United States Court of Appeals

for the

Third Circuit

Case No. 22-2983

UNITED STATES OF AMERICA,

– v. –

KHALED MIAH,

Appellant.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 2-21-CR-00110-001, HONORABLE W. SCOTT HARDY

BRIEF AND APPENDIX VOLUME 1 OF 5 ON BEHALF OF DEFENDANT-APPELLANT (Pages A1 to A10)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The Appellant, Khaled Miah, was charged by Indictment in the Western District of Pennsylvania, Crim. No. 21-110, over which the District Court had original jurisdiction under 18 U.S.C. § 3231. As an appeal from a criminal conviction and sentence, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

I. Did the district court err in failing to dismiss Counts 1, 2, 3, and 5 of the Indictment for failure to state an offense when Miah's tweets did not identify any person against whom a threat was directed?

Standard: The district court order denying a motion to dismiss is subject to *de novo* review over legal conclusions and review of findings of fact for clear error. *United States v. Huet*, 665 F.3d 588, 594 (3d Cir. 2012). "A finding is clearly erroneous when[,] although there is evidence to support it, the reviewing [body] on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Grier*, 475 F.3d 556, 570 (3d Cir. 2007).

II. Was there insufficient evidence to prove Miah's tweets at Counts 1 through 6 constituted "true threats"?

Standard: This Court "review[s] the sufficiency of the evidence in the light most favorable to the government and must credit all available inferences in favor of the government." *United States v. Riddick*, 156 F.3d 505, 509 (3d Cir. 1998). "If

a rational juror could have found the elements of the crime beyond a reasonable doubt, we must sustain the verdict." *United States v. Fattah*, 902 F.3d 197, 246 (3d Cir. 2018).

III. Did the district court's order closing *voir dire* proceedings from the public violate Miah's Sixth Amendment right to a public trial, requiring reversal?

Standard: Violation of the right to a public trial is reversible error; where, as here, trial counsel did not lodge a contemporaneous objection, this Court's review is for plain error. *United States v. Williams*, 974 F.3d 320, 340 (3d Cir. 2020).

IV. Did the district court abuse its discretion in admitting substantial prior bad acts evidence for improper propensity purposes?

Standard: The admission of evidence is reviewed for abuse of discretion. *United States v. Hoffecker*, 530 F.3d 137, 189 (3d Cir. 2008). Plenary review is applied to rulings "based on a legal interpretation of the Federal Rules of Evidence." *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010).

V. Did the district court misapply the Sentencing Guidelines § 2A6.1(b)(1) enhancement for conduct evidencing an intent to carry out a threat and err in grouping the obstruction count with the threat counts to impose an above-guidelines sentence for obstruction?

Standard: This Court "exercises plenary review over a district court's interpretation of the Guidelines," but reviews "factual findings relevant to the

Guidelines" for clear error. *See Grier*, 475 F.3d at 570. If the Court finds a procedural error at sentencing, it must determine whether the error was harmless. *United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021).

STATEMENT OF THE CASE

Miah was arrested on January 6, 2021. A43 On March 16, 2021, he was indicted on eight counts: Counts 1-5 for violating 18 U.S.C. § 875(c), Counts 6-7 for violating 18 U.S.C. § 115(a)(1)(B), 115(b)(4), and Count 8 for violating 18 U.S.C. § 1519. A44. Miah's pre-trial motion to dismiss the Indictment was denied. A174. The trial spanned December 9-17, 2021. A546-A1693. The jury convicted Miah on Counts 1-6 and Count 8, acquitting on Count 7. A298. Post-trial motions were denied.

On October 18, 2022, Miah was sentenced to a term of 72 months and three years' supervised release. A1694, A2. He has been detained since his arrest.

A notice of appeal was timely filed. A1.

STATEMENT OF THE FACTS

A. The FBI notices Miah's controversial online speech.

In January 2019, YouTube user "Mosul Medic" posted a video depicting military personnel treating wounds in Iraq. A675-676. The user was former military; "Mosul" is a city in Iraq. A673. Miah commented anonymously on the video, "I wanna cut your balls off Mosul medic," and then posted, "Hey, Medic, you'll be needed in America, not in Mosul. We are all here. Tick-tock." A676-678, A1817. Mosul Medic reported the comment to the FBI. A673. Based on the complaint, the FBI opened an investigation into Miah's statements and online activities. A673.

After more than a year and a half passed, the FBI decided to approach Miah for an interview. Supervisory Agent Dave Foster testified at trial that "we felt like we can resolve this by continuing investigative steps or we can have a conversation with him, and it really is a – it's an olive branch…" A1225. On September 28, 2020, FBI agents went to Miah's apartment to interview him about the YouTube comment and other social media posts. A713. Miah did not cooperate and instead filed a complaint against the agents. A1228.

Agents tried to interview Miah again the next day. During the interview, Agent Foster told Miah, "I know you feel harassed, but you said that you filled out a complaint, but we want to go away. We don't want to continue this investigation, because we don't think you're -- our inclination is that you're not dangerous, but

you need to explain these threats." A1226. Miah again refused to cooperate, and soon after, began trolling the agents online.

B. Miah trolls the FBI agents with offensive tweets.

On October 8, 2020, Miah made updates to his Twitter accounts, changing his profile picture to that of Agent Edquist's wife, which he obtained from a public online source. A744, A755-758. He changed his display name from "@Lugenpresse" to "@[wife's name]presse" and changed his bio to match the public information. A755-756. Miah's tweets on this modified account included offensive statements about the agent and his wife. On October 9, 2020, the day after the agents discovered these tweets, they obtained a warrant to search Miah's home and electronic devices. A838. During the search, agents confronted Miah about using the wife's information and photo. A45. He subsequently deactivated or deleted this account and two others. A804.

But Miah did not heed the agents' warnings for long. Instead, he created new accounts with display names "@BruhKhaled" and "@54marienstrasse," and profile photo of the satirical character, Borat.[1] A620, A789-791. On them, Miah tweeted that he did not believe his actions violated the stalking law, stating, "Requires a pattern

[1] "Borat" is a fictional foreign journalist in the "mockumentary," *Borat: Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*. Widely considered offensive, the film was banned in several countries. *See Arab countries ban Borat*, THE GUARDIAN (Dec. 1, 2006), https://www.theguardian.com/ film/2006/dec/01/filmcensorship.

of two or more acts, not one troll post...” A792-794. Miah tweeted numerous statements about Agent Edquist and his wife (e.g., “[Edquist’s] grandfather was prob Nazi Waffen SS. Pussy face coward. His whole clan are bitch asses. Retarded wedding.”). A802. On November 12, Miah explained, “I don’t believe in violence. But I do believe in offending people. The law is the law [Edquist]. Too bad We both know each other’s secrets.” A803.

C. Miah mocks the ongoing investigation on a fake FBI Twitter account.

In December 2020, Miah responded to the agents’ continuing investigation by creating another Twitter account with display name, “Federal Intelligence Service” and profile photo of a mock FBI seal. A1925. It was from this account that Miah posted the tweets which form the basis of the Indictment:

Dec. 27: “Currently eating pasta and watching the second plane hit the south tower. Nick, Dave, Mike and the whole bureau, the deed will be done at a time which is most opportunistic for me, chosen by myself.” A1933 (Count 1)

Dec. 28: “The zero hour is approaching.” A1935 (Count 2)

Dec. 29: “38° 53' 42. 7" N, 77° 1' 33" W"” [the apparent coordinates of the FBI headquarters in D.C.] A1930 (Count 3)

Dec. 30: “Rasheed, Dave, Nick, Mike ... how’s your investigation going? Things are looking “bright” in 2021. Did you find the Saudi passports?” and “2001-2021 is 20 years. An entire generation, yet men like me still exist and pop up into existence. Next time you come in cowboy with the crew, the hardwood will collapse beneath your feet.” A1937 (Counts 4 and 6)

Dec. 31: “Remember boys, the more eyes on me, the less on the others. Regardless, yellow tapes will flow.” A1931 (Counts 5 and 7)

Agents took screen shots of Miah's tweets as he posted them.

D. The government charges Miah with eight counts related to the tweets.

The agents claimed that upon seeing the tweets, they feared for their safety and feared Miah could be planning an attack. A797, 836. Yet, they waited a week before arresting Miah on January 6. The Indictment comprised eight charges:

- Counts 1-5: threats to injure "FBI agents" in violation of 18 U.S.C. § 875(c) (one count for every day that Miah tweeted)
- Counts 6-7: threats to assault "FBI agents" in violation of 18 U.S.C. § 115(a)(1)(B) (these counts correspond to the December 30-31 tweets in Counts 4-5).
- Count 8: altering and/or deleting records in violation of 18 U.S.C. § 1519.

