APPENDIX

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10079
Non-Argument Calendar

D.C. Docket Nos. 9:16-cv-80862-DMM,
9:14-cr-80009-DMM-1

MARK RICHARD HILLSTROM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(January 17, 2019)

Before WILSON, BRANCH, and HULL, Circuit Judges.

PER CURIAM:

Mark Hillstrom appeals the denial of his motion to vacate his sentence under 28 U.S.C. § 2255. After pleading guilty to transmitting a threat in interstate

commerce, 18 U.S.C. § 875(c), Hillstrom now argues that the indictment against him on that charge was insufficient because it did not allege the requisite mens rea. Because we find that any such defect in the indictment was rendered harmless by the facts he admitted when he pleaded guilty, we affirm the denial of relief.

A federal grand jury indicted Hillstrom in 2014 on one count of violating 18 U.S.C. § 875(c)[1] when he "did knowingly and intentionally transmit in interstate commerce a communication over the internet, which communication contained a threat to injure the person of another, specifically 'M.S.'" Hillstrom later pleaded guilty pursuant to a written plea agreement that contained an appeal waiver. He also signed a proffer explaining the factual basis for his guilty plea, stating that he had posted the following entry on JAABlog, "a blog devoted to coverage of the Broward County courts and judiciary":

> Rouge asa will die wrote: by the end of this year a rouque asa will be executed for his abuse of prosecutorial power that hurt my kids and ruined my life. His kids will be spared but he has too much power to be left to his sma minded sick decptions to get convictions and further his career. He will be accompained by current and former judges who abused their judcial power to destroy good lives and decent people. [M.S.] goes first.

[1] "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."

The proffer further stated that he "knowingly posted the threat, which was a true threat to injure M.S., after years of disagreement with the Broward State Attorney's office, of which M.S. is the head."

During the change-of-plea hearing, the magistrate judge reviewed the plea agreement and appeal waiver; Hillstrom acknowledged that he had read it, signed it, and discussed it with his lawyer. Upon questioning, Hillstrom said he understood the agreement and had not been threatened into accepting it. He agreed that he was pleading guilty of his own free will because he was in fact guilty. He further stated that he had read, signed, and discussed with his lawyer the factual proffer, and that he assented to its factual basis for the plea. The magistrate judge found that Hillstrom entered his plea knowingly and voluntarily, and recommended that the district court accept the guilty plea.

Before the district court, Hillstrom's counsel made no objection to the report and recommendation of the magistrate judge. The district court accepted the recommendation, entered a judgment of conviction, and imposed a sentence of 10 months' imprisonment followed by 3 years' supervised release. Hillstrom later violated the terms of his supervised release and was sentenced to time served and a new period of 24 months' supervised release, which he is currently serving.

Hillstrom did not file a direct criminal appeal. More than a year after his conviction, the U.S. Supreme Court decided *Elonis v. United States*, 135 S. Ct.

2001 (2015), which clarified the necessary elements for a conviction under 18 U.S.C. § 875(c). In 2016, Hillstrom moved through appointed counsel to vacate his sentence under 28 U.S.C. § 2255. In that motion, Hillstrom argued that the conduct to which he pleaded guilty is not a crime because, under *Elonis*, the government failed to allege the requisite mens rea in the indictment.

The magistrate judge found that *Elonis* applied retroactively, but that Hillstrom's guilty plea was nonetheless valid because he "admitted to facts demonstrating that he knowingly transmitted a threatening communication and specifically intended for such communication to be a threat as required under § 875(c)." After Hillstrom filed objections, the district court agreed with the magistrate judge, adding that any claim for relief based on an insufficient factual basis for the plea was procedurally barred by Hillstrom's failure to file a direct appeal. The court denied the § 2255 motion and denied a certificate of appealability. Hillstrom appealed, and a judge of this Court granted a certificate of appealability on "[w]hether, under 28 U.S.C. § 2255, Hillstrom is entitled to vacate his guilty plea, for a violation of 18 U.S.C. § 875(c), pursuant to *Elonis*." We now consider that question.

