UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	No. 09 CR 650 / 15 CV 3845
	)	
vs.	)	Judge Donald E. Walter
	)	
	)	
HAROLD TURNER	)	

Government's Response to Defendant's Motion to Vacate His Conviction Pursuant to 28 U.S.C. § 2255

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

A. Legal Framework: § 2255 2

B. The Supreme Court's Holding in *Elonis v. United States* 3

C. Procedural Background 4

III. ARGUMENT 5

A. *Elonis*'s Statutory Interpretation of 18 U.S.C. § 875(c) Does Not Apply to Turner's Conviction Under Section 18 U.S.C. § 115(a)(1)(B) 6

B. *Elonis*'s Analysis Does Not Extend to Turner's Conviction Because § 115(a)(1)(B) Contains An Explicit Mens Rea Element 7

C. Even If *Elonis* Is Read to Extend to Turner's § 115(a)(1)(B) Conviction, Any Error is Harmless 10

IV. CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bilzerian v. United States, 127 F.3d 237 (2d Cir. 1997) 7

Bousley v. United States, 523 U.S. 614 (1998) 2, 3

Brecht v. Abrahamson, 507 U.S. 619 (1993) 2, 10, 11

Carter v. DeTella, 36 F.3d 1385 (7th Cir. 1994) 11

Carter v. United States, 530 U.S. 225 (2000) 9

Davis v. United States, 417 U.S. 333 (1974) 1, 3, 6

Elonis v. United States, 135 S. Ct. 2001 (2015) ..... *passim*

Hamling v. United States, 418 U.S. 87 (1974) 8

Ianniello v. United States, 10 F.3d 59 7

In re M.S., 10 Cal.4th 698 (Cal. 1995) 9

Ingber v. Enzor, 841 F.2d 450 (2d Cir. 1988) 7

Kotteakos v. United States, 328 U.S. 750, (1946) 10, 11

Martinez v. United States, 135 S. Ct. 2798 (Mem) 5

Morissette v. United States, 342 U.S. 246 (1952) 4, 8

Murr v. United States, 200 F.3d 895 (6th Cir. 2000) 11

O'Neal v. McAninich, 513 U.S. 432 (1995) 11, 21

Peck v. United States, 106 F.3d 450 (2d Cir. 1997) 10

Ross v. United States, 289 F.3d 677 (11th Cir. 2002) 11

Santana-Madera v. United States, 260 F.3d 133 (2d Cir. 2001) 11

Shackelford v. Shirley, 948 F.2d 935 (5th Cir. 1991) 9

Turner v. United States, 135 S. Ct. 49 (Mem) 4, 5

United States v. Canady, 126 F.3d 352 (2d Cir. 1997) 11

United States v. Dago, 441 F.3d 1238 (10th Cir. 2006) 11

United States v. Johnson, 457 U.S. 537 (1982) 3

United States v. Montalvo, 331 F.3d 1052 (9th Cir. 2003) 11

United States v. Reguer, 901 F. Supp. 515 (E.D.N.Y. 1995) 7

United States v. Turner, 720 F.3d 411 (2d Cir. 2013) 9, 20

United States v. Ulibarri, 2015 WL 4461294 (D.N.M. July 15, 2015) 9

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 4, 8

Virginia v. Black, 538 U.S. 343 (2003) 8

Watts v. United States, 394 U.S. 705 (1969) 8

STATUTES

18 U.S.C. § 115(a)(1)(B) ..... *passim*

18 U.S.C. § 875(c) 1, 3, 4, 6

28 U.S.C. § 2255 ..... 1, 11

I. INTRODUCTION

Defendant Harold Turner moves under 28 U.S.C. § 2255 to vacate his conviction for threatening three federal judges, in violation of 18 U.S.C. § 115(a)(1)(B), citing the Supreme Court's recent decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015).

A defendant may vacate his conviction under § 2255 based on intervening Supreme Court precedent, yet only in narrow circumstances. As relevant here, Turner must establish that, as a result of *Elonis*, his conviction is for an act "that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974).