A44.

E. The court denies Miah's motion to dismiss the Indictment.

Miah sought dismissal of all counts of the Indictment for failure to state an offense on the ground that the tweets did not contain a threat to "injure" (§ 875(c)) or "assault" (§ 115(a)(1)(B)) a natural person as required by the threat statutes. A54. Ignoring this statutory language, the court denied the motion on the ground that a juror could consider Miah's tweets to be "true threats" due to the surrounding "context." A158.

F. The court issues erroneous evidentiary rulings and jury instructions.

At pre-trial, the government moved to admit more substantial "intrinsic evidence" or alternatively, "404(b) evidence." A181.

The government argued that these prior bad acts were admissible under Rule 404(b) to provide background and context and prove "motive, intent, plan, preparation and knowledge." A192-194. It claimed to offer evidence of Miah's internet searches, downloads, and conversations relating to his admiration of terrorists "for only one purpose: to prove [his] knowledge and intent." A211. Miah objected because the other-acts evidence was not intrinsic to the offense and none of the evidence was offered for a proper Rule 404(b) purpose. A196.

The court found that none of the government's exhibits were intrinsic. A236. Yet, after acknowledging the government failed to articulate a chain of propensity-free inferences for several exhibits, the court assumed the government's burden and provided the inferential chains itself. A238. In the end, the court admitted most of the government's exhibits, concluding they were offered for proper Rule 404(b) purposes and their probative value was not substantially outweighed by the risk of unfair prejudice. A237-254. Further, the court found any prejudice or confusion would be ameliorated by a limiting instruction if requested. A237-254. Miah submitted proposed limiting instructions that tracked the Third Circuit Model Instructions. A261, 286. However, at the eleventh hour, the court rejected the Model Instructions and used its own version containing tilting language and multiple errors.

G. The court closes *voir dire* from the public.

Prior to jury selection, the defense filed a written request for a jury questionnaire, which was denied. A175. Then over defense objection, the government requested an anonymous jury, which was granted. A293. At the beginning of jury selection, the court asked limited questions regarding juror bias. An overwhelming number of jurors gave answers that necessitated additional questioning on bias. The court then *sua sponte* ordered individual *voir dire* of all jurors *in camera* with the stenographer.

Over the next two days, the court interviewed nearly 100 jurors, of whom at least half were excused for cause. At the end of jury selection, Miah's counsel was instructed to destroy any documents that contained juror names, including attorney work product. Although purportedly recorded, no transcript of the *voir dire* was produced.[2]

H. Miah is convicted of obstruction and six of the seven threat counts.

At the close of the government's case, Miah moved for acquittal on all counts, which was denied. A1339, 1345.

Additionally, because the evidence showed multiple instances of Miah altering or deleting Twitter accounts, Miah requested a unanimity instruction on

[2] After Miah filed this appeal, the court provided transcripts for all proceedings **except** *voir dire*.

Count 8 so that if found guilty of obstruction, the record could reflect for which course of conduct the jury convicted him. A1543-1549. The court declined this request as well.

The jury convicted Miah of Counts 1-6 and 8. It acquitted on Count 7, which charged Miah with threatening a federal officer under § 115(a) for tweeting, "Remember boys, the more eyes on me, the less on the others. Regardless, yellow tapes will flow."[3]

I. The court imposes two enhancements and sentences Miah to 72 months.

The Presentence Investigation Report (PSR)[4] recommended a Sentencing Guidelines total offense level of 32 and criminal history category I. To reach this recommended sentence, the PSR applied a six-level offense enhancement on the threat charges for "conduct evidencing an intent to carry out the convicted threat" under U.S.S.G. § 2A6.1(b)(1), and a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1. A301. Over Miah's objection, the court applied both enhancements and sentenced Miah to 72 months' imprisonment. A2.

Miah has been detained since January 6, 2021.

[3] Miah was convicted of Count 5 for the same tweet under §875(c).
[4] PSRs filed separately under seal.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court and, to counsel's knowledge, there are no related cases or proceedings pending or about to be presented to this Court or any other court or agency.

SUMMARY OF THE ARGUMENT

I. Miah's tweets were offensive, harassing, and troubling. For some, they even read like an ominous warning to the world that maybe someday, when we aren't looking, someone—maybe Miah himself—will commit a terrorist attack, maybe an attack on civilians like earlier terrorists, or maybe against law enforcement.

But Miah was not charged with threatening a terrorist attack. *See* 18 U.S.C. § 2332a(a)(2). Instead, he was charged with threatening to injure the FBI agents investigating him.

Section 875(c) makes it an offense to transmit a communication containing a "threat to injure the person of another." The plain meaning of § 875(c), confirmed by the statute's contextual features and textual cross-references to other threat statutes, requires that "person" be limited to *natural* persons. As a matter of statutory interpretation, the tweets at Counts 1, 2, 3, and 5 do not contain threats to injure a natural person (or group of natural persons).

The district court declined to dismiss the Indictment, concluding that although these tweets lacked any language directing a threat to an actual person, they could nevertheless be considered threats "based on the context and totality of the circumstances." A144. At trial, however, the "context" evidence did not prove threats to injure a natural person, only general terroristic threats that, while troubling, are not punishable under § 875(c).

II. The evidence is insufficient to support a finding that Miah's tweets were "true threats." A true threat is a statement "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). The evidence showed that Miah's tweets were hyperbolic, offensive, harassing, and even sympathetic to terrorist causes. But none of that speech may be prohibited by § 875(c) without offending the First Amendment, particularly where the speech deals with matters of public concern, as Miah's tweets did here. Relatedly, the threat statutes fail to provide a defendant like Miah with fair notice that each of his tweets constitutes a "threat to injure a person" or a "threat to assault, kidnap, or murder" an FBI agent.

Unlike in other threat cases before this Court, the "reasonable recipient" of Miah's tweets would not have viewed them as threats to injure the FBI agents given what the agents knew before and at the time. Further, the context, subject matter, satirical nature, and public broadcast of Miah's tweets all demonstrate that he did not intend for them to be perceived as threats.

III. The court's closure of jury selection violated Miah's Sixth Amendment right to a public trial. Because the court refused to use a jury questionnaire, Miah was forced to decide between a closed *voir dire* or complete forfeiture of in-depth questioning for bias. The court has never produced a transcript of the closed jury

selection. The court's closure seriously affected the fairness and integrity of the judicial proceedings, requiring a new trial.

IV. The court abused its discretion in admitting prior bad acts evidence for improper propensity purposes. Rule 404(b) is a "rule of general exclusion," prohibiting evidence of "prior bad acts" to prove a defendant's character or to demonstrate he acted in conformity therewith.

Here, the court admitted numerous exhibits of prior bad acts that were neither contemporaneous nor necessary to prove any element of the charged offenses. It erroneously found a non-propensity purpose where the only true purpose, and the inescapable effect, was to portray Miah as a terrorist-in-the-making who must be locked away. For their part, the court's "limiting instructions" exacerbated rather than mitigated this prejudicial effect.

V. The court's finding at sentencing that Miah's conduct evidenced an intent to carry out the charged threats under U.S.S.G. § 2A6.1(b)(1) was clearly erroneous. To support its six-level enhancement, the court pointed to evidence of unrelated visits to a gun range, online research of weapons, unsubstantiated travel in the general vicinity of the agents, and a years' old video of Miah mouthing off at a Pittsburgh police officer. None of this evidence demonstrated an overt act sufficiently connected to the charged threats to evince an intent to carry them out.

Finally, the court erred in grouping Count 8 for obstruction of justice with the threats counts. The court provided no reasoning for grouping these unrelated counts or for imposing an above-guidelines sentence for Count 8. These errors were not harmless.

ARGUMENT

I. Section 875(c) Proscribes Threats Made Against Identifiable Natural Persons.

No matter how disturbing the speaker or the subject matter, a statement does not constitute a threat under § 875(c) unless it is directed against a natural person. Accordingly, as a matter of statutory interpretation, the district court erred in declining to dismiss Counts 1, 2, 3, and 5 of the Indictment.

A. The plain meaning of § 875(c) requires that the term "person" be limited to natural persons.

Section 875(c) makes it a felony to "transmit[] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). "Person" is not defined.

It is a fundamental canon of statutory construction that "[i]n the absence of a specific statutory definition, the language of the statute should be given its ordinary meaning and construed in a commonsense manner to accomplish the legislative purpose." *United States v. Zavrel*, 384 F.3d 130, 133 (3d Cir. 2004) (interpreting "communication" in § 876). However, "the meaning of statutory language, plain or not, depends on context," *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 (1991), and "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997).