When evaluating the denial of a § 2255 motion, we review legal conclusions de novo and factual findings for clear error. *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). A prisoner filing his first § 2255 motion is entitled to relief

if he establishes that his conviction or sentence was imposed in violation of the Constitution or laws of the United States, so long as that motion is not untimely or otherwise procedurally barred. 28 U.S.C. § 2255(a), (f). Hillstrom argues that his indictment was constitutionally insufficient under *Elonis* because it failed to allege that he subjectively knew his communication contained a threat.[2] The problem for Hillstrom, however, is that any *Elonis* error in his indictment was rendered harmless by the factual proffer that accompanied his guilty plea.

In *Elonis*, the Supreme Court instructed that, although the text of § 875(c) does not specify any particular mental state, we must read a mens rea requirement into the statute in order to avoid criminalizing otherwise innocent conduct. 135 S. Ct. at 2008, 2010. Thus, a conviction under § 875(c) requires proof that the defendant knew that his communication contained a threat. *Id.* at 2011. Accordingly, a § 875(c) indictment that fails to allege the defendant's mens rea or facts from which his intent may be inferred is constitutionally insufficient. *United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015) (applying *Elonis* on direct appeal when the defendant had preserved the issue in the district court).

We assume, but do not decide, that the new rule announced in *Elonis* is retroactive to convictions that are already final because it appears to be the kind of

[2] Before *Elonis*, our Circuit had required only objective intent under § 875(c): that "a reasonable person would construe [the communication] as a serious expression of an intention to inflict bodily harm." *United States v. Alaboud*, 347 F.3d 1293, 1297 (11th Cir. 2003) (quoting *United States v. Callahan*, 702 F.2d 964, 965 (11th Cir. 1983)).

substantive rule that "narrow[s] the scope of a criminal statute by interpreting its terms." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). We further assume that Hillstrom had cause for procedurally defaulting this claim, given that our precedent would have barred him from asserting it on direct appeal, in light of his guilty plea and appeal waiver. *See United States v. Brown*, 752 F.3d 1344, 1354 (11th Cir. 2014) (explaining that an unconditional guilty plea waives all non-jurisdictional defects in an indictment, including the omission of a mens rea element); *but see Bousley v. United States*, 523 U.S. 614, 622–23 (1998) (explaining that failure to raise a then-futile legal argument on direct review does not establish cause for a procedural default). Further, we assume that there actually was an *Elonis* problem with Hillstrom's indictment.

Even with the benefit of all of these assumptions, Hillstrom is not entitled to vacatur under § 2255 because any error was harmless in light of the conduct he admitted in his factual proffer. That statement, signed and sworn, averred that Hillstrom "knowingly posted the threat." To the extent the indictment failed to allege that Hillstrom subjectively knew that his communication contained a threat, *see Elonis*, 135 S. Ct. at 2011, the proffer supplies the factual basis for inferring that scienter. *See Martinez*, 800 F.3d at 1295. In characterizing the interstate communication he knowingly posted as a "threat," Hillstrom freely and voluntarily admitted all of the elements of the offense under § 875(c). Any error in his

indictment was therefore harmless. To put it another way, Hillstrom has not established that he suffered any actual prejudice from the error, nor has he argued that he is actually innocent of the charge. *See Bousley*, 523 U.S. at 622. The denial of Hillstrom's § 2255 motion is therefore

AFFIRMED.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-10079-H

MARK RICHARD HILLSTROM,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Mark Hillstrom is currently on supervised release after he pled guilty, in March 2014, to making a threat in interstate communications, in violation of 18 U.S.C. § 875(c), and was sentenced to ten months' imprisonment and three years of supervised release. Hillstrom filed the instant, counseled 28 U.S.C. § 2255 motion, arguing that his conviction is invalid in light of *Elonis v. United States,* 135 S. Ct. 2001 (2015) (holding that a conviction under § 875(c) is supported by sufficient mental state evidence if the government proves that the defendant transmitted a communication for the purpose of issuing a threat, or with the knowledge that the communication would be viewed as a threat). Specifically, Hillstrom argued that his indictment did not allege a crime, because it did not allege the requisite intent, and the district court lacked jurisdiction to accept his guilty plea. He also maintained that the language of his indictment was identical to the language of the indictment in *United States v. Martinez,* 800 F.3d 1293 (11th Cir.

