

No. 19-6609

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IN THE SUPREME COURT OF THE UNITED STATES

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CHAD MICHAEL STONER, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined, on plain-error review, that sufficient evidence supports petitioner's convictions for conspiring to transmit a threat in interstate commerce and transmitting such a threat, in violation of 18 U.S.C. 371 and 875(c), and for mailing threatening communications, in violation of 18 U.S.C. 876(c), where petitioner caused a video containing a threat to kill police officers to be posted on YouTube and mailed letters to his girlfriend threatening to kill police officers and others.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

United States v. Stoner, No. 16-cr-357 (Aug. 30, 2018)

United States Court of Appeals (3d Cir.):

United States v. Stoner, No. 18-3036 (July 18, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the Federal Reporter but is reprinted at 781 Fed. Appx. 81.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2019. A petition for rehearing was denied on August 13, 2019 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on November 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of possessing a firearm after a felony conviction, in violation of 18 U.S.C. 922(g). Pet. App. 2a. Following a jury trial in the same court, petitioner was convicted on one count of conspiring to transmit a threat in interstate commerce, in violation of 18 U.S.C. 371; one count of transmitting a threat in interstate commerce, in violation of 18 U.S.C. 875(c); and two counts of mailing threatening communications, in violation of 18 U.S.C. 876(c). Judgment 1-2. The district court sentenced petitioner to 150 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4. The court of appeals affirmed. Pet. App. 1a-12a.

1. Petitioner, a resident of Conewago Township, Pennsylvania, was arrested for disorderly conduct after township supervisor Loretta Wilhide called the police to report that petitioner had caused a disturbance at a township meeting. Pet. App. 2a-3a. The next day, petitioner and his girlfriend Emily Winand went to the township building to speak with township manager Lou Anne Bostic. Id. at 3a. Petitioner appeared to be wearing a holster containing a gun, as well as a machete-type knife on his belt. Gov't C.A. Br. 7; see Pet. App. 3a.

Petitioner told Bostic that if Wilhide "continues to act in the way that she is, I think Houston, Texas, is going to turn into

Conewago Township." Pet. App. 3a (citation omitted). He explained to Bostic that this was a reference to "where they shot all them cops," and he later explained in a prison phone call that he meant Conewago Township would be like Dallas, where several police officers had been shot. Id. at 3a & n.1. (citation omitted). As he was leaving, petitioner told Bostic to tell Wilhide that he was out of jail. Id. at 3a. After reviewing surveillance footage of the interaction, police arrested petitioner for terroristic threats. Ibid.

Winand had recorded the interaction between petitioner and Bostic, and in recorded phone calls from prison they discussed posting the video on the internet. Pet. App. 4a. In the discussion, petitioner remarked to Winand, "once again you wonder why the people of Dallas did what they did." Ibid. (citation omitted). Winand later posted the video on YouTube. Ibid.

During a search of petitioner's home related to a separate firearms investigation, officers found a safe containing letters from petitioner to Winand, along with a list of names and addresses of local police officers and their families. Pet. App. 4a. In the letters, petitioner stated, "we do need to kill more 'law enforcement[''] or in other words 'domestic terrorist[s]'." Ibid. (citation omitted; brackets in original). Petitioner wrote that people who caused harm to him and his family would have "hell to pay" when he was released, and that he had "a lot of time to plan" his retaliation. Ibid. (citation omitted). Petitioner directed

Winand to purchase "as much of the 5.56 armor-piercing Raufoss rounds as she could" for his AR-15 rifle, referring to the ammunition as "cop killers." Ibid. (brackets and citation omitted).

2. A federal grand jury in the Middle District of Pennsylvania returned a superseding indictment charging petitioner with one count of conspiring to transmit a threat in interstate commerce, in violation of 18 U.S.C. 371; one count of transmitting a threat in interstate commerce, in violation of 18 U.S.C. 875(c); two counts of mailing threatening communications, in violation of 18 U.S.C. 876(c); and four counts of possessing a firearm or ammunition after a felony conviction, in violation of 18 U.S.C. 922(g)(1). Superseding Indictment 1-6, 8-9.

Petitioner pleaded guilty to one firearm count, the government dismissed the other firearm counts, and petitioner proceeded to trial on the remaining counts. Pet. App. 2a. The jury returned a guilty verdict on all of those counts. Id. at 4a. The district court sentenced petitioner to 150 months of imprisonment, to be followed by three years of supervised release. Judgment 3-4.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-12a. As relevant here, the court rejected petitioner's challenge to the sufficiency of the evidence. Id. at 9a. The court stated that proof of a threat under 18 U.S.C. 875(c) or 876(c) requires the government to show that the defendant

(1) "transmitted a communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat"; and (2) "the defendant transmitted a communication that a reasonable person would view as a threat." Pet. App. 6a (quoting United States v. Elonis, 841 F.3d 589, 596 (3d Cir. 2016), cert. denied, 138 S. Ct. 67 (2017)). The court observed that "the jury convicted [petitioner] of making threats in both the YouTube video of his encounter with Bostic and the letters he sent to" his girlfriend, Winand. Id. at 7a. And, on plain-error review, the court found that "overwhelming" evidence supported the jury's verdict for both sets of threats. Id. at 9a; see id. at 6a & n.3.