1. The contextual features of § 875(c) indicate that "person" means only natural persons.

The Dictionary Act defines common statutory terms that courts apply to determine "the meaning of any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1. This "context" is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993). The Act defines "person" as "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

In *Rowland*, the Supreme Court considered the meaning of "person" in 28 U.S.C. § 1915, which permitted appearance *in forma pauperis* "by a person who makes affidavit that he is unable to pay [court fees and] costs." 506 U.S. at 196. There, a representative inmates association argued that it was permitted to bring an action against prison officials *in forma pauperis* because the Dictionary Act defines "person" to include artificial entities. *Id*. at 196–97. The Court disagreed, holding the "contextual features indicate that 'person' in § 1915(a) refers only to individuals." *Id*.

Similarly, the contextual features of § 875(c) indicate that "person" refers only to individuals, i.e., natural persons. The first is the relationship between "person" and "threat," the latter this Court defined to mean an "expression of an intent to inflict injury in the present or future." *United States v. Stock*, 728 F.3d 287, 297 (3d

Cir. 2013). Section 875(c) uses "person" in this context twice: first, "any threat to kidnap any person" and second, "any threat to injure the person of another." 18 U.S.C. § 875(c). "Person" in the first phrase can only mean a natural person because an artificial entity cannot be kidnapped.[5] If there was any doubt whether the same is true of the second phrase, that doubt must be resolved by the "vigorous" presumption that a term repeated in the same sentence has the same meaning.[6] *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Another contextual feature is the similar use of "person" and "threat" in subsections (b) and (d), confirming they mean the same thing. 18 U.S.C. §§ 875(b), (d). *See Brown*, 513 U.S. at 118 (finding a "textual cross-reference" to a related statute "confirms [the Court's] conclusion" regarding the meaning of "injury").

[5] While this case does not involve an alleged threat to kidnap, the inclusion of such language in §875(c) is significant because it reflects the legislative history and purpose. In 1934, Congress amended the Kidnapping Act and enacted the predecessor to §875 to help address the kidnapping "epidemic." *United States v. Mobley*, 971 F.3d 1187, 1199 (10th Cir. 2020).

[6] The rule of lenity and doctrine of constitutional avoidance also resolve any doubt. "When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Univ. C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952). Where a statute is susceptible of multiple plausible constructions and one "would raise a multitude of constitutional problems, the other should prevail." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

2. Limiting "person" to natural persons avoids rendering other language superfluous.

It is "a cardinal principle" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Similarly, when Congress includes language in one section of a statute while omitting it in another, courts generally presume the disparate inclusion or exclusion was purposeful. *Bates v. United States*, 522 U.S. 23, 29–30 (1997).

Subsections 875(b) and (d) both begin with the phrase, "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value..." 18 U.S.C. §§ 875(b), (d). If "person" included non-natural persons, then the words "firm, association, or corporation" would be superfluous in subsections (b) and (d). Instead, the Court should presume Congress intended to include artificial entities in (b) and (d) and to exclude them from (c). *United States v. Carlson*, 787 F.3d 939, 947 (8th Cir. 2015) (concluding "the inclusion of the term 'corporation' in § 875 serves only to convince us" that "'person'… in § 876 [must] be a natural person").

3. Courts have interpreted "person" in another threat statute to mean a natural person.

This Court should follow other Circuits interpreting "person" in threat statutes to mean a natural person. The Ninth Circuit in *United States v. Havelock* interpreted

"person" in 18 U.S.C. § 876(c), which prohibits mailing "any communication… addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another." 664 F.3d 1284, 1286 (9th Cir. 2012). Havelock mailed a "manifesto" to newspapers and websites before driving to the stadium hosting Super Bowl XLII with a newly-purchased assault rifle. *Id*. The "manifesto" stated, *inter alia*, "you have attacked my family.… So now, I will reciprocate in kind.… I will slay your children. I will shed the blood of the innocent." *Id*. at 1287. After parking in a lot near the stadium, "wait[ing] for the opportunity to shoot people," Havelock had a "change of heart" and left without hurting anyone. *Id*. at 1287–88. Havelock was charged with violating § 876(c) for threatening to injure "children and persons in the vicinity of the Super Bowl XLII event." *Id*. at 1288.

Applying *Rowland*, the court concluded that the associations of the term "person" throughout the statute "clearly require that 'person' mean a natural person," including "release of any kidnapped person" and "any threat to accuse the addressee or any other person of a crime." *Id*. at 1291. The court found "[t]extual-cross reference to related statutes"—including § 875—"confirms this conclusion":

> Section 875 makes it a felony for someone to transmit in interstate or foreign commerce certain communications "with intent to extort from any person, firm, association, or corporation." *Id*. § 875(c), (d). Thus, § 875 clearly envisions that "person" is limited to a natural person and that the statute, by referring to "firm, association, or corporation," applies to both natural and non-natural persons.

Id. at 1292. Because Havelock's mailings did not indicate the "identity of any individual 'person' to whom the communication supposedly was addressed," the court reversed his convictions, holding no reasonable juror could have found his writings were addressed to a natural person as required by § 876. *Id*. at 1296. Other circuits have reached the same conclusion. *See Carlson*, 787 F.3d at 947 (holding that "person" means a natural person in § 876); *United States v. Williams*, 376 F.3d 1048, 1053 (10th Cir. 2004) (holding that "person" under § 876 includes a government official addressed by his title because an official is a natural person "capable of having a sense of personal safety"); *but see United States v. Bly*, 510 F.3d 453 (4th Cir. 2007) (holding that "person" in § 876 included artificial entities).

B. Counts 1, 2, 3, and 5 do not constitute threats to injure a person.

Miah's tweets in Counts 1, 2, 3, and 5 do not identify any natural person to whom a threat is directed. Count 1 begins by referencing 9/11: "Currently eating pasta and watching the second plane hit the south tower." It then addresses "Nick, Dave, Mike and the whole bureau," but instead of directing a threat toward the agents, alludes to the possibility of another attack: "the deed will be done at a time which is most opportunistic for me, chosen by myself."

Similarly, in Count 5, although the words, "Remember boys," are presumably addressed to FBI agents, the preceding language gives no indication as to whom any

threat is directed: "the more eyes on me, the less eyes on the others. Regardless, yellow tapes will flow."

Counts 2 and 3 are even less clear. Count 2 states, "The zero hour is approaching," while Count 3 provides the coordinates of the FBI headquarters in Washington, D.C. The FBI agents in the tweets are in Pittsburgh, not D.C. Properly instructed, no reasonable juror could find that these tweets were threats to injure a person. At most, they can be read as ominous threats to commit a terrorist attack, something Miah was never charged with.

II. As Applied to Miah's Tweets, Sections 875(c) and 115(a) Violate the First Amendment.

The Supreme Court in *Watts v. United States* recognized "[t]he language of the political arena… is often vituperative, abusive, and inexact." 394 U.S. 705, 707 (1969) (finding the statute constitutional on its face but unconstitutional as applied). Thus, threat statutes like § 875(c) "must be interpreted with the commands of the First Amendment clearly in mind," distinguishing "true threats" from constitutionally protected speech. *Stock*, 728 F.3d at 293. While *Watts* did not define "true threat," *Virginia v. Black* effectively did:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.… Intimidation in the constitutionally proscribable sense of the word is 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.

538 U.S. 343, 359 (2003). By contrast, a "merely … vehement or emotional expression of political opinion, hyperbole or arguments against government officials" is not a true threat. *United States v. Zavrel*, 384 F.3d 130, 136 (3d Cir. 2004); *United States v. Elonis* (*Elonis III*), 841 F.3d 589, 596–97 (3d Cir. 2016) (distinguishing between true threats and political hyperbole or satire). Miah's tweets fall into this latter category, which "our citizens must tolerate" "to provide adequate breathing space to the freedoms protected by the First Amendment." *United States v. Marcavage*, 609 F.3d 264, 282 (3d Cir. 2010).

A. Miah's tweets constitute political speech.

Even "[h]arassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections." *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3rd Cir. 2008); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (invalidating anti-cross-burning law noting, "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible"). Nowhere is this protection more important than with political speech involving matters of public concern, which "rest[s] on the highest rung of the hierarchy of First Amendment values." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *see Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (The "inappropriate [and] controversial character" of a statement "is irrelevant to the question whether it deals with a matter of public concern.").

