admissible in order to place the intimidating letter in context. Similarly, the typographical error in Count 6 regarding the date that one of the defendant's threats against Warman appeared on the Internet created nothing more than a harmless variance because the date was not an element of the offense and because the Internet posting at issue was adequately identified in the indictment. Moreover, the jury instructions for both counts corresponded to the facts alleged in the indictment and the evidence presented at trial.

This Court is bound by its prior precedent in *United States* v. *Darby*, 37 F.3d 1059 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995), construing Section 875(c) as a general intent crime. Contrary to the arguments made by the defendant and the American Civil Liberties Union (ACLU) of Virginia, Inc., as *amicus curiae*, the statute does not require proof of specific intent to threaten, and the Supreme Court's decision in *Virginia* v. *Black*, 538 U.S. 343 (2003), is not to the contrary. *Black* simply rejected interpretation of a Virginia statute that would have imposed strict liability on the act of cross burning. By contrast, Section 875(c), under *Darby*, prohibits the knowing transmission of a communication containing a true

threat, as determined by a reasonable recipient familiar with the context of the communication. This objective standard strikes the proper balance between First Amendment values and the evils Congress sought to remedy in prohibiting interstate threats by ensuring that only speech involving threats of physical injury, not purely political speech, is punished.

Finally, as argued in the United States' opening brief, the district court erred in granting judgment of acquittal on Count 6 and in sentencing the defendant on Count 3. The evidence was sufficient to support the jury's verdict on Count 6 because it showed that a reasonable person, familiar with the context of the defendant's statements that someone should firebomb Richard Warman's home and that Warman should be "dr[agged] out into the street and shot," would perceive them as true threats. Also, the court erred in refusing to apply the vulnerable-victim sentencing adjustment to the defendant's offense level on Count 3 because the court required proof that the defendant targeted the victims because of their age, a requirement that was eliminated in 1995.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S VERDICT ON COUNTS 1, 3, AND 5 OF THE INDICTMENT

The defendant argues (Def. Br. 30-35, 39-46) that the evidence was insufficient to sustain a conviction on Counts 1, 3, and 5 because the evidence did

not establish that the charged communications were true threats. In a separate part of his brief, the defendant also argues (Def. Br. 14-27) that the district court erred in denying his motion for judgment of acquittal as to Counts 3 and 5 because his speech was protected under the First Amendment. The defendant acknowledges (Def. Br. 14), however, that this argument simply asks the Court to determine whether sufficient evidence supported the jury's finding that the defendant's speech contained a true threat. See also *United States* v. *Bly*, 510 F.3d 453, 458 (4th Cir. 2007) (explaining that the defendant's challenge to the threat element alleged in the indictment "is not a legal sufficiency issue; rather, it is an issue of failure of proof on the part of the prosecution"); *United States* v. *Roberts*, 915 F.2d 889, 891 (4th Cir. 1990), cert. denied, 498 U.S. 1122 (1991) ("[W]hat is or is not a true threat is a jury question."). Indeed, Section 875(c) requires proof that the communication contained a true threat and thus only prohibits speech not protected by the First Amendment. Because the defendant's arguments based on sufficiency of the evidence and First Amendment grounds are redundant, this brief will respond to both arguments together.[8]

[8] The defendant states in his summary of the argument (Def. Br. 13) that the indictment was not sufficient as to Counts 3 and 5 because his speech was protected by the First Amendment, and then states in his conclusion (Def. Br. 50) that these counts should have been dismissed "either before trial or post-verdict." The defendant, however, does not present any argument challenging the sufficiency of the indictment. Accordingly, any claim that Counts 3 and 5 should

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A. Standard Of Review

"In reviewing the sufficiency of the evidence, [this Court] must affirm the verdict below if there is substantial evidence, taking the view most favorable to the government, to support a finding of guilt." *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995).

B. The First Amendment Does Not Protect True Threats

As a preliminary matter, the United States agrees with the defendant (Def. Br. 15-16) that the First Amendment's protection is broad. The United States also agrees with the defendant (Def. Br. 16-17) that First Amendment protection applies to speech made over the Internet, as well as to political speech. As explained in the United States' opening brief (Br. 16-20), however, the First Amendment does not protect "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* v. *United States*, 394 U.S. 705, 708 (1969)); accord *Bly*, 510 F.3d at 458. Consequently, it does not protect true threats

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have been dismissed before trial has been abandoned on appeal. See, *e.g.*, *United States* v. *Hammoud*, 381 F.3d 316, 334 n.7 (4th Cir. 2004) (explaining that, pursuant to Federal Rule of Appellate Procedure 28(a)(9)(A), this Court does not consider claims unsupported by argument), cert. granted and judgment vacated on other grounds, 543 U.S. 1097 (2005).

that appear on the Internet, see *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), or true threats accompanied by political rhetoric, see *e.g.*, *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. 1040 (1999).

C. The Evidence Was Sufficient To Support The Jury's Verdict On Counts 1 And 5

Counts 1 and 5 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." Thus, to prove a violation of Section 875(c) consistent with the First Amendment, "the government must establish that the defendant intended to transmit the interstate communication and that the communication contained a true threat." *Darby*, 37 F.3d at 1066. "The government does not have to prove that the defendant subjectively intended for the recipient to understand the communication as a threat." *Ibid.* Rather, "[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." *Ibid.*[9]

[9] As discussed later in this brief, see pp. 43-52, *infra*, this Court, like most (…continued)

Courts must "consider the *whole factual context* and '*all of the circumstances*,' in order to determine whether a statement is a true threat." *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal.*, 290 F.3d 1058, 1078 (9th Cir. 2002) (citation omitted) (emphasis added), cert. denied, 539 U.S. 958 (2003). Some factors include 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). Other important factors are "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*, 290 F.3d at 1078 (citing *United States* v. *Dinwiddie*, 76 F.3d 913, 925 (8th Cir.), cert. denied, 519 U.S. 1043 (1996)). 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).

Consistent with these standards, the district court properly instructed the jury

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courts of appeals, requires only proof of general intent to threaten under Section 875(c).

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. The court instructed the jury that it should "carefully scrutinize *all* of the evidence given in the case," including "the reaction of [the] recipient in determining whether a reasonable person would consider the message a true threat." J.A. 888, 918 (emphasis added). The court also instructed the jury that "a true threat is more than mere political hyperbole * * * or vehement, caustic, and unpleasantly sharp political attacks or crude, offensive, and abusive methods of stating political opposition," and that "[i]dentifying and providing personal information on a website, standing alone, while it may be offensive or disturbing to those listening, is protected under the First Amendment." J.A. 918-919.