As explained below, Turner falls well short of that standard because *Elonis* has no bearing on Turner's conviction. The *Elonis* Court neither addressed the "true threats" exception to the First Amendment nor redefined the term "threat." Instead, th Court interpreted a particular threats statute, 18 U.S.C. § 875(c), and its interpretation turned on one key feature—the absence of a criminal intent element—which led the Court to read such an element into the statute, relying on ordinary rules of statutory construction. Its holding thereby narrowed the scope of § 875(c), and nothing more. As such, *Elonis* does not touch on Turner's conviction for violating § 115(a)(1)(B), much less render Turner's conduct no longer a crime.

Even if one were to expand *Elonis* to other threats statutes, as Turner implicitly urges, contravening the constraints of § 2255 motions, that would not help Turner. *Elonis*'s holding emerged from the fact that § 875(c) is "silent on the required mental state," quite unlike the threats statute at issue here, which contains an explicit specific intent requirement. *Id.* at 2010. Section 115(a)(1)(B)

requires that a defendant issue a threat with the intent to impede, intimidate, interfere, or retaliate against his victim. Neither the cases cited in *Elonis* nor the concerns raised about criminal liability without a mens rea element are at play in Turner's case.

Finally, even if this Court opted to apply *Elonis*'s language, despite the crucial differences in the statutes, that would not change the outcome, particularly under the harmless error standard for collateral review, which is less demanding given interests of finality in criminal cases. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In light of the jury's finding of specific intent, coupled with all of the evidence presented at trial, Turner cannot establish that he lacked knowledge that his blog posting would have been taken as a threat by his victims, or at the very least that he acted recklessly in that regard, either of which are sufficient under *Elonis*. Nor can Turner satisfy the demanding perquisites for vacating a conviction on collateral review. Because there was no error, and any potential error was harmless, this Court should deny Turner's § 2255 motion.

II. BACKGROUND

A. Legal Framework: § 2255

When a decision of the Supreme Court results in a "new rule," that rule typically does not apply to convictions that are already final. *Bousley v. United States*, 523 U.S. 614, 620-621 (1998). One exception is for new rules that substantively narrow the scope of a criminal statute such that a petitioners' "conviction and punishment are for an act that the law does not make criminal." *Davis v. United States*, 417 U.S. 333, 346 (1974); *see also Bousley*, 523 U.S. at 620

("[D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal."). This rule stems from the general principle that when the Supreme Court interprets a substantive statute it is in effect declaring what the statute meant from the date of its enactment so that full retroactivity attaches to the Court's interpretation. *United States v. Johnson*, 457 U.S. 537, 550 (1982) (recognizing "full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place," and that "the prior inconsistent judgments or sentences were void ab initio").

Accordingly, section 2255 permits retroactive relief from a conviction that, in light of intervening precedent, does not state a violation of federal law. *Id.*

B. The Supreme Court's Holding in *Elonis v. United States*

Anthony Elonis was convicted of 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." Because § 875(c) does not specify any required mental state, the jury instructions in his case imposed no intent requirement, and instead only required the jury to find that he communicated what a reasonable person would regard as a threat (*i.e.*, a negligence standard). Elonis's conviction was thus "premised solely on how his posts would be understood by a reasonable person." *Elonis*, 135 S. Ct. at 2003.

The Supreme Court in *Elonis* held that a negligence standard cannot support a conviction under § 875(c), though its decision was founded on statutory

interpretation, and not the First Amendment. *See id.* at 2004 ("Given our disposition, it is not necessary to consider any First Amendment issues."). The Court began with § 875(c)'s text, noting that it contained no criminal intent element. That omission, the Court observed, stood in tension with the notion that a defendant must be "blameworthy in mind" before he can be found guilty. *Id.* at 2003 (quoting *Morissette v. United States*, 342 U.S. 246 (1952)). As the Court reasoned, where a *mens rea* requirement "is necessary to separate wrongful conduct from 'otherwise innocent conduct,'" it typically reads one into the statute, "even where the statute by its terms does not contain one." *Id.* (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994).

Applying those principles of statutory interpretation, the Court decided that mere negligence is not enough to support a conviction under § 875(c). The Court offered less guidance, however, about the appropriate standard. It ruled that a § 875(c) conviction may stand "if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat," but declined to rule out recklessness as a basis for criminal liability. *Id.* at 2012-13.