Miah's tweets involved matters of public concern that have received significant attention since 9/11: widespread Islamophobia and counterterrorism efforts targeting Muslim-Americans.[7] A65. Alongside numerous terrorism prosecutions are numerous civil suits alleging discriminatory government actions against Muslims in the name of "national security." *See, e.g.*, *Hassan v. City of New York*, 804 F.3d 277 (3d Cir. 2015) (NYPD's discriminatory surveillance); *FBI v. Fazaga*, 142 S.Ct. 1051 (2022) (FBI's undercover mosque infiltration); *Tanzin v. Tanvir*, 141 S.Ct. 486 (2020) (FBI agents' retaliatory placement of Muslims on No-Fly List). It was against this backdrop that Miah tweeted hyperbolic statements challenging the agents, mocking their investigation, and even foreshadowing some future attack.[8]

In declining to dismiss the Indictment, the court focused largely on the "highly sensitive subject matter" in Miah's "reference to the September 11th terrorist attacks." A124. But it is no surprise that the subject of speech opposing

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[7] A 2017 Pew Research survey showed that 30% of Muslim Americans believed arrests of "Muslims on suspicion of plotting terrorist acts" "have mostly involved 'people who were tricked by law enforcement and did not pose a real threat." Geneive Abdo, *Like most Americans, U.S. Muslims concerned about extremism in the name of Islam*, PEW RSCH. CTR., Aug. 14, 2017, https://www.pewresearch.org/fact-tank/2017/08/14/like-most-americans-u-s-muslims-concerned-about-extremism-in-the-name-of-islam/.

[8] *Anti-Muslim assaults reach 9/11-era levels, FBI data show*, PEW RSCH. CTR., Nov. 21, 2016, https://www.pewresearch.org/fact-tank/2016/11/21/anti-muslim-assaults-reach-911-era-levels-fbi-data-show/.

counterterrorism practices referenced or even suggested terrorist attacks. Miah's tweets are in this way analogous to the political hyperbole in *Watts*, where the defendant's opposition to the draft came in the form of a "threat" to turn an army-issued rifle on the Commander in Chief. 394 U.S. at 707 ("If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."). In both cases, the government has an important national security interest; however, as this Court "learned from experience[,] it is often where the asserted interest appears most compelling that we must be most vigilant in protecting constitutional rights." *Hassan*, 804 F.3d at 306–07.

Further, the Supreme Court has held that where it involves matters of public concern, the First Amendment protects speech advocating the use of violence against government officials and even independent advocacy of terrorism. *See Brandenburg v. Ohio*, 395 U.S. 444, 448 n.3 (1969); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 36 (2010) (finding the material support statute constitutional because it did not prohibit independent advocacy of terrorism); *Boim v. Quranic Literacy Inst. & Holy Land Found.*, 291 F.3d 1000, 1026 (7th Cir. 2002) (recognizing the statute permits individuals to advocate "goals and philosophies" of terrorist organizations). Protection of this speech must not only exist on paper but must be applied in practice—even where courts find such speech "reprehensible." *R.A.V.*, 505 U.S. at 396.

B. The threat statutes failed to provide fair notice that Miah's speech is prohibited.

It is "[a] fundamental principle in our legal system that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 253 (2012). The lack of notice in a law criminalizing expression "raises special First Amendment concerns," *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997), and requires the Court to employ a "more stringent vagueness test." *Hoffman Ests. v. Flipside*, 455 U.S. 489, 499 (1982). Applying this "stringent vagueness test," the language "threat[s] to injure the person of another" (§ 875(c)) and "threat[s] to assault, kidnap, or murder [a Federal law enforcement officer]" (§ 115(a)(1)(B)) fails to provide sufficient notice that Miah's tweets are criminally proscribed. *Id.*

Counts 2, 3, and 5 illustrate this swimmingly. Count 2 states only, "The zero hour is approaching." The tweet is not directed at anyone. It says nothing about an anticipated act, event, time, or location. Similarly, Count 3 contains no reference to a person, act, or event. It mentions only a location—but not the location of the FBI agents that Miah allegedly threatened. And Count 5 ("Remember boys, the more eyes on me, the less eyes on the others. Regardless, yellow tapes will flow."), suggests the FBI is needlessly investigating Miah while "others" go unnoticed. Even "yellow tapes," assuming it means crime-scene tape, does not equate with a threat *to injure*. Rather, based on the preceding sentence, this language is akin to warning,

"If you visit that neighborhood, you'll get attacked." Neither that statement nor Miah's constitutes a true threat to injure a person and neither speaker would believe their words were proscribed as such.

All of Miah's tweets are political, trolling, and interwoven with humor and hyperbole. They resemble millions of other political and provocative posts online at a time when "cyberspace—the vast democratic forums of the Internet in general, and social media in particular"—is "the most important place[]… for the exchange of views." *Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017). They were posted on satirical Twitter accounts named after the FBI and came on the heels of other statements described in the Indictment as "profane and intentionally provocative." They were public, were not sent to any specific individual, and did not "tag" any group or person. *See United States v. Carmichael*, 326 F. Supp. 2d 1267, 1289 (M.D. Ala. 2004) ("[S]peech that is broadcast to a broad audience is less likely to be a 'true threat' not more.") (citing *United States v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993)).

As applied to these tweets, §§ 875(c) and 115(a)(1)(B) "permit the punishment of the fair use of th[e] opportunity [for free political discussion]," in contravention of the First and Fourteenth Amendments. *Cramp v. Bd. of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961).

C. The government applied the threat statutes in a novel and arbitrary way.

To obtain its indictment and conviction, the government based its case on a novel application of the threat statutes "to conduct that neither the statute[s] nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Harra*, 985 F.3d 196, 212 (3d Cir. 2021). That is, the government used § 875(c) to charge and convict Miah of making a general threat to commit a terrorist attack.

By contrast, *United States v. Fratus*, recently before this Court, epitomizes a proper application of § 875(c). No. 22-1185, 2023 WL 2710270, at *1 (3d Cir. Mar. 30, 2023) (unreported). There, the defendant was charged with one count of violating § 875(c) based on two emails he sent to the Police Commissioner, a black woman. In the first, Fratus stated, "Calling the police now for an emergency. No answer. Dirty n****r! Find a n****r, hang a n****r. Jews into the ovens!!!" In the second, he repeated "Find a n****r, hang a n****r," and asked, "Where does police chief live?" *Id*.

Minutes later, Fratus called a Jewish charity and said, "Find a Jew, Kill a Jew. I'll find out where that fucking day camp is and I'll find out where they are and I'll kill all those fucking kids, how about that?" *Id*. He called three more times, leaving voicemails promising to put Jews "in [the] oven" and "find out where Jews live so I can kill them." *Id*. The government did not charge Fratus with making threats against the charity.

This Court affirmed Fratus's conviction, holding "[t]he jury was entitled to conclude from the openly violent and racist nature of the emails that Fratus intended to threaten the Commissioner." *Id*. at *4 (cleaned up). This outcome makes sense. A reasonable person could infer the statement "find a n****r, hang a n****r," sent to the Commissioner was a serious expression of an intent to inflict bodily injury on her, particularly when coupled with a request for her address. Fratus's emails contained no hint of humor or political hyperbole. They were "unequivocal, unconditional, immediate and specific as to the person threatened." *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976).

In *Fratus* and other similar cases, the threat statute provided defendants fair notice that their speech was prohibited. *See United States v. C.S.*, 968 F.3d 237, 240-42 (3d Cir. 2020) (affirming threat conviction where defendant's threats included specific plans, victims, and weapons, defendant admitted he wanted others to believe he was serious, and there was no evidence of jokes or hyperbole); *United States v. Fullmer*, 584 F.3d 132, 155 (3d Cir. 2009) (statute was not vague as-applied to statements directed at specific individuals, admitted to prior unlawful acts, and claimed "we're only warming up"); *United States v. Stoner*, 781 F. App'x 81, 86 (3d Cir. 2019) (defendant posted a video of himself wearing a knife and gun and telling law enforcement he would make the town look like the site of a known police massacre). But "the [vagueness] inquiry is undertaken on a case-by-case basis, and

a reviewing court must determine whether the statute is vague as-applied to the affected party." *Fullmer*, 584 F.3d at 152. This case is much different.

In *Fratus*, the government refrained from charging the four calls to a Jewish charity and refrained from charging two emails as two separate counts. Here, it did the opposite, overreacting after Miah offended its agents and giving in to "[t]he eternal temptation ... to arrest the speaker rather than to correct the conditions about which he complains." *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting). Miah was charged with eight counts, seven of which were for five tweets.

D. The evidence was insufficient to prove Miah's tweets were true threats.

A true threat is one 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. The government must prove both an objective and subjective standard for true threats.