1. Sufficient Evidence Showed That The Defendant's March 22, 2007, Email Contained A Threat To Injure Jennifer Petsche

Count 1 of the indictment alleged that on March 22, 2007, the defendant sent a threatening email to Jennifer Petsche, a Citibank employee. See J.A. 34. The email, admitted at trial, was addressed to three different versions of Petsche's email address and displayed personal information for Petsche and her husband, including their current home address and phone number. J.A. 1018. The email stated, in part, "I must admit I have run out of patience with you and your smug

attitude. I hope the fact that I've obviously paid someone to find you conveys the seriousness with which I take your current attitude." J.A. 1018. It continued, "[i]f you resolve this issue quickly and efficiently I can guarantee you will not hear from me again; if you don't, well, you will be well known to the Citibank customers you are currently in litigation with in [a] very short amount of time." J.A. 1018-1019. The email ended with the statement, "Lord knows that drawing too much publicity and making people upset is what did in Joan Lefkow." J.A. 1019. The email included a web link to an Internet search on Lefkow, which revealed that she was a judge who had presided over a high-profile case and whose husband and mother were shot and killed at their home. See J.A. 306-307, 1019, 1027-1030.

Although the email alone was sufficient to prove a true threat, see, *e.g.*, *United States* v. *Floyd*, 458 F.3d 844, 849 (8th Cir. 2006) (concluding that anonymous mailing of newspaper article about Judge Lefkow's murdered family to several judicial officers, along with the message "Be Aware Be Fair," was a true threat), cert. denied, 549 U.S. 1236 (2007), the United States also introduced an abundance of evidence placing the email in context. Such evidence included testimony, documentation, and the defendant's own words regarding his legal dispute and frustration with Citibank. See J.A. 209-215, 1004-1011. The evidence also showed that, before sending the threatening email to Petsche, the defendant

repeatedly called Citibank until he finally reached Petsche's voice mail and then bragged on his website that he made about 100 to 150 calls to find her. See J.A. 171-175, 290, 1016, 1023-1026. The jury also learned that the defendant called Petsche at her home and heard an audio recording of the message that he left on her home answering machine, demanding that Petsche read and respond to his email. See J.A. 140, 260, 295-296; Gov't Exh. 11. This evidence supported the jury's determination that the email contained a true threat. See, *e.g.*, *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.").

The evidence also included testimony from Petsche and four other individuals that they took the defendant's conduct very seriously. Petsche testified that she perceived the email as a direct threat to her and her family, and that she lived in fear for the next three years. See J.A. 307, 314. Terri Ryning, who worked in Citibank's legal department, also testified that she perceived the defendant's email as a threat and immediately alerted Citibank security. J.A. 263-265. Ryning further testified that she was so upset by the email that she broke out in hives and had to leave work. See J.A. 274-275. Additionally, Robert Ballou, Citibank's attorney, testified that he believed that the email "contained threats."

J.A. 225.[10] Ballou's letter to the defendant's attorney advising him that the defendant's email "appears to contain threats" and demanding that the defendant "immediately cease any contact with Citibank or its agents" also was admitted into evidence. J.A. 1021. Finally, Citibank's investigator, Ric Bentz, testified that the defendant's email caused an immediate security concern, which only increased after discovering that the defendant was affiliated with a white supremacist organization because Bentz knew that such organizations often were associated with violent acts. See J.A. 164, 169-170. Bentz also testified that he turned his investigation over to the FBI. See J.A. 179.[11] All of this testimony also supported the jury's verdict. 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 1298 (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").

The district court, therefore, correctly concluded that a "reasonable juror might interpret the entire letter and course of dealing as a veiled threat that a

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[10] The defendant's assertion (Def. Br. 33) that Ballou "did not take the email as a threat" contradicts the record.

[11] The defendant's characterization of the email (Def. Br. 33) as simply "not nice," "not kind," but simply "frightening," contradicts the testimony of Petsche and others who perceived the email as a serious threat.

particular disgruntled customer, *i.e.* Defendant White, would visit Ms. Petsche or her family with physical violence." J.A. 1136. Indeed, the court found that "[n]othing in the email suggests a joking tone, and it was, in fact, an entirely serious matter for both parties. All the communication was narrowly targeted at a private individual, both at home and [at] work. Although the email was grammatically conditional, it might easily be interpreted to promise 'violent retribution if he did not receive the result he sought.'" J.A. 1136 (quoting *Bly*, 510 F.3d at 459). Moreover, "[t]here were no public issues at stake, merely a private legal dispute." J.A. 1136. In sum, there "was sufficient evidence for a rational juror to find the Defendant guilty beyond a reasonable doubt on Count One." J.A. 1136; see also *Bly*, 510 F.3d at 459 (concluding that letter signaling defendant's intention to seek redress outside legal channels was a true threat).

2. Sufficient Evidence Showed That The Defendant's October 31, 2007, Telephone Call And Internet Postings Contained A Threat To Injure Kathleen Kerr

Count 5 of the indictment alleged that on October 31, 2007, the defendant threatened Kathleen Kerr, a university professor and administrator, by phone and via the Internet. See J.A. 36. Carol Bedgar, who answered the phone when the defendant called Kerr's office, testified that the defendant identified himself as "Commander Bill White of the American White Workers Party" and asked to speak with Kerr; told Bedgar that he knew that Kerr was at work because he had

just called her home phone number and spoken with Chris (her husband); and said, in a "cold" and "dead sounding" tone of voice, "tell her that people that think the way she thinks, we hunt down and shoot." J.A. 708-710; see also J.A. 1064 (the defendant's phone records). The evidence also included two Internet postings that the defendant published later that day, which displayed Kerr's personal information, including her full name, her home phone number (noting that it was "confirmed"), her father's full name (incorrectly identified as Kerr's husband), and her father's home address. See J.A. 1054-1057. The first Internet posting was entitled "University of Delaware's Marxist Thought Reform," and stated, beneath Kerr's personal information, "We shot Marxists sixty years ago, we can shoot them again!" J.A. 1054. The second one was entitled "Smash The University Of Delware [sic]," and stated, beneath Kerr's personal information, "You know what to do: Get to work!" J.A. 1055-1057.

The United States also introduced overwhelming evidence of the seriousness with which Kerr, her family, Bedgar, the university, and various law enforcement agencies took the defendant's threats. For example, Kerr, her husband, and her father all testified that they were terrified by the defendant's communications and that they took numerous security precautions in response to them. See J.A. 805-818, 823-834, 838-868. Specifically, Kerr and her husband testified that they changed their home phone number to an unlisted number; did not allow their

children to go trick-or-treating in their own neighborhood; and forbid their children from playing outside and from answering the phone or door. See J.A. 828, 831-833, 857, 866-867. Similarly, Kerr's father canceled his plans; did not leave his house for several days; and secured his doors and covered his windows. See J.A. 808. Kerr, her husband, and her father also testified that local police departments parked patrol cars outside their homes. See J.A. 813, 831, 858. Bedgar testified that her immediate reaction to the defendant's phone call was to pray for protection; contact Kerr to warn her of the threat; and, given the recent massacre at Virginia Tech, discuss with the other staff assistants what kind of security measures they could take in the event that the defendant was already on campus and on his way to their office. See J.A. 711-715. Michael Gilbert, the Vice President of Student Life, testified that he viewed the defendant's communications as "the most serious of threats" and that he and other top administrators immediately convened an emergency meeting with the university president to discuss security. See J.A. 750-756. Finally, James Flatley, the university's Chief of Police, testified that he escorted Kerr to her office on the day of the threat; ordered his officers to patrol the area around Kerr's office and to keep a marked police car outside her building at varied times; and contacted local law enforcement agencies in New Jersey and Delaware, as well as the FBI. See J.A. 688-689.