C. Procedural Background

Turner's procedural history before the Supreme Court is notable given the present motion in that the Court declined certiorari in this case soon after it granted it in *Elonis v. United States*, 135 S. Ct. 2001 (2015). *See Turner v. United States*, 135 S. Ct. 49 (Mem) (October 6, 2014). Indeed, because the Supreme Court decided to take *Elonis* during Turner's briefing, he had an opportunity to explain

why the Court should at the very least hold his case pending resolution of *Elonis* (*see Turner v. United States of America*, Petitioner's Reply Brief, 2014 WL 4253039 (August 27, 2014)), a practice the Court adheres to when the disposition of one case may bear on another. The Supreme Court rejected this request, declining both certiorari and Turner's request for the case to be held pending resolution of *Elonis*, even though it granted certiorari and remanded other threats cases, *see, e.g.*, *Martinez v. United States*, 135 S. Ct. 2798 (Mem) (2015) (remanding threats conviction under § 875). As explained below, this was not an oversight by the Supreme Court; rather, Turner's case simply raises different issues than the ones involved in *Elonis*.

III. ARGUMENT

This Court should deny Turner's motion, which is premised on a misreading of *Elonis* and a misapprehension of § 2255's procedures. Though *Elonis* involved a similar subject matter (online threats) that is where the similarities end. The defendant in *Elonis* was convicted under a different threats statute (§ 875(c)), and the Supreme Court's analysis was tied to that particular statute. What troubled the *Elonis* Court was the absence of a mens rea element in § 875(c), which led the Court to read an element into the statute. No such issue is present in this case, for Turner was convicted of 18 U.S.C. § 115(a)(1)(B), a statute that requires a finding of specific intent to impede, intimidate, interfere with, and retaliate against one's victim. Under no plausible reading of *Elonis* did it render Turner's threat lawful, so his § 2255 motion must be denied.

A. *Elonis*'s Statutory Interpretation of 18 U.S.C. § 875(c) Does Not Apply to Turner's Conviction Under Section 18 U.S.C. § 115(a)(1)(B).

Having failed to convince the Supreme Court that his case should be treated like *Elonis*'s on direct appeal, Turner now asks this Court to do so under the auspices of a motion under § 2255, but to no avail. Turner's motion flouts § 2255's restrictions and presents a deeply flawed reading of *Elonis*.

To reiterate, *Elonis* involves the statutory analysis of a different threats statute. Its holding has nothing to do with the First Amendment's "true threats" exception or the general definition of a "threat." That forecloses Turner's § 2255 motion at the outset. In order to reap the benefit of retroactivity in a § 2255 motion, Turner must establish that, because of a "new rule" from an intervening case, his conviction is for "an act that the law does not make criminal." *Davis*, 417 U.S. at 346. That cannot be true for the straightforward reason that *Elonis* never addressed the statute at issue in Turner's case, much less alter the statute's boundaries such that Turner's threat is no longer criminal. One cannot use a § 2255 motion to offer a gloss on a new case, effectively asking that a district court expand a Supreme Court's holding in an effort to get relief under *Davis*.

The limitations inherent in a § 2255 motion are embodied in the cases Turner cites on his behalf. Every one of them involved an intervening case that narrowed the scope of the very same statute that was the subject of the motion for collateral relief. *See Davis v. United States*, 417 U.S. 333 (1974) (reviewing intervening appellate decision interpreted "the same regulation" under "virtually identical" circumstances and reached a different result); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir.

1988) (reviewing mail fraud conviction after Supreme Court decision interpreted § 1341 narrowly to exclude the defendant's conduct); *Bilzerian v. United States*, 127 F.3d 237 (2d Cir. 1997) (reviewing conviction under § 1001(a)(2) after Supreme Court "redefined § 1001(a)(2) to legalize certain conduct previously thought to be criminal"); *Ianniello v. United States*, 10 F.3d 59 (reviewing RICO conviction after intervening en banc decision narrowed the scope of RICO); *United States v. Reguer*, 901 F. Supp. 515, 518 (E.D.N.Y. 1995) (reviewing structuring conviction after Supreme Court reinterpreted the statute's enforcement provision to include a willfulness requirement). Those cases reflect the common sense principle that, contrary to Turner's suggestion, a decision as to one statute cannot wipe out crimes encompassed by other statutes, certainly not without careful attention to the decision's reasoning.