2015), where this Court vacated the defendant's conviction, pursuant to *Elonis*, because the indictment failed to allege an essential element of § 875(c). The district court denied the § 2255 motion and a certificate of appealability ("COA"), and Hillstrom now seeks a COA from this Court.

To obtain a COA, a petitioner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). Where the district court has denied a habeas petition on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Hillstrom has shown that jurists of reason would debate the district court's denial of his § 2255 motion. The language of his indictment is similar to the language of the indictment in *Martinez*, which this Court held was insufficient in light of *Elonis*, because it failed to allege Martinez's *mens rea*. *See Martinez*, 800 F.3d at 1295. As such, Hillstrom's motion for a COA is granted for the following issue:

> Whether, under 28 U.S.C. § 2255, Hillstrom is entitled to vacate his guilty plea, for a violation of 18 U.S.C. § 875(c), pursuant to *Elonis v. United States*, 135 S. Ct. 2001 (2015).

/s/ Adalberto Jordan
UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 16-CV-80862-MIDDLEBROOKS/BRANNON
(14-CR-80009)

MARK RICHARD HILLSTROM,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT AND DENYING § 2255 MOTION

THIS CAUSE is before the Court on Magistrate Judge Dave Lee Brannon's Report and Recommendation (DE 8) on Movant's Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Motion"). Movant filed Objections to the Report on October 23, 2017. (DE 16).

Background. Movant was charged by Indictment of one count of transmitting a threat in interstate commerce in violation of 18 U.S.C. § 875(c). (CR-DE 23). The indictment reads:

MARK RICHARD HILLSTROM,

> did knowingly and intentionally transmit in interstate commerce a communication over the internet, which communication contained a threat to injure the person of another, specifically "M.S.," in violation of Title 18, United States Code, Section 875(c).

(CR-DE 23). Movant did not file a motion to dismiss the indictment. On March 7, 2014, Movant pled guilty before Magistrate Judge Dave Lee Brannon pursuant to a plea agreement (CR-DE 36). He also signed a factual proffer, which stated that the United States and Movant agree that had the case proceeded to trial, the United States would have proven the following beyond a reasonable doubt:

> On November 27, 2013 at approximately 9:52 a.m., on JAABlog, a blog devoted to coverage of the Broward County courts and judiciary, HILLSTROM posted the following entry:
>
> > Rouge asa will due wrote: by the end of this year a rouque asa will be executed for his abuse of prosecutorial power that hurt my kids and ruined my life. His kids will be spared but he has too much power to be left to his sma minded sick decptions to get convictions and further his career. He will be accompanied by current and former judges who abused their judicial power to destroy good lives and decent people. [M.S.] goes first.
>
> HILLSTROM posted the entry on the internet blog using a computer. HILLSTROM was in Palm Beach County, Florida at the time he made the post. JAABlog's website is hosted by Go Daddy. Go Daddy's computer servers are located in Arizona. As a result, the posting/message was sent in interstate commerce.
>
> HILLSTROM knowingly posted the threat, which was a true threat to injure M.S., after years of disagreement with the Broward State Attorney's office, of which M.S. is the head.

(CR-DE 37). Magistrate Judge Brannon issued a Report and Recommendation on Movant's guilty plea (CR-DE 38), which I adopted at Movant's sentencing hearing on May 15, 2014. (CR-DE 43, 44). I sentenced Movant to 10 months' imprisonment followed by a term of 3 years of supervised release and a $100 special assessment. (DE 43). Movant's Judgment was signed on May 20, 2014 and entered on the docket on May 21, 2014. (DE 45). Movant did not appeal. He has served his term of imprisonment but remains on supervised release.