The objective standard. First, a reasonable recipient familiar with the context of Miah's tweets would not interpret them to be threats. *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994). Here, the reasonable recipient is an FBI agent with knowledge of the investigation who knew that after visiting Miah in October 2020,

he began trolling and mocking them on Twitter.[9] In *City of Houston v. Hill*, the Supreme Court reaffirmed "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers," noting that "'a properly trained officer may reasonably be expected to exercise a higher degree of restraint' than the average citizen." 482 U.S. 451, 461–62 (1987) (quoting *Lee v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring)); *see also Wood v. Eubanks*, 25 F.4th 414, 422 (6th Cir. 2022) ("The question is whether, under the circumstances, it is probable that a reasonable police officer would find [the] language and conduct annoying or alarming and would be provoked to want to respond violently."). Here, the reasonable FBI agent under the circumstances would undoubtedly find the tweets to be offensive, harassing, and annoying, but not serious expressions of an intent to inflict injury on FBI agents. *See Hill*, 482 U.S. at 465.

The subjective standard. Second, it is not sufficient that the "reasonable recipient" would perceive the statement as a threat to injure another. *See United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir. 2011). Instead, the state can only punish threatening expression if 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. Thus, the government

[9] This reasonable recipient would not have knowledge of Miah's online activity discovered by agents after Miah's arrest in January 2021.

must also prove the defendant "transmit[ted] a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis v. United States*, 575 U.S. 723, 740 (2015). Put another way, "[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal." *Bagdasarian*, 652 F.3d at 1122.

Here, there was insufficient evidence that Miah intended the tweets to be perceived as threats to injure the FBI agents. While undoubtedly disturbing, the tweets were vague and hyperbolic. Several were predictive or exhortatory in nature. *Id.* But neither the tweets nor the surrounding circumstances "convey[ed] a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027.

III. The Jury Selection Procedures Violated Miah's Sixth Amendment Right to a Public Trial.

Although courts are granted wide latitude in conducting jury selection, their discretion is limited by the commands of the Sixth Amendment. *Rosales-Lopez v. U.S.*, 451 U.S. 182, 189 (1981); *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (holding the Sixth Amendment right extends to jury selection). Here, the trial court closed *voir dire* from the public, violating Miah's Sixth Amendment rights and abusing its discretion.

The court's closure of *voir dire* parallels the closure that this Court found objectionable in *United States v. Williams*, 974 F.3d 320, 340 (3d Cir. 2020). But although the constitutional error did not necessitate a new trial in *Williams*, the Court

should find a new trial is needed here. First, unlike in *Williams*, the harm has not been mitigated by publication of the *voir dire* transcript. *See id.* at 346-47; *see also United States v. Bansal*, 663 F.3d 634, 661 (3d Cir. 2011) (finding that jury selection was not concealed from the public because it was transcribed and recorded). Second, absent the requirement of a new trial, courts will continue to utilize unconstitutional measures in jury selection. *Williams* deemed the exact procedures utilized in this case plain error, but unfortunately the holding had no deterrent effect.

And third, requiring a defendant to object to preserve his constitutional right to a public trial forces the Hobbesian choice of either forfeiting the *voir dire* necessary to discover bias, or forfeiting his right to public jury selection. Here, Miah reasonably requested a jury questionnaire to discover anti-Muslim bias, but the request was denied. It would be unfair to punish a defendant for failing to object to a closed *voir dire* where that objection would have resulted in complete forfeiture of in-depth questioning for bias. The court's closure "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," requiring a new trial. *Williams*, 974 F.3d. at 344.

IV. The Court Abused its Discretion in Admitting Improper 404(b) Evidence.

Although it found none of the governments' proffered evidence intrinsic to the charged offenses, the court nevertheless admitted more than 60 exhibits and associated testimony under Rule of Evidence 404(b). A225.

Rule 404(b) prohibits admission of evidence of "prior bad acts" to prove

character or to demonstrate the defendant acted in conformity with them. *United States v. Caldwell*, 760 F.3d 267, 276 (3d Cir. 2014). It guards against a juror's natural tendency to infer that the defendant is "by propensity a probable perpetrator of the crime," depriving him of "fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519 U.S. 172, 181 (1997). Character or propensity evidence "is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

Thus, prior bad acts are only admissible if they satisfy the test in *Huddleston v. United States*, 485 U.S. 681 (1988), which requires the government to show the evidence is (1) offered for a proper, non-propensity purpose under Rule 404(b)(2), (2) relevant under Rules 401 and 402, (3) sufficiently probative under the Rule 403 balancing requirement, and (4) accompanied by a proper limiting instruction. *United States v. Steiner*, 847 F.3d 103, 111 (3d Cir. 2017) (citing *Huddleston*, 485 U.S. at 691–92). Here, the court abused its discretion in admitting substantial prior acts in violation of *Huddleston*.

A. The prior bad acts evidence came in for improper propensity purposes.

1. YouTube comment to Mosul Medic (A1817).

In January 2019, a former service member going by "Mosul Medic" made a complaint to the FBI about a comment on YouTube:

A1817 – G-1 at 6– January 22, 2019: Post from Blitz Krieg YouTube Account to Mosul Medic

Although the comments to Mosul Medic were the plainest "threats" to physically harm any person, the government did not charge Miah for making them. Instead, it sought to admit the 2019 comments under Rule 404(b). A216.

The court found that the government failed to articulate a non-propensity reason for the comments but admitted them as "background" anyway, citing *United States v. Repak*, 852 F.3d 230, 274–78 (3d Cir. 2017). The court extrapolated from the government's reasoning that the comments would show the agents were performing "their official duties" when Miah threatened them. A236. It concluded

that any prejudice would be mitigated by a limiting instruction. A240. But even with the limiting instruction, admission of this exhibit was an abuse of discretion.

As explained in *United States v. Steiner*, prior-act evidence may "supply helpful background information," but it does not necessarily make that evidence relevant to a proper 404(b) purpose. 847 F.3d at 106. *Steiner* highlighted "background" is most commonly appropriate to explain relationships and circumstances in conspiracy cases, while in other cases, the label of "'background' … is uninformative at best and, at worst, can be an unacceptable substitute for the analysis required by Rule 404(b)." *Id.* at 111–12. The "worst" is precisely what happened here. Although it falls on the government to provide the non-propensity reason for admission of evidence, *United States v. Smith*, 725 F.3d 340, 342 (3d Cir. 2013), the court inexplicably assumed this burden, searching the record for something to support admission and abandoning its role as neutral arbiter of the law.

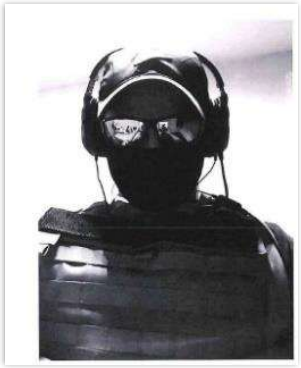
Here, Miah's comments were not necessary to explain background. All the jury needed was evidence that the charged tweets were made after Miah learned the FBI was investigating him and after agents searched his home seizing his electronic devices. As to evidence of "official capacity," it was established by the fact of the investigation, not the trigger for it. Indeed, had the defense been offered the opportunity to stipulate, it would have, thereby tipping the balance in favor of exclusion. *See Old Chief*, 519 U.S. at 186–92.

2. Firearm and gun-range evidence (A1828, A1830, A1831, A1839, A1950, A1955).

The government next proffered images and testimony regarding Miah's use of firearms and tactical gear arguing they were admissible to prove knowledge, intent, and plan. They included:

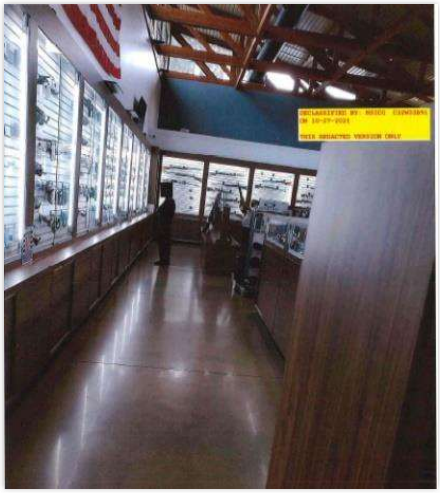
A1830 - G-32– created Aug. 2, 2020

A1831 - G-33– created July 22, 2020



A1839 - G-67– created May 14, 2020

A1950 - G-123 - Keystone Shooting Center receipts



A1955 - G-124 –Surveillance image

None of these acts were contemporaneous with the charged offenses, nor were they necessary to prove any element as required by *United States v. Himelwright*, 42 F.3d 777 (3d Cir. 1994). Nevertheless, the court admitted the evidence, reasoning:

> Defendant's familiarity and experience shooting guns (i.e., knowledge thereof) is relevant contextual and circumstantial evidence tending to make more probable the likelihood that a reasonable person would consider Defendant's charged communications to be serious expressions of an intent to inflict bodily injury when considering the context and circumstances in which these communications were made.

A246. It further found the images were probative of Miah's knowledge and intent when considered in conjunction with his statements after the FBI's seizure but before his charged conduct. A247.