Therefore, as a threshold matter, Turner cannot make a claim under § 2255 because *Elonis* did not alter the scope of the statute involved in Turner's case.

B. *Elonis*'s Analysis Does Not Extend to Turner's Conviction Because § 115(a)(1)(B) Contains An Explicit Mens Rea Element.

Not only is § 2255 an improper vehicle for seeking to extend a Supreme Court ruling, the interpretation urged by Turner pays no heed to the Court's analysis. His motion neglects to address the single feature that animated the Court's decision—that § 875(c) contains no criminal intent element, in contrast to § 115(a)(1)(B).

The *Elonis* decision is premised on the peculiarities of § 875(c)—*i.e.*, that it lacks a criminal intent element. That led the Court to invoke the "rule of construction" that "mere omission from a criminal enactment of any mention of

criminal intent should not be read as dispensing with it," relying on the principal that "wrongdoing must be conscious to be criminal." *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 250, 252 (1952). The "central thought" as the Court put it, "is that a defendant must be 'blameworthy in mind' before he can be found guilty." Every one of the cases the Court relied on in reaching its decision involved a statute that lacked a mens rea requirement (*see, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 (1994) (production of child pornography); *Morissette v. United States*, 342 U.S. 246, 270-71 (1952) (theft of government property); *Hamling v. United States*, 418 U.S. 87 (1974) (mailing obscene materials).

Turner glosses over the Court's statutory analysis and declares that *Elonis* "redefined the substance of a threat offense." Doc. #1 at 13. But that assertion has no footing in the opinion itself. *Elonis* never mentions, much less "redefines," the Court's threats precedent (such as *Virginia v. Black*, 538 U.S. 343 (2003) or *Watts v. United States*, 394 U.S. 705 (1969)). Quite the contrary, the Court rebuffed the petitioner's efforts to redefine the term "threat." The petitioner asserted that "the word 'threat' itself" involves a mens rea requirement, citing a number of dictionary definitions of the term. *Elonis*, 135 S. Ct. at 2008. The Court rejected that theory, pointing out that those definitions have nothing to do with "the mental state of the author." *Id.* The Court instead latched onto a much narrower issue—the absence of a mens rea requirement in § 875(c)—and, following rules of construction, read such a requirement into the statute.

Unlike § 875(c), the statute for Turner's conviction contains an explicit mens rea element. To violate § 115(a)(1)(B), a defendant must "threaten to assault and murder . . . a United States judge with intent to impede, intimidate, interfere with . . . or retaliate against" his victim. 18 U.S.C. § 115(a)(1)(B). *See United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) ("The statute of Turner's conviction . . . includes both objective and subjective elements"). Through this specific intent requirement, § 115(a)(1)(B) already "separate[s] wrongful conduct from otherwise innocent conduct," *Elonis v. United States*, 135 S. Ct. at 2011, thereby eliminating the need for a judicially-created mens rea element. Indeed, the *Elonis* Court cautioned against an expansive reading akin to the one Turner now advances, emphasizing that one should *only* read a mens rea element into a statute when it is "silent on the required mens rea." *Elonis*, 135 S. Ct. at 2003 (quoting *Carter v. United States*, 530 U.S. 225, 269 (2000)). Turner's theory disregards the restraint urged in *Elonis*.[1] *See also Shackelford v. Shirley*, 948 F.2d 935, 939 (5th Cir. 1991) (declining to impose additional intent requirements because the statute at issue "contains an explicit intent requirement"); *In re M.S.*, 10 Cal.4th 698, 712 (Cal. 1995) (same).