Through counsel, Movant filed his Motion to Vacate on May 31, 2016, seeking relief in light of the Supreme Court's decision in *Elonis v. United States*, 135 S. Ct. 2001 (2015). Movant argues that "his conviction cannot stand because the conduct he pled guilty to is not a crime." (DE 1 at 3). Movant argues that his indictment failed to allege the required mens rea element and thus the grand jury did not find probable cause for each element of a violation of § 875(c), as required by the Fifth Amendment. (*Id.* at 6-9). Movant also argues that the Court exceeded its

authority by entering a judgment based on a guilty plea without an insufficient factual basis. (*Id.* at 9-10).

Elonis. In 2015, the United States Supreme Court issued its decision in *Elonis*, in which it clarified the mens rea required under 18 U.S.C. § 875(c). In *Elonis*, the jury had convicted Elonis after the following instruction:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

Id. at 2007. The Court held that an instruction providing "that the Government need prove only that a reasonable person would regard [the defendant's] communications as threats" was error. *Id.* at 2012. Although it did not specify the exact mental state required, the Court explained that "the mental state requirement in Section 875(c) is satisfied 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." *Id.* at 2012.

Report. The Report recommends denying Movant's Motion on the merits and denying a certificate of appealability. The Report reviews the Indictment and factual proffer signed by Movant at the time of his guilty plea and concludes that "the record established that Movant admitted to facts demonstrating that he knowingly transmitted a threatening communication and specifically intended for such communication to be a threat as required under § 875 (c)." (DE 13 at 7). While I agree that the factual proffer includes such facts that support the required mens rea for a § 875 (c) offense, I also find that Movant has waived any challenge to the indictment based on an omission of the mens rea element in light of his guilty plea and appeal waiver.

Challenge to Indictment. In response to Movant's Motion, the United States argues that Movant's arguments that the Court "exceeded [its] authority is not well taken at this stage of the proceedings" and that Movant has waived any argument concerning the validity of his indictment. (DE 9 at 5). As explained by the Eleventh Circuit:

> "A guilty plea, since it admits all the elements of a formal criminal charge, waives all non-jurisdictional defects in the proceedings against a defendant." *United States v. Fairchild*, 803 F.2d 1121, 1124 (11th Cir. 1986) (quoting *United States v. Jackson*, 659 F.2d 73, 74 (5th Cir. 1981)); *see also United States v. Patti*, 337 F.3d 1317, 1320 (11th Cir. 2003) ("Generally, a voluntary, unconditional guilty plea waives all non-jurisdictional defects in the proceedings."). On the other hand, jurisdictional error "can never be waived by parties to litigation" because it "implicates a court's power to adjudicate the matter before it." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). Therefore, the pivotal question here is whether [defendant's] claim that her indictment was defective for omitting the mens rea element is jurisdictional in nature.

United States v. Brown, 752 F.3d 1344, 1347-48 (11th Cir. 2014). After extensive analysis of cases discussing jurisdictional and non-jurisdictional defects, the Eleventh Circuit held that the omission of the mens rea element from an indictment is non-jurisdictional and can, therefore, be waived either by "an unconditional guilty plea" or by "sign[ing] an appeal waiver." *Id.* at 1354.[1] Accordingly, any argument that the indictment omitted the requisite mens reas has been waived by Movant though entering an unconditional guilty plea and by signing an appeal waiver.[2]

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[1] The Eleventh Circuit also "noted the critical distinction between mere 'indictment omissions,' which are non jurisdictional defects, and 'the affirmative allegation of specific conduct that is not proscribed by the charging statute,' which is a jurisdictional defect." *Id.* at 1352 (quoting *United States v. Peter*, 310 F.3d 709, 713 (11th Cir. 2002) (finding jurisdictional defect in indictment that "affirmatively alleged a specific course of conduct that is outside the reach of the mail fraud statute")).

[2] Movant's circumstances are distinguished from the defendant in *United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015). In *Martinez*, the defendant unsuccessfully moved to dismiss the indictment, then pled guilty while "reserv[ing] the right to appeal the district court's denial of her motion to dismiss." *Id.* at 1295.