This finding ignores the analysis in *Himelwright*, recognizing the meaningful distinction between an intent *to make* a threat to injure and an intent *to carry out* the threat. 42 F.3d at 783. Himelwright was charged with making threats in violation of §§875(c) and 875(b). *Id*. at 779. Like here, firearm evidence was admitted to show that he was prepared to carry out the threats. *Id*. This Court held:

> On its face, this might appear to be a plausible basis for admissibility under Rule 404(b), at least to the extent that the government attempted to connect one of the exceptions delineated in the Rule (intent) to an element of the offense…. To appreciate the error in this position, however, and in the district court's acceptance of it, one must look deeper, for the problem with the government's argument lies in the unavoidable distinction between the general intent to make a threat to injure another, on the one hand, and a subjective intention to carry out the threats, on the other. We believe the government's true aim in offering the firearms evidence was to prove the latter. Significantly, §875(c) requires proof of a defendant's general intent to threaten injury,

> but does not require proof of a specific intent to injure another or the present ability to carry out the threat.

Id. at 783. Similarly, the firearm and tactical gear evidence admitted to show a reasonable person would consider Miah's tweets to be serious expressions of an intent to injure goes to an intent *to carry out* the threat. A233. That is particularly problematic where the alleged threats do not mention firearms (or any weapon). The only purpose of this evidence is to suggest that Miah is capable of, or intends to, carry out the charged threats. As in *Himelwright*, such evidence is not relevant to determine whether Miah intended to threaten and was therefore offered for an improper propensity purpose. A233.

3. Research and images of mock IEDs (A1939, A1943, A1945).

The court admitted evidence the FBI found on Miah's electronic devices, including:

A1943 - G-105 – created on May 10, 2017

A1939 - G-101 – created Sept. 17, 2017

A1945 - G-113 – downloaded Sept. 17, 2017

It also admitted Miah's screenshots of Wikipedia's definition of a Vehicle Borne Improvised Explosive Device:

A1946 - G-114A – downloaded Nov. 1, 2017

The court reasoned that although the evidence preceded the charged conduct, it was necessary to provide context, namely Miah's knowledge of the FBI's discovery showed motive, and thus demonstrated an intent to threaten. As with the firearm evidence, this logic suffers from a misunderstanding of the kind of intent necessary to prove a threat. *See Himelwright*, 42 F.3d at 782–83.

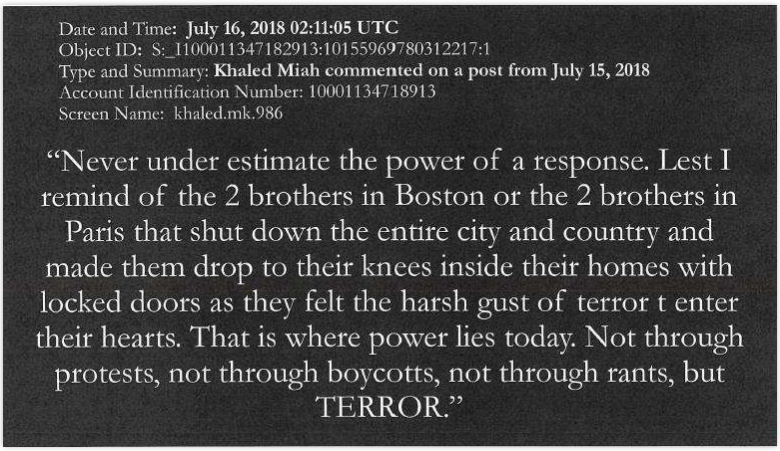
Further, because of the time lapse and lack of any threat to use an IED, the jury had to assume something about Miah's character and infer he was acting in

conformity. That is, the IED evidence was created in 2017, three-years before the tweets, and a year before the investigation began. To find it relevant to Miah's intent in 2020, the jury would have to conclude that the evidence showed an interest and desire to utilize an IED in a terrorist attack. That conclusion speaks to a bad character and propensity to commit a terrorist attack.

In *United States v. Smith*, this Court made clear that where the admission of bad character evidence concerning motive or intent rests on assumptions by the jury of a criminal character trait, the evidence cannot be admitted to prove threats. 725 F.3d at 345. There, this Court rejected evidence that the defendant previously sold drugs on the same corner where he allegedly threatened officers years later, explaining that to conclude the prior act was evidence of motive, the jury would have to "(a) assume something about the defendant's character (that he was then a drug dealer), and (b) infer that he acted in conformity with that character by dealing drugs with the motive to defend his turf." *Id.* at 346 (cleaned up). Likewise here, for the jury to conclude the evidence is proof of motive, intent, preparation, knowledge, or plan, it would have to (a) assume that Miah was a terrorist-sympathizer or even a terrorist, and (b) infer that his tweets were consistent with that character.

4. The Tsarnaev Brothers (A1823, A1833, A1834, A1836, A1837, A1838).

The court admitted evidence regarding the Tsarnaev Brothers, including Miah's comments in July 2018 and images between January-August 2020.[10]



A1840 - G-69 – created July 16, 2018

[10] A1840 (Exhibit G-69) contained these posts as well as 12 others regarding political violence dated between August 2017 and December 2018.

A1837 - G-60 – downloaded Jan. 29, 2020

A1836 - G-59 – downloaded Jan. 29, 2020

A1823 - G-34 – downloaded Aug. 8, 2020

A1833 - G-35– downloaded Aug. 8, 2020

The court admitted the evidence on the basis that it demonstrated Miah's "intent (i.e., the power of instilling terror) for making the charged threat communications more probable than without such evidence." A257. The court further found because the evidence did not amount to "prior convictions, the images of the Tsarnaev brothers were not of the same prejudicial ilk as *Caldwell*, 760 F. 3d at 284." A249. Thus, it found "these inferential chains connect this other-acts evidence to context, motive, knowledge, and intent without reliance on any prohibited propensity inferences." A258.

Miah moved for reconsideration with respect to the July 2018 post because the quote was incomplete, and the complete post did not demonstrate intent. A2131. After reviewing the complete post, the court concluded the "newly revealed text does not insert a disqualifying propensity link." A2140. These rulings were error.

Like the IED and firearm evidence, connecting the Tsarnaev brothers' evidence to motive and intent required the jury to infer propensity. Specifically, for these six-to-eight-year-old statements and images to demonstrate Miah's intent, the jury would have to conclude something about his character, namely that he glorifies political violence and admires the Tsarnaev brothers. The propensity was that Miah acted in accordance with that character when he made threatening statements in December 2020.

5. February 2018 video (A1948).

While searching his phone, FBI agents discovered a video Miah recorded in February 2018 in front of a Pittsburgh Police car saying "f*** the police" and singing about ISIS. The court found this evidence admissible for Miah's state of mind in making the charged threats. In other words, Miah's animosity toward local police in 2018 made it more likely he was motivated to make true threats against the FBI agents in December 2020. A244. The court erroneously concluded no inferential links are required. The inferential link is this: to find that Miah's video led him to threats against officers three years later, the jury must infer something about Miah's character—he disdains law enforcement and acted in conformity.

The court's logic starkly contrasts with the approach in *United States v. Fratus*, where the district court rejected admission of evidence that the defendant previously assaulted four people, including an officer. No. 20-270, 2021 U.S. Dist.

LEXIS 138701, at *14 (E.D. Pa. July 26, 2021). The court found assaultive conduct would tend to persuade the jury that Fratus is "violence-prone" by character and thus will infer "that he intended violence in this particular instance." *Id.* (citing *Himelwright*, 42 F.3d at 786 n.8.). Here, however, the court easily—and erroneously—found a statement made to a different police department under different circumstances permitted the jury to infer Miah threatened FBI agents three years later.

B. The court erred in failing to balance the evidence's probative value with its prejudicial effect.

1. The cumulative effect of the evidence substantially prejudiced Miah.

Where the government seeks to offer multiple pieces of character evidence, the court must consider the cumulative effect of every additional prior act and "stop at each step to recalibrate the Rule 403 scale to consider the overall impact on the jury." *State v. Hill*, 309 F. Supp. 3d 266, 270–71 (E.D. Pa. 2018). It must keep in mind that "in addition to tilting the Rule 403 scale further in the direction of unfair prejudice, the cumulative nature of the evidence would also more likely lead the jury to consider it for the improper purpose of showing propensity." *Id.*

All the Rule 403 factors weigh against admission of the evidence. Miah was not charged with a terrorism offense. He was charged with using tweets to threaten FBI agents, allegedly to retaliate against them for investigating him. None of the offered evidence relates to animosity toward the agents or the FBI generally. Much

of it is remote in time. And there was other evidence admitted to show Miah's intent and "context" regarding these agents (i.e., evidence regarding alleged reconnaissance of agent's home, tweets about the agent's family, and messages allegedly sent to a friend discussing the agents). A745-747.