Elonis and the cases it relied on all arise from criminal statutes that lack criminal intent requirements, raising the risk that a defendant could be convicted without any proof of criminal intent. *See Elonis*, 135 S. Ct. at 2009-10. No such risk

[1] One federal district court has already declined to extend the mens rea requirement announced in *Elonis* to a threats sentencing guidelines enhancement, in part because the enhancement already has a mens rea element. *United States v. Ulibarri*, 2015 WL 4461294, at *19 (D.N.M. July 15, 2015).

is present here, for the jury found beyond a reasonable doubt that Turner acted with intent impede, intimidate, interfere with, and retaliate against his victims. Hence, even if Turner passed the first step of expanding *Elonis* to a different statute (despite § 2255 prohibiting him from doing so), he cannot get past the second step because the statute at issue is not defective—it *has* a specific intent element. *Elonis* addressed a statutory problem that cannot be found in this case.

C. Even if *Elonis* is Read to Extend to Turner's § 115(a)(1)(B) Conviction, Any Error is Harmless.

Even if this Court were to extend *Elonis*'s reach and decide that it applies to a § 115(a)(1)(B) conviction, despite the statute's notable differences, any error in the jury instructions was harmless. When evaluating presumptively correct convictions on collateral review, the harmless error inquiry is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776, (1946)); *Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997) (distinguishing harmless error on direct and collateral review, and noting that "as the Court explained in *Brecht*, considerations of finality, federalism, and comity warrant the application of a less-onerous harmless error standard" on collateral review).[2]

[2] Note, *Santana-Madera v. United States*, 260 F.3d 133, 140 (2d Cir. 2001), suggested that *Brecht* may not apply where no direct appeal was taken, but that is not the case here (Turner took a direct appeal of his conviction). Most Circuits have held that the *Brecht* standard applies to a post-conviction challenge to a federal conviction under 28 U.S.C. § 2255. *See, e.g.*, *United States v. Dago*, 441 F.3d 1238, 1246 (10th Cir. 2006); *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003); *Ross v. United States*, 289 F.3d 677, 682 (11th Cir. 2002); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000).

Brecht held that the appropriate standard applied on collateral review of federal constitutional error is the same as the standard applied on direct review of non-constitutional error, namely, whether the error " 'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 637 (quoting *Kotteakos*, 328 U.S. at 776). That standard requires more than "a reasonable possibility" that the error contributed to the verdict. *Brecht*, 507 U.S. at 637; *Carter v. DeTella*, 36 F.3d 1385, 1392 (7th Cir. 1994) (quotations omitted). Instead, on collateral review, a court may reverse a conviction only if after looking at the record as a whole, the court concludes—or has a "grave doubt" about whether—the error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637-38; *O'Neal v. McAninich*, 513 U.S. 432, 435 (1995); *Carter*, 36 F.3d at 1392. In conducting that review, the evidence must be viewed in the light most favorable to the government, all inferences must be drawn in the government's favor, and the conviction must be affirmed if "the fact finder might fairly have found guilt beyond a reasonable doubt." *United States v. Canady*, 126 F.3d 352, 356 (2d Cir. 1997).

Were *Elonis* to apply, the jury instructions would have included a requirement that the government establish the Turner "transmit[ed] [the] communication" (1) "for the purpose of issuing a threat," (2) "with knowledge that the communication [would] be viewed as a threat," or (3) was "reckless" as to whether the communication would be viewed as a threat.[3]

[3] *Elonis* held that negligence is insufficient for liability under § 875(c). It explicitly declined to deem recklessness as insufficient as well, so that remains a viable basis for liability.

To perform the harmless error analysis, one must compare *Elonis*'s language to the given instructions in this case, which included a specific intent requirement. This Court instructed the jury that the government had to prove each of the following elements beyond a reasonable doubt:

> First, that the defendant threatened to assault or murder Chief Judge Frank Easterbrook, Judge Richard Posner and Judge William Bauer;
>
> Second, that at the time of the alleged threat, Chief Judge Frank Easterbrook, Judge Richard Posner and Judge William Bauer were United States judges; and
>
> Third, that the defendant acted with the intent to impede, intimidate or interfere with these judges while engaged in the performance of their official duties or with the intent to retaliate against these judges on account of the performance of their official duties.

8-3-2010 Tr. at 567. With respect to the first element, the jury was also instructed that "[t]he relevant intent is intent to communicate the threat." *Id.*

Because *Elonis*'s standard is so similar to the instructions in Turner's case, it is useful to compare it side-by-side:

Given Instructions	*Elonis* Standard
Turner intended to communicate the threat and did so with the specific intent to impede, intimidate, interfere with, and retaliate against the judges.	Turner acted with knowledge that the communication would be viewed as a threat *or* he acted recklessly to that fact.