The defendant ignores all of this evidence, which clearly supported the jury's verdict, and contends (Def. Br. 26-27, 34-35), instead, that his communications did not contain a true threat because they contained hyperbolic political language and because they did not set forth a time frame for taking action. This argument fails on both grounds. First, as already explained, see p. 23, *supra*, "[t]he political rhetoric accompanying the threats furnishes no constitutional shield. Rather, the violent tone of the rhetoric amplifies the threats." *United States* v. *Daughenbaugh*, 49 F.3d 171, 174 (5th Cir.), cert. denied, 516 U.S. 900 (1995). Indeed, in *Lockhart*, this Court concluded that the defendant's letter threatening to kill the President but also criticizing the war in Iraq constituted a true threat because "although the letter contains political statements, the manner in which Miss Lockhart gave the letter to is recipients is different from a speech at a political rally," noting that "[n]othing in Miss Lockhart's actions suggest she intended to engage in political discourse." 382 F.3d at 452. Similarly, the defendant's phone call to Kerr's office informing her that he "hunt[s] down and shoot[s]" people like her did not signal a desire to engage in political discourse. On the contrary, Bedgar testified that the defendant immediately hung up after making the threatening statement. And like the recipients in *Lockhart*, see *id*. at 449, Bedgar and the police took the threat seriously.

Second, there is no requirement that a true threat set forth a time frame for

action. See *United States* v. *Parr*, 545 F.3d 491, 497 (7th Cir. 2008) ("A threat doesn't need to be communicated directly to its victim or specify when it will be carried out."), cert. denied, 129 S. Ct. 1984 (2009). Indeed, the letter at issue in *Lockhart* contained no time frame for injuring the President. See 382 F.3d at 449. The defendant asserts (Def. Br. 27) that a time frame is necessary to satisfy "the requirement that any threat of violence be imminent," pursuant to *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). As explained in the United States' opening brief (Br. 38-39), however, *Brandenburg*'s imminence standard applies only to laws prohibiting incitement, not to laws, like Section 875(c), "that prohibit someone from threatening another." *Dinwiddie*, 76 F.3d at 922 n.5. The Seventh Circuit recently rejected the defendant's attempt to expand *Brandenburg*'s protection beyond the incitement context, see *United States* v. *White*, 610 F.3d 956, 961-962 (7th Cir. 2010), and this Court should do the same.

The district court, relying in part on *Lockhart*, correctly concluded that the defendant's communications contained a true threat. See J.A. 1137. It explained: "The evidence presented by the government established that the University of Delaware's diversity program was a highly contentious political and social issue that received a significant amount of attention from the news media and the public. Nevertheless, this factor is not controlling. * * * [A] juror could reasonably determine that the Defendant was not expressing the desire to participate in an

uninhibited, robust debate on public issues * * * but rather the desire to hunt down Dr. Kerr and shoot her because of her beliefs." J.A. 1137. The court found that, although the defendant disseminated his opinion about the diversity program widely, his communications "were individually targeted, very much unlike the speech at the political protest in *Watts*." J.A. 1137. Finally, the court found that the defendant's communications were not rhetorically conditional, but rather "uncompromising and demonstrative," and "[t]here was nothing that suggested his words were in jest, nor was the context of his complaint about the diversity program a lighthearted, humorous context." J.A. 1137. Accordingly, this Court should affirm the district court's determination that sufficient evidence supported the jury's verdict on Count 5.

D. The Evidence Was Sufficient To Support The Jury's Verdict On Count 3

Count 3 alleged that the defendant knowingly used intimidation with the intent to influence, delay and prevent the testimony of African-American tenants who were pursuing a housing discrimination claim against their landlord, in violation of 18 U.S.C. 1512(b)(1). See J.A. 35. Section 1512(b)(1) makes it unlawful to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person, or attempt[] to do so, or engage[] in misleading conduct toward another person, with intent to * * * influence, delay, or prevent the testimony of any person in an official proceeding." The defendant contends (Def. Br. 21-25, 34)

that the evidence in support of Count 3 was insufficient to support the jury's verdict because (1) in order for the statute to be applied constitutionally, evidence of intimidation must rise to the level of a true threat; and (2) the evidence in this case does not prove a true threat. As explained below, the defendant is wrong on both accounts.

1. The District Court Correctly Held That "Intimidation" In Section 1512(b)(1) Need Not Rise To The Level Of A True Threat

The defendant contends that "Section 1512(b)(1) requires proof of 'intimidation,' which the Supreme Court has held to mean, in the constitutionally proscribable sense, 'a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.'" Def. Br. 22 (quoting *Black*, 538 U.S. at 344). The district court, however, rejected *Black*'s definition of intimidation for proving a violation of Section 1512(b)(1), explaining that "[i]n *Black*, the crime which the statute sought to prevent was intimidation. Thus the Supreme Court necessarily concluded that the intimidation * * * was itself proscribable." J.A. 1129. "In contrast, here the 'substantive evil which Congress sought to prevent' was the improper influence, delay, or prevention of testimony in an official proceeding." J.A. 1130 (quoting *United States* v. *Varani*, 435 F.2d 758, 762 (6th Cir. 1970)). It concluded, "[w]here, as here, the intimidation is the vehicle for the commission of a different crime, the intimidation does not need to rise to the level of a true threat." J.A.

1130. Rather, "intimidation under [Section] 1512(b)(1) may be found from what an ordinary, reasonable person considers 'harassing' or 'frightening' activities, as long as they were done with the intent to influence, delay, or prevent the testimony of any person in an official proceeding." J.A. 1131.