Meanwhile, the prejudice was substantial. The evidence portrayed Miah as a terrorist-in-the-making who, if not put away, could conduct an attack in the future. The volume of evidence admitted consumed a significant portion of trial, focusing the jury's attention on the character evidence rather than the threat allegations. Under these circumstances, the jury concentrated not on what language constituted a threat against the agents, but whether Miah posed a threat of committing a terrorist attack.

2. The court's limiting instructions exacerbated rather than mitigated the prejudice.

A limiting instruction could not overcome the prejudice to Miah in this case, particularly with the instruction actually given by the court. Curative instructions are ineffective where there is "an overwhelming probability that the jury would be unable to follow the limiting instructions, or a strong likelihood that the evidence would be devastating to the defendant[.]" *United States v. Bradley*, 173 F.3d 225, 230 (3d Cir. 1999); *see also United States v. Moore*, 375 F.3d 259, 260–63 (3d Cir. 2004) (a limiting instruction did not cure the "highly prejudicial" evidence of prior violence, drug dealing, and child abuse offered as "background" in an arson and felon-in-possession case); *Fratus*, 2021 U.S. Dist. LEXIS 138701 at *16 ("even the

most forceful limiting instruction would not protect Fratus from the unfair prejudice this evidence would cause").

The limiting or cautionary instruction here did not overcome the prejudice to Miah. Quite the opposite, the instruction suggested that the jurors were free to consider Miah's potential to commit a terrorist attack in determining whether he threatened FBI agents.

With almost no warning, the court rejected Miah's proposed instructions, based on Model Instructions, and offered its own instructions containing multiple errors. First, the court referred to Rule 404(b) evidence as "uncharged acts" rather than "other acts" (A1648), suggesting that Miah could have been charged for these acts, including acts indisputably legal and protected by the First and Second Amendment. *See e.g.*, Exhibits G-28, G-31, G-32, G-33 (Miah's legal gun use), Exhibit G-119 (Miah singing about ISIS).

Second, the court used tilting language that presupposed the jury's answers and undermined the presumption of innocence.

- Miah's proposed instruction based on Model: "You may consider this evidence only for the purpose of **deciding whether** the defendant had the knowledge or intent necessary to commit the crime charged in the indictment." A281-282 (citing Third Circuit Model Final Instructions § 4.29 and Cmt).

- The trial court's instruction: "You may consider this evidence **for the purpose of deciding Miah's state of mind, particularly his knowledge, intent and motive to make true threats to injure FBI agents** as charged in Counts 1 through 5 of the indictment …' A1654 (emphasis added).

Third, the instruction suggested a lower standard to determine whether a reasonable person would consider Miah's tweets to be threats, labeling his communications "charged threat communications" and obliterating any remaining presumption of innocence.

- Miah's Proposed instruction based on Model: "[You may consider this evidence only for the purpose of] deciding whether a reasonable recipient of the charged communications in December 2020 would consider those communications to be serious expressions of an intent to inflict bodily injury." A281-282 (citing Third Circuit Model Final Instructions § 4.29).

- The trial court's instruction: "You may also consider this evidence as to whether **it may be more probable** that a reasonable person would consider Miah's charged **threat** communications to be serious expressions of intent to inflict bodily injury." A1653 (emphasis added).

Fourth, although motive and intent are distinct and motive is not an element of § 875(c) or § 115(a), the court used the phrase, "deciding Miah's motive or intent to make true threats…" for 12 exhibits, including several that were particularly prejudicial. A1649-1650 (using the words "motive or intent" for Exhibits G-28, G-31-36, G-59-61, G-99, and G-119).

Fifth, the court used the word "particularly" to emphasize that knowledge, motive, and intent were the most important states of mind the jury should decide when considering the evidence. *See, e.g.*, A1651-1655.

Sixth, without using the "whether" qualifier, the court instructed the jury to decide Miah's "state of mind, particularly his knowledge, intent and motive to make true threats to injure FBI agents …" This instruction signaled to the jury (a) Miah

had knowledge, intent, and/or motive, and (b) Miah made true threats to injure FBI agents. This instruction essentially told the jury that Miah committed the crime charged and all they needed to do was decide his reason for doing so.

In its memorandum admitting the above evidence, the court assured Miah 11 times that the evidence would be admitted "subject to appropriate limiting instructions upon request." A241-259. Pursuant to those assurances, Miah requested a standard 404(b) instruction. The Court, however, gave a limiting instruction that rather than mitigating harm, exacerbated it, thereby eviscerating any mitigation of prejudice.

3. The court's erroneous admission of 404(b) evidence was not harmless.

"The test for harmless error is whether it is 'highly probable that the error did not contribute to the judgment.'" *United States v. Brown*, 765 F.3d 278, 295 (3d Cir. 2014) (citing *United States v. Cunningham*, 694 F.3d 372, 391–92 (3d Cir. 2012)). This Court finds such a high probability only when there is a "sure conviction" that the error did not unfairly prejudice the defendant. *Cunningham*, 694 F.3d at 392. In this case, Miah easily clears the harmless error threshold. As discussed, the 404(b) evidence in this case consisted of 35 exhibits, with a significant portion of the trial focusing on Miah's potential to commit a terrorist act rather than whether his statements were true threats to injure a natural person. Under these circumstances, it would be erroneous to conclude that the admission of the evidence was harmless.

V. The Court Erred in Increasing Miah's Offense Level by Six Points Under U.S.S.G. § 2A6.1(b).

The Sentencing Guidelines at § 2A6.1(b)(1) permit a six-level increase if the defendant was convicted of a crime involving a threatening communication and "involved conduct evidencing an intent to carry out such threat." U.S.S.G. § 2A6.1(b)(1).

> The purpose of the enhancement is to punish more severely the individual whose actions indicate an intent to carry out the threat that serves as the basis for the underlying conviction. It is not a general mandate to punish more severely people with bad character or those generally more likely to carry out their threats.

United States v. Barbour, 70 F.3d 580, 587 (11th Cir. 1995). Before imposing the enhancement, the court must find the defendant engaged in (1) an overt act before or during the offense that is (2) "substantially and directly connected to the offense." *United States v. Brodie*, 824 F. App'x 117, 121–22 (3d Cir. 2020). Here, the court erred in finding that Miah's conduct evidenced an intent to carry out the convicted threats, subsequently applying the six-level enhancement under § 2A6.1(b)(1).

A. The connection between Miah's prior conduct and convicted threats was insufficient to find an intent to carry out the underlying threat.

Before imposing the enhancement, the court must find that the prior conduct was "substantially and directly connected" to the convicted threats. *Brodie*, 824 F. App'x at 121. Prior conduct is only evidence of an intent to carry out the threat if the conduct was also directed at the recipient of the threat and occurred contemporaneously with or just before the threat. *United States v. Nissen*, 492 F.

Supp. 3d 1254, 1276–77 (D.N.M. 2020) (enhancement did not apply where defendant that had threatened to shoot officers in the head during traffic stop subsequently visited station unarmed with letters detailing constitutional rights, because the visit failed to indicate he intended to shoot officers in the head as he threatened); *see also United States v. Sullivan*, 75 F.3d 297, 302 (7th Cir. 1996) (applying enhancement where defendant recently shot at victim because conduct evidenced intent to carry out subsequent threats against victim). The fact a defendant engaged in prior dangerous or illegal activity is "insufficient to demonstrate that that person intended to carry out any particular threat." *Barbour*, 70 F.3d at 587.

The Eleventh Circuit in *Barbour* identified several non-exclusive factors for determining whether pre-threat conduct supports applying the enhancement:

- The proximity in time between the threat and prior conduct,
- the seriousness of the prior conduct, and
- the extent to which the pre-threat conduct has progressed towards carrying out the threat.

Id. Ultimately, "[t]he essential inquiry for § 2A6.1(b)(1) purposes is whether the facts of the case, taken as a whole, establish a sufficiently direct connection between the defendant's pre-threat conduct and his threat." *United States v. Taylor*, 88 F.3d 938, 943 (11th Cir. 1996).

Here, the court put substantial significance on evidence that Miah researched the agents and later traveled "in the vicinity" of the FBI Field Office and Agent Edquist's residence. A402-404. But although the FBI had multi-person and multi-car surveillance following Miah 24/7 for months, they never observed any activity to suggest that Miah intended to carry out any type of terroristic threat against them. There is no evidence Miah conducted surveillance of or approached the residence or the Field Office. A775-789. Miah took no photos of the agents, family members, residences, or vehicles. A891-901. No evidence exists that Miah ever obtained restricted information about any agents, solicited anyone to harm the agents, or sought out the agents or FBI in a manner consistent with the threat of an assault or attack.