When one compares what the jury found beyond a reasonable doubt to the language of *Elonis*, the difference is razor thin, making it nearly impossible for Turner to establish harmless error, especially under the exacting standards for collateral review.

In fact, given Turner's unusual background and the evidence at trial, the *Elonis* requirement would have been easier to meet than the given instructions. Much of the evidence at trial left little doubt that Turner acted with knowledge that the judges would regard his blog posting as a threat, or at the very least that he published it recklessly—that is, knowing that he was taking a legal risk, but disregarding it.

First, the language and images Turner carefully selected in his website posting were deadly serious. What began as an overwrought critique of the judicial decision of Judges Easterbrook, Posner, and Bauer, took an unmistakably violent turn. After describing what Turner perceived were the consequences of the decision upholding the Chicago handgun ban, Turner declared an end to the years of "peaceful legal challenges," opting instead for "the ultimate response." Gov. Ex. 1 at 6. The problem, as Turner put it, was that the judges had not "faced REAL free men willing to walk up to them and kill them for their defiance and disobedience." *Id.* at 7.

Even more menacing was Turner's celebration of the murder of Judge Joan Lefkow's husband and mother. *Id.* at 7-8. In Turner's view, the performance of Judge Lefkow's judicial duties led to the "slaughter" of her family. *Id.* These murders were portrayed as a "lesson" for any judges who dare to rule in a way that "outrages" Turner. *Id.* at 8. According to Turner, Judges Easterbrook, Posner, and Bauer "didn't get the hint after those killings," hence "another lesson" was needed. *Id.* Turner grimly forecast that if Judges Eastbrook, Posner, and Bauer were

"allowed to get away with this by surviving, other Judges [would] act the same way." *Id.* Turner summed up the "lesson" to be conveyed: "obey" Turner's version of the Constitution, "or die." *Id.*

As Turner well knew, the murders of Judge Lefkow's husband and mother hit close to home. Judge Lefkow is a colleague and friend of each of these judges, all of whom work in the same building. 8-11-2010 Tr. at 70, 92, 122. The invocation of the Judge Lefkow tragedy was, as Chief Judge Easterbrook put it, "a statement you must take us seriously." 8-11-2010 Tr. at 122. To him the message was clear: "a judge's husband and mother have been murdered and that's going to happen again. It is a message that this threat should not be discounted." *Id.*

Turner also knew that his victims were also keenly aware of Matt Hale—the white supremacist who solicited the murder of Judge Lefkow in retaliation for ruling against him in a trademark dispute. 8-11-2010 Tr. at 93, 121. Matt Hale served as a striking example of how the violent fringe could become operational, the same sort of violent fringe Turner had for years courted with his website. Def. Ex. M, H1. According to Chief Judge Easterbrook, "Mr. Hale had attempted, and indeed placed a contract on the life of a federal judge, had been arrested and had been convicted for the crime, and it looked like the writer of this message was saying you have to take us as seriously as you took Mr. Hale." 8-11-2010 Tr. at 121. These were carefully and deliberately chosen words tailored to the three judges to instill fear.

At the end of the website posting, immediately after the words "Obey the Constitution or die," Turner displayed the judges' photographs, phone numbers,

work addresses and room numbers, along with photograph of the building in which they work and a map of the building's location. Gov. Ex. 1 at 9-10. There was also the promise that the judges' "home addresses and maps will soon follow." *Id.* Turner modified the photograph of the Dirksen Federal Building, the building where the judges work, so that there were arrows and a label "Anti-truck bomb barriers." *Id.* at 10. Through this information, Turner implicitly communicated "we know where to find you." And lest there be ambiguity about the significance of the judges' location, the inclusion of a picture of their building with "anti-truck bomb barriers" labeled surely drove the point home—the judges were marked men and violence was the way to get at them.