Factual Basis for Plea. Further, any claim based on an insufficient factual basis for Movant's guilty plea is procedurally barred as it was not raised on direct appeal. *See, e.g., Bousley v. United States*, 532 U.S. 614, 621 (1998). Movant does not make any argument to overcome the procedural bar and does not argue that he is actually innocent. Finally, I agree that the factual proffer sets forth a factual basis for the guilty plea for the reasons stated in the Report (DE 13 at 6-7).

Upon a careful, *de novo* review of the record, the Court agrees with the Report's recommendation to deny the Motion for the reasons contained therein and the additional reasons set forth above. I also agree with the Report's recommendation that no certificate of appealability should be issued.

ORDERED AND ADJUDGED:

*(1) The Report (DE 13) is **ADOPTED**, as modified by the additional reasons set forth above.*

*(2) Movant's Motion (DE 1) is **DENIED.***

*(3) A certificate of appealability is **DENIED**.*

*(4) The Clerk of Court shall **CLOSE** this case.*

***DONE AND ORDERED** in Chambers at West Palm Beach, Florida, this 6 day of November, 2017.*

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-80862-Civ-Middlebrooks/Brannon

MARK RICHARD HILLSTROM,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT RECOMMENDING THAT
§ 2255 MOTION TO VACATE BE DENIED

THIS CAUSE is before the Court on Movant Mark Richard Hillstrom's Motion to Vacate Sentence under 28 U.S.C. § 2255 (DE 1), which has been referred to the undersigned by U.S. District Judge Donald M. Middlebrooks (DE 3). Respondent responded in opposition (DE 9), and Movant timely replied (DE 12). For the following reasons, the Court respectfully recommends that the § 2255 Motion be **DENIED**.

I. PROCEDURAL HISTORY

On January 21, 2014, Movant was indicted by a federal grand jury on one count of transmitting a threat in interstate commerce, in violation of 18 U.S.C. § 875(c) [DE 23].[1] On March 7, 2014, Movant pled guilty to the single-count Indictment pursuant to a fully-executed Plea Agreement and an accompanying Factual Proffer [DE 35]. According to the written Plea Agreement, Movant:

[1] Citations to the underlying criminal case, *U.S. v. Hillstrom*, Case No. 14-80009-Cr-Middlebrooks/Brannon, are in brackets, "[DE__]," while citations to the instant § 2255 proceeding are in parentheses, "(DE__)."

> agrees to plead guilty to count 1 of the indictment, which count charges [Movant] with knowingly and intentionally transmitting in interstate commerce a communication over the internet, which communication contained a threat to injure the person of another, specifically, "M.S.," in violation of [§ 875(c)].

[DE 36 at 1]. In turn, the Factual Proffer states as follows:

> On November 27, 2013, at approximately 9:52 a.m., on JAABlog, a blog devoted to the coverage of the Broward County courts and judiciary, [Movant] posted the following entry:
>
> > Rogue asa will die wrote: by the end of this year a rouque [sic] asa will be executed for his abuse of prosecutorial power that hurt my kids and ruined my life. His kids will be spared but he has too much power to be left to his sma [sic] minded sick decptions [sic] to get convictions and further his career. He will be accompanied by current and former judges who abused their judicial power to destroy good lives and decent people. [M.S.] goes first.
>
> [Movant] posted the entry on the internet blog using a computer. [Movant] was in Palm Beach County, Florida at the time he made the post. JAABlog's website is hosted by Go Daddy. Go Daddy's computer servers are located in Arizona. As a result, the posting/message was sent in interstate commerce. [Movant] knowingly posted the threat, which was a true threat to injure M.S., after years of disagreement with the Broward State Attorney's office, of which M.S. is the head.

[DE 37 at 1-2]. At his change of plea hearing, Movant acknowledged that he had reviewed every part of the Plea Agreement and Factual Proffer with his counsel, that he understood and voluntarily agreed to all terms of each document, that he voluntarily signed both, and that he was pleading guilty because he was, in fact, guilty [DE 82].