The district court correctly held that the intimidation proscribed by Section 1512(b)(1) need not rise to the level of a true threat for it to be constitutionally applied. It is "well established that speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice* v. *Paladin Enters., Inc.*, 128 F.3d 233, 243 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998); see also *United States* v. *Gilbert*, 813 F.2d 1523, 1529 (9th Cir.) ("If conduct contains both speech and non-speech elements, and if Congress has the authority to regulate the non-speech conduct, incidental restrictions on freedom of speech are not constitutionally invalid."), cert. denied, 484 U.S. 860 (1987). In other words, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Rice*, 128 F.3d at 243 (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Section 1512, as evident from its title, proscribes "[t]ampering with a

witness, victim, or an informant." As the district court explained (J.A. 1130), the evil that Congress sought to remedy in enacting the statute was interference with the judicial process. Subsection (b)(1) prohibits such interference by one of four different methods: (1) intimidation; (2) threats; (3) corrupt persuasion; and (4) misleading conduct. See 18 U.S.C. 1512(b)(1). Use of intimidation, therefore, is only one of four ways to violate the statute. Moreover, "intimidation" may or may not involve speech. See, *e.g.*, *United States* v. *Hicks*, 980 F.2d 963, 972 (5th Cir. 1992) ("'Intimidate' * * * is a word that is not simply associated with a type of speech, but includes conduct as well. In fact, it encompasses only a relatively narrow range of speech, which frequently will be a concomitant of intimidating conduct."), cert. denied, 507 U.S. 998 (1993). But "speech is not protected by the First Amendment when it is the very vehicle of the crime itself." *Varani*, 435 F.2d at 762; accord *Rice*, 128 F.3d at 244.

To be sure, the statute prohibits only intimidation that is used "with intent to * * * influence, delay, or prevent the testimony of any person in an official proceeding." 18 U.S.C. 1512(b)(1). Consequently, "[o]nly intimidating speech in a quite limited context is proscribed." *Hicks*, 980 F.2d at 971. Thus, as the district court concluded, the statute may be constitutionally applied absent proof that the intimidation at issue constituted a true threat. See J.A. 1131 ("Instead, intimidation under [Section] 1512(b)(1) may be found from what an ordinary, reasonable

person considers 'harassing' or 'frightening' activities, as long as they were done with the intent to influence, delay, or prevent the testimony of any person in an official proceeding."); cf. *Hicks*, 980 F.2d at 972 (In proscribing intimidation used to interfere with an airline crew's duties, "Congress did not unnecessarily infringe passenger's first amendment liberties to use intimidating profanity.").

2. In Any Event, The Evidence Was Sufficient To Prove A True Threat

The defendant does not dispute that the evidence was sufficient to prove a violation of Section 1512(b)(1) if that statute does not require proof of a true threat. But even assuming it was necessary for the United States to prove that the defendant's use of intimidation under Section 1512(b)(1) rose to that level, the evidence in this case was sufficient to satisfy this Court's true-threats standard. Indeed, the district court instructed the jury that "[t]o intimidate someone means intentionally to say or do something that would cause a reasonable person of ordinary sensibility to be fearful of harm to himself or another." J.A. 897. This instruction is nearly identical to the court's instruction on true threats: "[A] particular statement is a true threat if * * * 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.

The evidence showed that the defendant sent a letter to Tiese Mitchell,

Tasha Reddick, and other African-American tenants who were pursuing a housing discrimination complaint against their landlord. See J.A. 343, 432-435, 482-486. The letter, which was admitted into evidence, was printed on swastika letterhead and addressed to "Whiny Section 8 Nigger." J.A. 1037. The letter began by referencing the tenants' housing complaint and stating, "your actions have not been missed by the white community. For too long, niggers like you have been allowed to get one over on the white man." J.A. 1037. It ended with the warning, "know that the white community has noticed you * * * and that our patience with you and the government that coddles you runs thin," and was signed by "Bill White, Commander." J.A. 1037. The evidence also showed that accompanying each letter was a copy of the defendant's ANSWP magazine, which displayed a swastika on the cover along with "THE NEGRO BEAST." J.A. 341, 1038. Page 12 of the magazine showed that the ANSWP had chapters in several states across the country, including Virginia. 342, 1052.

Both Mitchell and Reddick testified that they felt threatened by the letter and understood it to mean that they should drop their housing complaint. See J.A. 445-447, 491-492. Mitchell testified that she felt like the defendant was "watching" her, and Reddick testified that she believed the defendant was going to "react" and also was concerned that someone might be "watching" her and her children. J.A. 442, 491, 496. Reddick further testified that she was even more alarmed that the

defendant appeared to know the names of her young children. See J.A. 494. Both tenants also testified that their fears were compounded by the fact that the defendant was the "commander" of a large organization, particularly one that promoted racial hatred. See J.A. 437-443, 492-493. Finally, they testified that they felt so scared that they immediately packed up some belongings for their children and went to stay with relatives for several days, and that, upon their return, they each took a number of security measures – such as boarding up their windows, securing their doors, and accompanying their children to school – and that other tenants of the housing complex instituted a neighborhood watch program. See J.A. 447-450, 494-496. This testimony supported the jury's determination that the defendant's letter contained a true threat. See, *e.g.*, *Alaboud*, 347 F.3d at 1298.

As with the other counts of conviction, the defendant characterizes his speech as a mere "attempt to engage in political discourse and a First Amendment expression of opinion." Def. Br. 25. But the evidence does not suggest that the defendant was attempting to engage in a political debate with the tenants. On the contrary, the evidence included an audio recording of the defendant's radio show, during which the defendant compared his actions to that of Klansmen who sought to "terrify[y]" "negroes who got out of hand" so that they "wouldn't vote" or "do anything." Gov't Exh. 86. The defendant's statements support the jury's

determination that he knowingly used intimidation with an intent to influence, delay, or prevent the tenants from pursuing their complaint and contradict his argument that he was merely expressing a political opinion. Indeed, unlike in *Watts*, see Br. 17-18, the defendant's views were expressed privately and sent directly to the homes of people whom he did not know and who did not share his views. Moreover, there was nothing to suggest that the letters were sent in jest.

The district court stopped short of concluding that there was sufficient evidence to prove a true threat because there was "no evidence presented at trial that White 'intended to place the victim in fear of bodily harm or death,'" and that "[t]he government did not endeavour to demonstrate that White possessed or exhibited this intent." J.A. 1129. But as the district court concluded (J.A. 1132-1135), and as explained further below, pp. 43-52, *infra*, specific intent to threaten is not required to prove a true threat in this circuit. See *Darby*, 37 F.3d at 1066; see also *United States* v. *Ketchum*, 550 F.3d 363, 367 (4th Cir. 2008) ("The 'intimidation element of [bank robbery statute] is satisfied if an ordinary person in the teller's position reasonably could infer a threat of bodily harm from the defendant's acts, whether or not the defendant actually intended the intimidation.'") (citation omitted).

The court failed to analyze the defendant's letter under this Court's objective standard. For example, the court ignored important contextual factors such as the

recipients' reaction; the fact that the message was delivered by private letter; and the fact that the letter was sent from the leader of a large organization that promoted racial hatred. Under this standard, the evidence was sufficient to support the jury's verdict on Count 3. See *Daughenbaugh*, 49 F.3d at 173-174 (concluding that private letters sent to judges, which bore swastikas and warned of impending race war that would eliminate white judges unless they changed their ways, provided sufficient evidence to prove a true threat under reasonable recipient standard, especially in light of security measures taken by recipients).