Second, the surrounding material Turner had on his website sheds light on the nature of Turner and his following. Turner and his readers were obsessed with violence against perceived enemies. Take, for example, Turner's other posting from the day of the threat. Turner invoked the very same phrase he levied against the judges ("obey the constitution or die") and laid out, in this separate posting, precisely what he meant in addressing the judges in this case. Speaking for himself and others about certain Connecticut legislators, Turner wrote, "It is our intent to foment direct action against these individuals personally. These beastly government officials should be made an example of as a warning to others in government: Obey the Constitution or die." Turner added, "If any state attorney, police department or court thinks they're going to get uppity with us about this; I suspect we have enough bullets to put them down too." *Id.* at 15.

This posting appeared on Turner's website almost immediately after his threat against the Chicago judges, and in it Turner spoke on behalf of a group when he promised to take up arms against legislators and law enforcement ("*our* intent" and "*we* have enough bullets"). Turner left his victims with the unmistakable sense that he and his followers had no compunctions about shooting to kill.

Another telling piece of evidence is Turner's earlier attack on investment bankers, in which he both claimed a violent following and used it to strike fear in his opponents. In that posting, Turner bragged that his "eight years on the radio and on the internet has gotten [him] in touch with enough of the right people to get [a murder] done. I know how to get it done. Federal District Judge Joan Humphrey Lefkow in Chicago is proof." Gov. Ex. 18. According to Turner, "Judge Lefkow made a ruling in court that I opined made her 'worthy of death.' After I said that, someone went out and murdered her husband and mother." *Id.* That is, Turner knew "the right people" in order to have someone murdered, and his online calls for violence could give rise to a real attack. This chilling assurance about an ability to inspire murder, proudly proclaimed over the internet, constitutes yet another piece of evidence of Turner's intent to instill fear and leave the impression that he had "the right people" to get a murder "done."

Turner also revealed the intensity of his convictions in his update to the Connecticut posting on June 2nd. Turner wrote, "Officer Boyle of the Connecticut State Capitol Police just called regarding this story. Seems they are concerned about the 'Commentary' below. Looks the tyrants are worried. Good." Gov. Ex. 1 at

15. When Turner drew the attention of law enforcement, he did not back off from his words or suggest this was merely his harmless "opinion"—he taunted the police. That Turner publicly embraced confrontation with the police only signaled the gravity of his threat.

After sending out his June 2nd posting threatening the judges, Turner dashed off an email to audience members to direct their attention to the posting. Gov. Ex. 34. The next morning Turner updated the posting to include the judges' photographs, phone numbers, work addresses, and room numbers. That update also promised that "their home addresses and maps will soon follow," and Turner began to make good on his promise. In a document created just after noon on June 3rd, Turner began creating a dossier that included residential addresses for each of his victims. Gov. Ex. 36. Each of these undertakings—alerting his followers and tracking down the judges' home addresses—corroborate Turner's intent and knowledge that his posting would be taken as a threat (or, at least the very least, his recklessness).

The reaction of Turner's victims only bolsters the conclusion that this threat conveyed a serious expression of an intent to inflict injury. Each of Turner's victims did not find the least bit of equivocation in Turner's message. To Judge Posner, the message was that "killing Judge Lefkow's mother and husband didn't send an adequate message" and that therefore he was to meet a similar fate. 8-11-2010 Tr. at 68. Having determined that there was a serious threat on his life, Judge Posner immediately had the posting forwarded to the United States Marshals. Judge Bauer

thought the threat was "fairly explicit" and immediately brought it to the attention of Chief Judge Easterbrook, whose "reaction was that somebody was threatening to kill me." *Id.* at 120. Turner's praise of the murders of Judge Lefkow's family and his demand for another "lesson" left no doubt that his posting was to be taken seriously.

Turner testified at trial that he had no intention of threatening Judges Easterbrook, Posner, and Bauer, but that was undercut by his emails admitted into evidence explaining his intent to use violent threats to shape government policy. Those emails followed Turner's rejection as an FBI informant, and reflected his increasingly vigilant opposition to government. Because of "things taking place in the country," Turner became convinced that "corrective measures" that "would probably not be legal" would "have to be imposed upon the government." Gov. Ex. 46. "[F]orce and violence," Turner concluded, "do not need to be legal in order to be effective. And I perceive that the U.S. is arriving at a point where effectiveness is more important than legality." *Id.*

Contrary to Turner's claim at trial that he could not have intended to threaten the judges because he "never spoke to them," 8-12-2010 Tr. at 270, 261, 263, only a couple of months before the threat, Turner boasted of the reaction he could get by disclosing the address of a judge—that it was "an effective way to cause otherwise immune public servants to seriously rethink how they can use the power lent to them by We The People." Gov. Ex. 27. Turner knew he did not have to speak directly to his victims in order to threaten them and instill fear.