On May 15, 2014, the Court sentenced Movant to a term of 10 months in prison, to be followed by 3 years of supervised release [DE 43]. Movant did not file a direct appeal. However, on May 31, 2016, Movant filed the instant § 2255 Motion (DE 9) arguing his conviction was no longer valid under a recent Supreme Court decision. At the time he filed

his § 2255 Motion, Movant was in a residential rehabilitation center serving a renewed term of supervised release [DE 1 at 2, DE 67].

II. LEGAL STANDARD

A federal prisoner is entitled to § 2255 relief if a court imposes a sentence that (1) violates the Constitution or United States law, (2) exceeds its jurisdiction, (3) exceeds the maximum authorized by law, or (4) is otherwise subject to collateral attack. 28 U.S.C. § 2255; *Hill v. U.S.*, 368 U.S. 424, 426–27 (1962). The statute does not afford a remedy for all errors that may have been made at trial or at sentencing; errors warranting modification must raise "a fundamental defect which inherently results in a complete miscarriage of justice." *U.S. v. Addonizio*, 442 U.S. 178, 185 (1979); *Lynn v. U.S.*, 365 F.3d 1225, 1232 (11th Cir. 2004). To obtain § 2255 relief on collateral review, a movant must "clear a significantly higher hurdle than would exist on direct appeal." *U.S. v. Frady*, 456 U.S. 152, 166 (1982).

III. DISCUSSION

Movant argues that his conviction cannot stand after the Supreme Court's decision in *Elonis v. U.S.*, 135 S.Ct. 2001 (2015) because "after *Elonis*, it is clear that the indictment did not allege a crime and the conduct he was convicted of is not a crime" [DE 1 at 4]. Respondent disagrees, countering that even if the Court finds that *Elonis* applies retroactively on collateral review, Movant's arguments fail on the merits because the underlying indictment adequately alleged specific intent and Movant admitted to facts showing the requisite mental state, even post-*Elonis*. The Court will briefly address the retroactivity of *Elonis* on collateral review before turning to the merits.

A. *ELONIS* APPLIES RETROACTIVELY.

Governing law grants federal prisoners seeking post-conviction relief one year from the latest of any of four events to file a § 2255 Motion. Relevant here is the latest of (1) the date on which the judgment of conviction becomes final, or (2) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review. 28 U.S.C. § 2255(f). It is undisputed that Movant filed his motion beyond the date on which his conviction became final but within one year of *Elonis*. The question then is whether *Elonis* applies retroactively in this collateral proceeding. The answer is yes.

Generally, under the well-known *Teague* framework, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989). *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew substantive rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Id.* at 353. "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351–52. Second, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495 (1990).

Under the above framework, this Court concludes that *Elonis* applies retroactively on collateral review. This is because *Elonis* changed the substantive reach of a federal criminal statute—namely, § 875(c)— thereby altering "the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S. at 353; *see also Bousley v. U.S.*, 523 U.S. 614, 620-21 (finding that a habeas petitioner's claims were not *Teauge*-barred where such claims were based upon a Supreme Court case deciding the meaning and substantive reach of a criminal statute enacted by Congress). As Movant filed his Motion within one year of *Elonis* and because the Court finds that *Elonis* applies retroactively in this case, the Court turns next to the merits.

B. MOVANT'S CONVICTION REMAINS VALID POST-*ELONIS*.

In *Elonis v. U.S.*, 135 S. Ct. 2001 (2015), the Supreme Court clarified the law regarding the element of intent in a § 875(c) case involving alleged interstate threats. There, the Supreme Court reversed and remanded a defendant's § 875(c) conviction, holding that a jury instruction providing "that the Government need prove only that a reasonable person would regard [the defendant's] communications as threats" was error. *Id.* at 2012. The Supreme Court determined that "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks"—is insufficient for a § 875(c) conviction. *Id.* at 2011. The Court cited "the basic principle that wrongdoing must be conscious to be criminal," and held that "what [the defendant] thinks does matter." *Id.* at 2009, 2011. Though the Supreme Court declined to answer the question of the exact mental state required by a defendant, it held that negligence is not enough to support a § 875(c) conviction. *Id.* at 2013. Rather, a defendant charged

under § 875(c) must intend the knowingly transmitted communication containing a threat, as a threat. *Id.* at 2011-12.