II

THIS COURT CONSTRUES SECTION 875(c) AS A GENERAL INTENT CRIME

The defendant and the ACLU as *amicus curiae* contend (Def. Br. 35-39; ACLU Br. 2-15) that proof of specific intent to threaten is required to prove a violation of Section 875(c) consistent with the First Amendment. They are incorrect.

A. Standard Of Review

Issues of statutory interpretation are legal issues that this Court reviews de novo. See *Scott* v. *United States*, 328 F.3d 132, 137 (4th Cir. 2003).

B. Section 875(c) Does Not Require Proof Of Specific Intent To Threaten

Section 875(c) makes it unlawful to "transmit[] in interstate or foreign commerce any communication containing any threat to * * * injure the person of

another." In *United States* v. *Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994), cert. denied, 514 U.S. 1097 (1995), this Court held that Section 875(c) "requires only general intent to threaten," and that "[t]he government does not have to prove that the defendant subjectively intended for the recipient to understand the communication as a threat." In so concluding, this Court relied on prior cases interpreting other anti-threats statutes. See *Darby*, 37 F.3d at 1065 (citing *United States* v. *Maisonet*, 484 F.2d 1356, 1358 (4th Cir. 1973), cert. denied, 415 U.S. 933 (1974); *United States* v. *Roberts*, 915 F.2d 889, 890-891 (4th Cir. 1990), cert. denied, 498 U.S. 1122 (1991)). Under *Darby* and those other cases, "whether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context of the communication." *Ibid*.; see also *Maisonet*, 484 F.2d at 1358 (applying "reasonable recipient" standard under 18 U.S.C. 876, which prohibits mailing threatening communications); *Roberts*, 915 F.2d at 890-891 (applying "reasonable recipient" standard under 18 U.S.C. 115(a)(1)(B), which prohibits threats to federal judges); accord *United States* v. *Armel*, 585 F.3d 182, 185 (4th Cir. 2009). The defendant and the ACLU now ask this Court to overturn its precedent in *Darby* and hold that proof of specific intent to threaten is required to prove a violation of Section 875(c). See Def. Br. 35-39; ACLU Br. 2-4. This Court should reject that request.

It is well-settled in this circuit that "a panel of this court cannot overrule,

explicitly or implicitly, the precedent set by a prior panel of this court. Only the Supreme Court or this court sitting en banc can do that." *Barbour* v. *International Union*, 594 F.3d 315, 321 (4th Cir. 2010) (quoting *Mentavlos* v. *Anderson*, 249 F.3d 301, 312 n.4 (4th Cir.), cert. denied, 534 U.S. 952 (2001)). Both the defendant and the ACLU concede (Def. Br. 35-36; ACLU Br. 3-4), as they must, that *Darby* is binding precedent in this circuit. The only question, therefore, is whether the Supreme Court has issued a "superseding contrary decision." *United States* v. *Prince-Oyibo*, 320 F.3d 494, 498 (4th Cir.), cert. denied, 540 U.S. 1090 (2003). The defendant acknowledges (Def. Br. 36) that the question whether Section 875(c) "is a specific or general intent crime * * * has not yet come before the Supreme Court." The ACLU, however, contends (ACLU Br. 4-9) that the Supreme Court's decision in *Black* requires proof of specific intent to threaten. The ACLU's argument fails.

Black is not contrary to this Court's holding in *Darby*. Indeed, the Court in *Black* did not construe Section 875(c) or any other federal anti-threats statute. Rather, it held that the Commonwealth of Virginia may ban the act of cross burning with "an intent to intimidate a person or group of persons" consistent with the First Amendment, but that it may not instruct juries that "[t]he burning of a cross, by itself, is sufficient evidence from which [they] may infer the required intent." *Virginia* v. *Black*, 538 U.S. 343, 363-364 (2003). The Court reasoned that

such an instruction "permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense." *Id*. at 365. In other words, the statute, as interpreted by the jury instruction, essentially imposes strict liability on the act of cross burning because it "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself." *Ibid*. By contrast, Section 875(c) is not a strict-liability offense because it requires proof "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.

The ACLU contends that, in *Black*, "[t]he Court defined 'true threats' as '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,' and that "[t]he plain meaning of this passage is that a speaker must specifically intend to threaten for his words to constitute true threats and thus fall outside First Amendment protection." ACLU Br. 4 (quoting 538 U.S. at 359). The ACLU misconstrues *Black*. First, the Supreme Court in *Black* did not dispositively "define" what is or is not a true threat. Rather, the Court stated that "'[t]rue 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." *Black*, 538 U.S. at 359 (emphasis added). This statement was not the holding of *Black*, but rather, *dicta* that appeared in the Court's preliminary discussion of First Amendment principles. See *Black*, 538 U.S. at 358-360. In any event, the Court also explained that "[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protect[s] 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.'" *Id*. at 359-360 (citation omitted).

Second, as the district court recognized, *Black* is entirely consistent with *Darby*. See J.A. 1132-1135. The court explained that a "reading of *Black* that transforms 'means to communicate' into 'subjectively intended to threaten' would require 'communicate' to carry much more weight than can reasonably be accorded to the basic understanding of 'communicate.' It is a much more reasonable conclusion that 'means to communicate' simply reiterates the requirement set forth in *Darby* that 'the defendant intended to transmit the interstate communication.'" J.A. 1134 (quoting 37 F.3d at 1066). The court further observed that "there is 'nothing in the *Black* opinion to indicate that the Supreme Court intended to overrule a majority of the circuits by adopting a subjective test when dealing with true threats.'" J.A. 1134 (quoting *United States*

v. *D'Amario*, 461 F. Supp.2d 298, 302 (D.N.J. 2006)). "To the contrary, the public policy rationale for prohibiting true threats that is outlined in *Black* supports a more objective test." J.A. 1134. The court explained, "[i]f the prohibition on true threats is meant to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders,' then the subjective intent of the speaker cannot be of paramount importance." J.A. 1134. Accordingly, the court correctly concluded that "*Black* did not effect a change in the law with regards to threats under 18 U.S.C. 875(c) and that the reasonable recipient test as set forth in *Darby* should still apply." J.A. 1134.

Indeed, as the district court noted (J.A. 1134), a majority of circuits have adopted an objective test for determining whether a communication contains a true threat, and several of those circuits, including this one, have continued to invoke that test since *Black*. See *Armel*, 585 F.3d at 185 (citing *Black*); see also *United States* v. *Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003), cert. denied, 540 U.S. 1132 (2004); *United States* v. *Zavrel*, 384 F.3d 130, 136-137 (3d Cir. 2004), cert. denied, 544 U.S. 979 (2005); *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004), cert. denied, 544 U.S. 1062 (2005); *United States* v. *Fuller*, 387 F.3d 643, 646 (7th Cir. 2004); *United States* v. *Alaboud*, 347 F.3d 1293, 1297 (11th Cir.