B. No evidence of overt acts existed to show Miah intended to carry out convicted threats.

Under § 2A6.1(b)(1), an overt act evidencing an intent to carry out a specified threat must be "an actual step toward the realization of [the defendant's] threats." *United States v. Goynes*, 175 F.3d 350, 355 (5th Cir. 1999) (finding the enhancement inapplicable where the "defendant did not purchase a weapon, travel to the victim's home, strike the victim, or do any other overt act that could be considered conduct evidencing an intent to carry out his threat"). Miah's actions are not overt acts.

1. Traveling near Edquist's residence.

The government offered evidence to suggest Miah drove past Edquist's home several times. But the data points did not show that Miah had been at, or near enough to, the residence to be "in the vicinity." One exception was when Miah's car was briefly in a cemetery across the street. Edquist described the cemetery as covered by mature trees, which would obstruct the view of the residence. A937-940. The residence and cemetery are separated by a busy road. A949.

Most of the data points were several blocks away in a busy neighborhood, for less than two minutes, which is consistent with driving down a busy road. A980-986. The only data point ever in the actual vicinity of the residence was inaccurately rendered by the FBI, which the government admitted. The defense's forensic expert was able to provide accurate data from the tracker for that date, which the FBI verified. A1290-1294.

The only time Miah drove directly past the residence was November 6, 2020, as Miah returned from an election rally in D.C. But that is the route he always used when returning from D.C. A947-949. The data point shows the car in the vicinity for under two minutes. November 6 is also the last date Miah's car was near the residence—**almost two months before Miah's tweets**. Miah never approached the residence, did not take any photos, and never tweeted anything suggesting he knew where Edquist lived. The defense expert testified that there was no evidence from

any of Miah's devices that he had even located Edquist's address. A1441 at 18-25, A151 at 1. Edquist admitted there was no direct evidence that Miah had his address. A891-892. Thus, Miah's actions lack the specificity and detail required to find an over act evidencing an intent to carry out the charged threats.

2. Visiting a gun range the same day as one of the convicted threats.

The court found that Miah visiting a gun range on one of the days he tweeted was an overt act evidencing an intent to carry out the threat. A1705. It ignored, however, that Miah had visited gun ranges recreationally for years. A425. From the beginning of the FBI's investigation—before agents approached Miah—they saw Miah frequent gun ranges without incident. A454, A456. No explanation was offered for why this visit to a gun range on a day Miah also posted tweets (which was most days) evinced an intent to attack the agents. Miah never bought a gun or ammunition. Agent Strebel, who reviewed Miah's internet activity from the month before his arrest, admitted Miah never searched how to buy weapons, or attempted any transactions. A1328. Courts have refused to find that even possession of weapons constituted evidence of intent. *See United States v. Philibert*, 947 F.2d 1467, 1471 (11th Cir. 1991). Miah's visit to a gun range, without more, does not show an intent to carry out the convicted threats.

3. Researching agents, weapons, and explosives.

The court erred in finding Miah's online research of the agents, weapons, terrorist attacks, and other violent topics constituted overt acts that showed intent to carry out threats. A403, A1704-1705. Miah had been researching the agents for several months, only using publicly available information. A887-890. He researched the violent topics going back to 2014. Miah's searches in December 2020 and January 2021 were no different. Agent Hassenpoor admitted Miah did not search anything specific regarding buying or making weapons he could use to attack anyone. A1155-1156.

Miah's searches did not indicate any sudden change or escalation in behavior. The topics were surely poor taste, but there is nothing to suggest that the searches in December 2020 or January 2021 demonstrated an intent to carry out a terrorist attack against the FBI, when it had not before. Miah did not know if the FBI, or anyone, would ever see his tweets. He had no followers on his accounts and had not heard from the FBI since their September interview. As he was on his numerous insulting/satirical Twitter Accounts (e.g., @FishingExpedition, @ServiceFederal, @bruhKhaled), Miah was all talk.

In the days before his arrest, the government had an FBI informant contact Miah. Miah told the informant he wanted to get away from the stress of the investigation and drive to Miami for vacation. A426, A471, A472. The FBI knew

this and arrested him before he could go. A438. Miah's communications to the informant did not suggest an intent to carry out the convicted threats; instead, they indicated Miah was trying to move on. *See contra United States v. Jackson*, No. 20-118, 2022 U.S. Dist. LEXIS 54858, at *16-17 (W.D. Pa. Mar. 25, 2022) (finding numerous contacts and aggressive verbal confrontation with victim constituted overt act evincing intent to carry out threat).

4. Travel in the vicinity of the FBI Office.

The court found Miah's car being in the vicinity of the FBI office in Pittsburgh was an overt act evidencing an intent to carry out threats. But Agent Edquist admitted the data points showing Miah's car in the vicinity of the FBI office also showed he was in the vicinity of the nearby GetGo Gas Station. A786-787. GetGo was Miah's regular and closest gas station. Agents knew this because they had surveilled him there several times. A786-787.

There was no evidence of Miah approaching the building or doing anything alarming while in the vicinity of the FBI office. Miah drove in that area for several months; it was just a mile from his home. This is not enough to show an intent to carry out an assault or attack against FBI agents, the bureau, or FBI headquarters in D.C.

C. The court erred in grouping Count 8 with the threat counts and providing no reasoning to impose a sentence above the Guidelines for Count 8.

Over Miah's objection, the court erroneously grouped Count 8 (obstruction of justice) with the threat counts, which resulted in a concurrent 72-month sentence for Count 8. A408.

The PSR cited U.S.S.G. § 3D1.2(c) and Application Note 8 of § 3C1.1 as the basis for grouping Count 8 with the threat counts. Application Note 8 states that if a defendant is convicted of both an obstruction offense (e.g., § 1519) and an underlying offense (e.g., § 875(c)), the count for the obstruction offense will be grouped with the count for the underlying offense under § 3D1.2(c). Application Note 8 further directs that the offense level for that group of closely related counts will be the offense level of the underlying offense increased by two levels.

Count 8, however, cannot be properly grouped with the threat offenses because it covers a wider range of conduct and time than the threat convictions. Count 8 charged the deletion and alteration of Twitter accounts between October 5, 2020, and January 1, 2021. This three-month time period includes Miah's deletion of a private Twitter account (@QassamSol) and alteration of his account to include Agent Edquist's wife's name and photograph. The charged obstruction is unrelated to the threat counts, Counts 1-7, which relate only to statements made in the last week of December 2020. The court provided no reasoning why, despite this disparity, an above-guidelines sentence was appropriate for Count 8. *See United*

States v. Colon, 474 F.3d 95, 99 (3d Cir. 2007) (an above-the-guidelines must be reasonable, and the district court's statement of reasons must support it). The Court erred in grouping Count 8 with the threat counts to impose a 72-month sentence.

D. The court's Guidelines errors were not harmless.

The courts procedural errors at sentencing were not harmless. *See United States v. Raia*, 993 F.3d 185, 195 (3d Cir. 2021). A Guidelines error is harmless if "(1) the district court would have reached the same result even if it had decided the guidelines issue the other way, and (2) the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor." *United States v. Gomez-Jimenez*, 750 F.3d 370, 382 (4th Cir. 2014) (internal quotation marks omitted).

Because the court's errors increased Miah's Guidelines range and because nothing in the record indicates that, in their absence, the court would have departed upward and imposed a 72-month sentence, these errors were not harmless. As the court noted at sentencing, it considered the mental health mitigation Miah presented and attempted to determine an appropriate sentence that fell somewhere between the government's request for a maximum guidelines sentence and Miah's request for a 36–41-month sentence. A453. Because the Guidelines recommendation is one of the factors the court is required to consider under 18 U.S.C. § 3553, the record indicates the court would not have imposed as great a sentence but for the error in applying the § 2A6.1(b)(1) enhancement and improper grouping of Count 8.

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse his convictions.

Respectfully submitted,

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Dated: June 5, 2023

CERTIFICATION OF ADMISSION TO BAR

I, Charles D. Swift, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: June 5, 2023

By: /s/ Charles D. Swift
Charles D. Swift

CERTIFICATION OF ADMISSION TO BAR

I, Sufia Khalid, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: June 5, 2023

By: /s/ Sufia Khalid
Sufia Khalid

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,819 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

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This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: June 5, 2023

By: /s/ Charles D. Swift
Charles D. Swift

CERTIFICATE OF FILING AND SERVICE

I certify that on this 5th day of June 2023, the foregoing Brief and Appendix Volume 1 were filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: June 5, 2023

By: /s/ Charles D. Swift
Charles D. Swift