Following *Elonis*, the Eleventh Circuit instructed a lower court to dismiss an indictment with prejudice where such indictment charged interstate threats under § 875(c), but did not allege specific intent to threaten, or facts from which such intent can be inferred, and alleged only "that a reasonable person would regard [a defendant's] communication as a threat." *U.S. v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015).

Here, unlike the facts of *Elonis* and *Martinez*, the record establishes that Movant knew at the time of his guilty plea that the elements of the crime charged included his specific intent to communicate a threat. First, the Indictment alleged that Movant "knowingly and intentionally" transmitted an interstate threat via his blog post. A fair reading of this allegation is that Movant knowingly transmitted an interstate communication and knew also that the communication was a threat. *See U.S. v. Sullivan*, 2016 WL 75060, at *8 (D. Or. Jan. 6, 2016), appeal dismissed (Oct. 5, 2016) (finding in a §2255 proceeding that an underlying information alleging that a movant "knowingly transmitted . . . an email communication via the Internet containing a threat to kill another person, A.K.," was fairly understood as requiring not only knowingly transmitting a threatening communication, but knowing also that the communication was a threat).

Moreover, during his change of plea hearing, Movant confirmed under oath that he had read the Plea Agreement and Factual Proffer, understood both, reviewed both with his counsel, and agreed to all of the terms contained within both documents. By virtue of these sworn confirmations, Movant admitted to facts demonstrating his specific intent to

communicate a threat. As stated in the Factual Proffer, Movant admitted to posting a blog entry stating that a "rouge" state attorney would "be executed for his abuse of prosecutorial power that hurt [Movant's] kids and ruined [Movant's] life." [DE 37]. According to the Factual Proffer, Movant's blog entry went on to threaten "current and former judges who abused their judicial power" and ended by specifically naming the individual head of the Broward State Attorney's Office as the one who "goes first" [*Id.*]. The Factual Proffer further made clear that Movant posted his entry on a blog devoted to coverage of the Broward County courts and judiciary "after years of disagreement with the Broward State Attorney's Office" [*Id.*]. It could certainly be inferred that Movant specifically intended to communicate a threat against known individuals with whom he had had past disagreeable dealings by posting his entry on such a blog. Taken together, the admitted facts of this case qualify as "facts from which such [specific] intent can be inferred" as required by *Elonis* and its progeny. *See U.S. v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015).

IV. RECOMMENDATION

Based on the foregoing, the Court finds that *Elonis* applies retroactively in these collateral proceedings. However, Movant's guilty plea and resulting conviction remain valid post-*Elonis* because the record establishes that Movant admitted to facts demonstrating that he knowingly transmitted a threatening communication and specifically intended for such communication to be a threat as required under § 875(c). Thus, the Court respectfully **RECOMMENDS** that the Motion to Vacate Sentence under 28 U.S.C. § 2255 (DE 1) be **DENIED**.

Moreover, the Court finds that a certificate of appealability should not be issued in

this case as there are no issues presented that are deserving of encouragement to proceed further. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (for a certificate of appealability to issue, an applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."). Accordingly, the Court further **RECOMMENDS** that a certificate of appealability be **DENIED** and that this case be **CLOSED**.

V. NOTICE OF RIGHT TO OBJECT

A party shall serve and file written objections, if any, to this Report with U.S. District Judge Donald M. Middlebrooks, within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(C). Failure to timely file objections shall bar the parties from a *de novo* determination by the District Judge of an issue covered in this Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

DONE AND RECOMMENDED in Chambers at West Palm Beach in the Southern District of Florida, this 26th day of September, 2017.

DAVE LEE BRANNON
U.S. MAGISTRATE JUDGE