2003).[12] In *Porter*, the Fifth Circuit cited *Black*'s definition of true threats to conclude, as the district court did in this case, that "[t]o lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person." 393 F.3d at 616 (citing, in footnote, *Black*, 538 U.S. at 359). The court further explained, "[i]mportantly, whether a speaker intended to communicate a potential threat is a threshold issue, and a finding of no intent to communicate obviates the need to assess whether the speech constitutes a 'true threat.'" *Id*. at 616-617.

Only the Tenth Circuit and one panel of the Ninth Circuit have cited *Black* for the proposition that a "true threat" must be made with specific intent to threaten. See *United States* v. *Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005), cert. denied, 547 U.S. 1097 (2006); *United States* v. *Cassel*, 408 F.3d 622, 630-633 (9th Cir. 2005). But in *Magleby*, the defendant was convicted of interfering with housing rights by burning a cross under 42 U.S.C. 3631, which requires proof that the defendant "willfully * * * intimidate[d]" the victims. See 420 F.3d at 1139. Thus, whether *Black* requires proof of specific intent to threaten under a general anti-threats statute like Section 875(c) was not at issue in that case. Similarly, in

[12] The defendant correctly points out (Def. Br. 36-37) that there are two variations of the objective test – one, which this Court adopted in *Darby*, that is "listener-based," and another that is "speaker-based" – but both tests essentially ask "how a 'reasonable *person* would construe' the communication." *Alaboud*, 347 F.3d at 1297 n.3 (11th Cir. 2003) (citation omitted).

Cassel, the Ninth Circuit held that *Black* required proof of specific intent to intimidate under 18 U.S.C. 1860, which prohibits interference with a federal land sale by intimidation. See 408 F.3d at 634. But in a subsequent case, the court refused to extend that holding to require proof of specific intent to threaten under a general anti-threats statute. See *United States* v. *Romo*, 413 F.3d 1044, 1051 n.6 (9th Cir. 2005) (explaining that "*Cassel* leaves untouched the reasonable person analysis for presidential threats because it did not address whether statutes like 18 U.S.C. 871(a) require [specific] intent"), cert. denied, 547 U.S. 1048 (2006). And in *United States* v. *Sutcliffe*, 505 F.3d 944, 961-962 (2007), the Ninth Circuit rejected the defendant's argument under Section 875(c) "that the jury was erroneously instructed to apply an objective, rather than subjective, test to determine whether his statements constituted true threats," explaining, "[g]iven our contradictory case law on this issue, it is not clear that the instruction was actually erroneous."

The ACLU also argues (ACLU Br. 10) that the "objective test * * * does not strike the proper balance between the values underlying the First Amendment and the purposes for punishing threatening speech." But in *Black*, the Court invalidated strict liability for cross burning because it "blurs the line between the[] two meanings of a burning cross." 538 U.S. at 365. It explained, "[t]he act of burning a cross may mean that a person is engaging in constitutionally proscribable

intimidation. But that same act may mean only that the person is engaged in core political speech." *Ibid*. The Court thus invalidated the Virginia statute, as interpreted by the strict-liability jury instruction, because there was a "possibility that the Commonwealth will prosecute – and potentially convict – somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." *Ibid*. A person engaged in "core political speech," however, could not be prosecuted and convicted under an objective standard unless the speech was accompanied by a threat of physical injury, as determined by a reasonable person familiar with the context.

Indeed, applying the objective standard to the facts of *Black* likely would yield the same result rendered by the Court in that case. A reasonable person familiar with the context of the cross burned by Defendant Black, who burned it during a Klan rally held on private property with the owner's permission, and which made a passerby feel "'awful' and 'terrible," *Black*, 538 U.S. at 349, likely would not construe the cross burning to be a serious expression of an intent to injure anyone. On the other hand, a reasonable person familiar with the context of the cross burned by Defendants Elliott and O'Mara, who burned it in the yard of their new African-American neighbor after the neighbor had voiced a complaint about Elliott, *id*. at 350, could likely conclude that it was a serious expression of an intent to injure that neighbor. As this Court explained in *Darby*:

> 'The difference between a specific intent and general intent crime involves the way in which the intent is proved – whether by probing the defendant's subjective state of mind or whether by objectively looking at the defendant's behavior in the totality of the circumstances.' Whether section 875(c) is a specific intent crime or a general intent crime, the government would still be required to 'prove that the threat is a "real threat" as opposed to a mistake or inadvertent statement.'

37 F.3d at 1065 (quoting *United States* v. *DeAndino*, 958 F.2d 146, 149 (6th Cir.), cert. denied, 505 U.S. 1206 (1992)) (internal citation omitted). The objective standard is thus consistent with First Amendment values.

Moreover, as the district court explained, the objective standard also furthers "the public policy rationale for prohibiting true threats," *i.e.*, "to protect listeners from the 'fear of violence' and the corresponding 'disruption that fear engenders.'" J.A. 1134 (quoting, *Black* 538 U.S. 344). In addition, "[a]n important purpose of antithreat statutes is to empower law enforcement to stop those who threaten violence before they attempt to carry out their threats. * * * To perform that function, law enforcement – the FBI, police, prosecutors – must evaluate the speaker's statements, so an objective contextual interpretation matters." *United States* v. *Parr*, 545 F.3d 491, 500-501 (7th Cir. 2008). Accordingly, this Court should reject a specific-intent requirement under Section 875(c), pursuant to *Darby*.

III

COUNTS 3 AND 6 OF THE INDICTMENT WERE NOT CONSTRUCTIVELY AMENDED

The defendant argues for the first time on appeal (Def. Br. 27-30, 40-41) that admission of the ANSWP magazine in support of Count 3 and a typographical error contained in Count 6 resulted in constructive amendments to the indictment in violation of his Fifth Amendment right. "A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." *United States* v. *Floresca*, 38 F.3d 706, 710 (4th Cir. 1994) (en banc). As explained below, the possible bases for conviction on Counts 3 and 6 were not impermissibly broadened in this case. Accordingly, the defendant's claims lack merit.

A. Standard Of Review

The defendant's claims, which were not raised below, should be reviewed for plain error. See *Floresca*, 38 F.3d at 711-712.

B. Admission Of The ANSWP Magazine Did Not Broaden The Legal Bases For The Defendant's Conviction On Count 3

The defendant contends (Def. Br. 30) that Count 3 of the indictment was constructively amended because "[t]he indictment charged [him] only with using

intimidation 'by mailing letters containing intimidating language,' not by sending the *National Socialist* [magazine] to the tenants," and that "the jury here was allowed to return a guilty verdict upon finding that the magazine constituted 'intimidation,' thus 'broadening the base' for [his] conviction beyond the grand jury indictment." These assertions are unsupported by the record.