Perhaps the most transparent example of Turner's purposeful use of a victim's address for intimidation comes from the day of his threat in this case. Turner fired off an email to an opponent first asking whether he "still works over at" a certain address and then promising that Turner will "be passing [his victim's] info out to my friends in the White racist skinhead groups out on the west coast. It ought to be funny to see what happens when they catch you coming out of work." 8-12-2010 Tr. at 319-20. Turner knew he could terrorize others by dangling the prospect of violence from one of his followers, and that the disclosure of a personal address was the perfect way to drive the point home.

Turner's own testimony revealed that his talk of a white supremacist following was not mere braggadocio. Turner came to the FBI's attention because of his preexisting notoriety within the white supremacist community. *See, e.g.*, 8-11-2010 Tr. at 182, 203-04. That did not change once the Bureau severed ties with him: as Turner disclosed in an email less than two months before his threat, his access to the white supremacist community remained "absolute and unfettered." Gov. Ex. 86.

The story Turner spun for the jury about his intentions was likewise undermined when Turner was asked about threats of violence his audience directed at him. 8-12-2010 Tr. at 313. With that question, Turner's persona at once changed and he became capable of understanding threats from a victim's perspective. When Turner found himself in the cross-hairs, he did not brush the words off as bravado or something from an imagined audience, they were genuine threats of violence that

gave Turner "grave concern," *id.*, an implicit admission of the danger posed by his audience.

The jury roundly rejected Turner's efforts to downplay his intent. It found beyond a reasonable doubt that Turner intended to impede, intimidate, interfere, and retaliate against his victim. So clear was this evidence regarding his intent that Turner did not even challenge the jury's finding on direct appeal. *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) ("Turner does not contest that the evidence at trial was sufficient to prove that he intended to intimidate or retaliate against Judges Easterbrook, Bauer, and Posner.").

That same evidence makes clear that Turner knew that Judges Easterbrook, Bauer, and Posner would regard his posting as a threat. At the very least, Turner acted recklessly when he fired off his posting that: (1) declared an end to the years of "peaceful legal challenges," opting instead for "the ultimate response"; (2) set up as the model response to "judicial malfeasance" the "slaughter" of Judge Lefkow's mother and husband, a tragedy which necessarily conveyed fear to Turner's victims; (3) displayed the judges' photographs, phone numbers, work addresses and room numbers, immediately after the words "Obey the Constitution or die," along with photograph of the building in which they work and a map of the building's location; (4) and modified the photograph of the Dirksen Federal Building so that there were arrows and a label "Anti truck bomb barriers." Turner well knew—as he even admitted in an email—that these tactics were aimed to instill fear and would be taken seriously by his victims.

As such, viewing the evidence in the light most favorable to the government, Turner cannot establish that he would not have been convicted with the addition of the *Elonis*, whose language is largely redundant with the given jury instructions. By no means should the *Elonis* standard leave this Court with "grave doubt" about whether any error resulted in "actual prejudice." *Brecht*, 507 U.S. at 637-38; *O'Neal v. McAninich*, 513 U.S. 432, 435 (1995).

IV. CONCLUSION

In sum, the Supreme Court correctly rejected Turner's petition for certiorari on direct appeal, even after the Court decided to hear *Elonis v. United States*. The Court in *Elonis* interpreted a particular threats statute, and its reasoning hinged on the statute's absence of a mens rea element. Turner, by contrast, was found guilty of issuing a threat with specific criminal intent, as required by the statute of his conviction. In other words, even if Turner were on direct appeal, *Elonis* would not save him. That is even more true of his § 2255 motion, for Turner falls well short of establishing that *Elonis* somehow narrowed § 115(a)(1)(B), rendering his threat no longer a crime. This Court should deny Turner's motion.

Respectfully submitted,

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