With respect to Count 3, the grand jury charged that the defendant "knowingly attempted to and did use intimidation with the intent to influence, delay and prevent the testimony in an official proceeding of African-American tenants, who had asserted claims that their landlord was engaging in discriminatory practices, by mailing letters containing intimidating language to the home addresses of the African-American tenants," in violation of Section 1512(b)(1). J.A. 35. Count 3 also stated that "[t]he Introduction to this Indictment is realleged and incorporated into this Count of the Indictment." J.A. 35. Paragraph 16 of the indictment's introduction alleged that "[t]hese letters were delivered in envelopes bearing the name and address of each African-America[n] tenant recipient. Included in the envelope was an ANSWP magazine, emblazoned with a swastika and entitled, 'The Negro Beast and Why Blacks Who Work Aren't Worth the Cost of Welfare.' The magazine contains numerous articles espousing extreme white supremacist viewpoints." J.A. 26. The grand jury therefore charged that the defendant knowingly used intimidation with intent to influence, delay, or prevent

the testimony of the tenants by mailing letters, which were accompanied by copies of the magazine. See J.A. 26, 35. Consequently, admission of the magazine into evidence did not "broaden[] the possible bases for conviction beyond those presented by the grand jury." *Floresca*, 38 F.3d at 710.

In any event, the jury could not have returned a guilty verdict on Count 3 based solely upon a finding of the magazine because the court instructed the jury that "Count Three * * * charges that * * * the defendant * * * knowingly attempted to and did use intimidation * * * by mailing *letters* containing intimidating language to the home address[es] of the African-American tenants." J.A. 896 (emphasis added). Accordingly, the defendant's claim that Count 3 of the indictment was constructively amended by admission of the magazine lacks merit.[13] Cf. *Floresca*, 38 F.3d at 710 (concluding that jury instruction resulted in constructive amendment to indictment where indictment charged defendant with one subsection of witness tampering statute but jury was instructed on another).

C. The Typographical Error In Count 6 Created A Harmless Variance

Count 6 alleged that "on or about February 23, 2008, and on or about February 26, 2008 * * * the defendant * * * knowingly transmitted in interstate commerce communications by Internet postings directed at [Richard Warman], a

[13] The United States notes that the defendant did not object to admission of the magazine (J.A. 342), which was relevant and admissible to show the context of the letters.

Canadian lawyer, containing a threat to injure [Warman]." J.A. 36. The defendant contends (Def. Br. 40) that there may have been a constructive amendment to the indictment because "Warman did not testify about any Internet posting on February 28, 2008." The United States assumes that the defendant means that Warman did not testify about any Internet posting on February 26, 2008 (not February 28, 2008), which is the date alleged in Count 6. In that case, the defendant is correct that Count 6 contained a typographical error. The error, however, was corrected before trial during an in-chambers conference with Judge Turk when the United States informed the court that the evidence would show that the second Internet posting charged in Count 6 was published on March 26, 2008, not February 26, 2008.[14] Consequently, the court properly instructed the jury that "Count 6 charge[d] that on or about February the 23rd, 2008, and on or about March the 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.

In any event, the typographical error did not cause the indictment to be constructively amended because it was, at most, a harmless variance. "A variance occurs when the facts proven at trial support a finding that the defendant committed the indicted crime, but the circumstances alleged in the indictment to

[14] The conference does not appear to have been transcribed.

have formed the context of the defendant's actions differ in some way nonessential to the conclusion that the crime must have been committed." *Floresca*, 38 F.3d at 709. "Once a reviewing court determines that the facts incorrectly noted in the indictment do not concern an issue that is essential or material to a finding of guilt, the focus is properly upon whether the indictment provided the defendant with adequate notice to defend the charges against him." *Id*. at 709-710. That is the case here.

It is well-settled that, "[w]here a particular date is not a substantive element of the crime charged, strict chronological specificity or accuracy is not required." *United States* v. *Kimberlin*, 18 F.3d 1156, 1159 (4th Cir.) (quoting *United States* v. *Morris*, 700 F.2d 427, 429 (1st Cir.), cert. denied, 461 U.S. 947 (1983)), cert. denied, 511 U.S. 1093, 511 U.S. 1148, and 513 U.S. 843 (1994); accord *Floresca*, 38 F.3d at 709 n.6. In *Kimberlin*, the defendant challenged his conviction on the ground that the indictment alleged that he carried a gun during a drug transaction "[i]n or about July, 1991, the exact date to the Grand Jurors unknown," but the evidence presented at trial showed that the drug transaction occurred in August of 1991. 18 F.3d at 1159. This Court concluded that "[t]his slight variance in time may be disregarded because, without a doubt, '[t]he indictment … fairly [apprised] the defendant of the crimes with which he was charged.'" *Ibid*. (quoting *Land* v. *United States*, 177 F.2d 346, 348 (4th Cir. 1949)).

Similarly, here, the indictment alleged that the defendant transmitted a threat over the Internet "*on or about* February 26, 2008." J.A. 36 (emphasis added). The exact date of the Internet posting was not a substantive element of the crime charged. Moreover, the defendant had adequate notice regarding which Internet posting was at issue because the indictment quoted the text of the March 26, 2008, posting verbatim. See J.A. 32-33. In addition, the defendant was not prejudiced by the typographical error because the jury was properly instructed on the correct dates of the postings, which corresponded to the evidence presented at trial. Accordingly, this Court need not, as the defendant asserts (Def. Br. 41), limit its review of the sufficiency of the evidence in support of Count 6 to only the February 23, 2008, Internet posting.

IV

REPLY BRIEF ARGUMENTS

A. Sufficient Evidence Showed That The Defendant's 2008 Internet Postings Contained A Threat To Injure Richard Warman

The United States argued in its opening brief (Br. 15-41) that the district court erred in granting judgment of acquittal on Count 6 because sufficient evidence existed for the jury to find that the defendant transmitted a true threat. Count 6 alleged that, in 2008, the defendant published two communications on the Internet containing a threat to injure Richard Warman, a Canadian civil rights activist. See J.A. 36. As already set forth (Br. 20-24), the evidence in support of

Count 6 included the two 2008 Internet postings; an email and magazine that the defendant sent to Warman in 2006; ten additional Internet postings made between 2006 and 2008, which described Warman in a racially inflammatory manner and displayed Warman's home address along with violent language; and the testimony of Warman and his wife regarding their understanding of and reaction to the defendant's communications. See J.A. 524-606, 659-673, 1073-1126.

The defendant's February 23, 2008, posting included the words "Good. Now someone do it to Warman . . .," along with an article describing how, 11 days earlier, neo-Nazis violently firebombed the home of another Canadian civil rights activist while his four children slept inside. J.A. 1111. The March 26, 2008, posting was entitled, "Kill Richard Warman: Man Behind Human Rights Tribunal's Abuses Should Be Executed," and stated, among other things, that Warman "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," followed by Warman's home address. J.A. 1113. Warman testified that he perceived these two Internet communications as serious threats to his personal safety because they were made within the context of the white supremacist movement, which he understood to have a history of violence, and because they followed the defendant's two-year "campaign of terror" against him, which escalated over time. J.A. 534-539, 548, 555-556. Warman and his

wife reported the defendant's threats to law enforcement and took a number of extreme measures to protect themselves and their family, including, among other things, accelerating a move to new home and giving their newborn daughter a different surname. See J.A. 560, 585, 605-606, 660-669.

The defendant argues (Def. Br. 41-46), incorrectly, that this evidence was insufficient to support the jury's verdict on Count 6 because (1) the February 23, 2008, Internet posting does not state that the defendant intended to firebomb Warman's home; (2) the defendant's Internet postings were "made for and to a group of like-minded individuals"; and (3) the defendants words, "even if a 'threat,' do not pass the *Brandenburg* 'imminence' test." All of these points fail. As already explained (Br. 38-39 & n.10), there is no requirement that the speaker express an intent to carry out the threat himself, or that the threat be "imminent." Moreover, the evidence in support of Count 6 shows that, although most of the defendant's communications were publicly distributed on white supremacist websites, they specifically targeted Warman, much like the defendant's threat to injure Kerr in Count 5. See J.A. 1137.

Indeed, in *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coal*., 290 F.3d 1058, 1085-1086 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), the Ninth Circuit upheld a jury's determination that naming certain abortion providers in an online database, labeled "the Nuremberg Files," and on

widely distributed "GUILTY" posters, conveyed a threat to injure those providers even though the posters were publicly distributed and contained no overtly threatening language. The court explained:

> The posters are a true threat because * * * they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files. The communication was not conditional or casual. It was specifically targeted. Crist, Hern, and the Newhalls, who performed abortions, were not amused.
>
> The "GUILTY" posters were publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted.

Id. at 1085-1086 (citations omitted). In analyzing the abortion opponents' speech, the court rejected their argument that, because "the posters contain no language that is a threat * * *, this case is really an incitement case in disguise," and must be analyzed under *Brandenburg*. *Id*. at 1072; see also Br. 26, 39-41 (discussing *Planned Parenthood*). Instead, the court analyzed it as a true-threats case under an objective, reasonable person standard. See *id*. at 1074-1075.

The evidence in support of Count 6 is very similar to the evidence in *Planned Parenthood*. Like the "Nuremberg Files" website and the "GUILTY" posters, the defendant's communications in this case do not state explicitly that he

intends to injure Warman, but a reasonable recipient who is familiar with the history of violence associated with the white supremacist movement and the recent act of violence perpetrated against another Canadian civil rights activist by neo-Nazis like the defendant could interpret the defendant's 2008 Internet postings as a threat of injury, particularly in the context of the defendant's two-year "campaign of terror." And, although the postings were widely distributed on white supremacist websites, they targeted Warman specifically. Moreover, the evidence showed that the defendant first initiated contact with Warman by sending him a private email and also by mailing a package to his home, and that Warman began monitoring the defendant's Internet activities on a regular basis thereafter. See J.A. 527, 549-551, 561-656, 637-638.

In short, the defendant's arguments on appeal, which reiterate the flawed analysis of the district court, must be rejected for all the reasons set forth in the United States' opening brief. No court has ever required that a true threat, subject to prosecution under Section 875(c), convey the defendant's intent that he personally will carry out the threat, or that the threatened injury be imminent. Indeed, in *United States* v. *Roberts*, 915 F.2d 889, 890-891 (4th Cir. 1990), cert. denied, 498 U.S. 1122 (1991), this Court upheld a jury's determination that a letter sent to Justice O'Connor was a true threat, where the letter stated simply, in third person, "you are all now notified that either Brennan, Stevens or Kennedy is to

die." The evidence in support of Count 6, viewed in the light most favorable to the United States, was more than sufficient to support the jury's finding that the defendant's 2008 Internet postings, as determined by a reasonable recipient familiar with their context, contained a threat to injure Warman. Accordingly, the judgment of acquittal should be reversed.

B. 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 United States argued in its opening brief (Br. 41-48) that the district court erred in calculating the defendant's offense level for Count 3 because it refused to apply U.S.S.G. 3A1.1(b)(1), 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). 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 the adjustment "applies * * * [if] the defendant knows or should have known of the victim's unusual vulnerability." U.S.S.G. 3A1.1, cmt. n.2. Thus, application of U.S.S.G. 3A1.1 depends on a two-part test: "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." *United States* v. *Llamas*, 599 F.3d 381, 388 (4th Cir.

2010) (citation omitted).

As previously summarized (Br. 47-48), the evidence showed that the defendant addressed two of his letters to Tasha Reddick's minor children, ages six and eight at the time, and that the defendant knew or should have known that those children were minors based on information he obtained from Reddick's housing complaint. See J.A. 953-955; J.A.S. 43-46, 48. Because minors generally are considered "unusually vulnerable," the two-level adjustment should have been applied. See *United States* v. *Crispo*, 306 F.3d 71, 83 (2d Cir. 2002); see also, *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).

The defendant contends (Def. Br. 46-49), however, that the district court correctly denied the adjustment because there was no evidence that the defendant "targeted" the minor victims. As previously explained (Br. 46 & n.14), proof of targeting under U.S.S.G. 3A.1.1 was eliminated in 1995. 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"). The district court's reliance (J.A. 995; J.A.S. 34-35) on the pre-1995 standard to deny the adjustment was thus error. This error resulted in a combined offense level of 16 rather than 18, and a guideline range of

24-30 months' imprisonment rather than 30-37 months' imprisonment. See U.S.S.G. Ch. 5, Pt. A. Because the court expressed a desire to sentence the defendant at the high end of the range (J.A. 999), the error was not harmless and should be reversed.

CONCLUSION

This Court should affirm the defendant's convictions on Counts 1, 3, and 5; reverse the district court's grant of judgment of acquittal on Count 6; and reverse the sentence portion of the final judgment and remand the case for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached RESPONSE/REPLY BRIEF FOR THE UNITED STATES AS APPELLANT:

(1) complies with this Court's order dated October 19, 2010, granting the United States' unopposed motion to file a brief in excess of the length limitations but not to exceed 16,500 words, because it contains 16,050 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007, in 14-point Times New Roman font.

s/ Tovah R. Calderón
TOVAH R. CALDERON
Attorney

Date: October 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2010, eight copies of the foregoing RESPONSE/REPLY 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:

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