With respect to the YouTube video, for which petitioner was convicted under Sections 371 and 875(c), the court of appeals explained that "[t]he content of the video satisfies the subjective element" because petitioner directly referred to violence targeting police officers and alluded to a police massacre in Conewago if the township supervisor continued her actions. Pet. App. 7a. The court explained that the content of the videos made it "impossible to believe [petitioner] was unaware it would be interpreted as a threat." Ibid. (quoting Elonis, 841 F.3d at 600). The court also observed that, before petitioner caused Winand to post the video on YouTube, petitioner knew -- based on Bostic's reaction at the time and the fact that petitioner was arrested for making terroristic threats -- that others had interpreted his conduct in the video as threatening. Id. at 8a. The court thus

determined that, by the time the video was posted on YouTube, petitioner was aware that the audience would view the interaction as a threat. Ibid. The court further determined that the video was objectively threatening, as a reasonable person viewing petitioner armed with a machete and referring to a police shooting if the township supervisor did not change her behavior would perceive a threat; in fact, Bostic interpreted petitioner's visit as a threat and called the police. Ibid.

With respect to the threatening letters, for which petitioner was convicted under Section 876(c), the court of appeals observed that petitioner was incarcerated for making terroristic threats when he wrote the letters, so he was subjectively aware that statements about shooting law enforcement officers would be viewed as threats. Pet. App. 9a. The court further observed that petitioner's references in the letters to killing police officers, planning retaliation against those who harmed him, and directing Winand to purchase ammunition that petitioner referred to as "cop killer[s]" would be viewed by a reasonable person as threatening. Ibid. (citation omitted). The court additionally determined that the location of these letters in a safe in petitioner's house alongside a list of police officers and their family members would also lead a reasonable person to believe that petitioner planned to carry out violence. Ibid.

## ARGUMENT

Petitioner contends (Pet. 4-7) that posting a video of a threatening communication on YouTube and mailing letters discussing violent retaliation against police officers and others to his girlfriend cannot be considered "true threats" and thus cannot be prohibited under 18 U.S.C. 875(c) and 876(c). The court of appeals correctly rejected those arguments, and its factbound and unpublished decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Petitioner was convicted under two different statutes that prohibit sending threatening communications. Section 875(c) makes it unlawful to "transmit[] in interstate \* \* \* commerce any communication containing \* \* \* any threat to injure the person of another." 18 U.S.C. 875(c). Section 876(c) makes it unlawful to "knowingly \* \* \* deposit[] or cause[] to be delivered" through the United States mail "any communication \* \* \* addressed to any other person and containing \* \* \* any threat to injure the person of the addressee or of another." 18 U.S.C. 876(c). The court of appeals stated that a conviction under either statute requires proof that the defendant transmitted a communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat, and that a reasonable person would view the communication as a threat. Pet. App.6a; see Elonis v. United States, 575 U.S. 723, 740 (2015); see

also ibid. (reserving the question whether a mens rea of recklessness would also be sufficient).

This Court has recognized that the First Amendment permits the prosecution of threats "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). But statutes targeting threatening communications reach only "true threat[s]," not mere jest, "political hyperbole," or even "vehement, caustic, [or] unpleasantly sharp attacks" that fall short of serious expressions of an intent to do harm. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (citation and internal quotation marks omitted).

2. Petitioner errs in contending (Pet. 5-6) that the record contains insufficient evidence of "true threats" on the particular facts of this case. Because petitioner did not move for acquittal before the district court, the court of appeals reviewed his claim only for plain error. Pet. App. 6a n.3. Accordingly, he can obtain relief from his conviction only if he can show that an error occurred, the error was plain or obvious, it affected his substantial rights, and it seriously affected the fairness, integrity, or public reputation of judicial proceedings. See United States v. Olano, 507 U.S. 725, 734-737 (1993). The court of appeals correctly found no error here, much less a plain or obvious one. Pet. App. 9a.

a. The court of appeals correctly determined that sufficient evidence supports petitioner's convictions related to posting the YouTube video of his interaction with Bostic. Pet. App. 7a. As the court explained, petitioner was aware that internet viewers would interpret the content of the YouTube video as a threat of violence toward police officers, because the conversation on the video had resulted in his arrest for making terroristic threats. Id. at 7a-8a. The court further correctly explained that sufficient evidence supported the jury's determination that petitioner's reference in the video to shooting police officers was objectively threatening. Id. at 8a.

Petitioner contends (Pet. 5) that the video cannot be considered a true threat because it "was merely a recording of a threatening incident," but "not a threat itself." Petitioner identifies no sound basis for distinguishing between making the "threat itself" (ibid.) and posting a recording of the threat online, and he does not contend that the circuits are divided on that issue or that this Court has drawn any such distinction. At a minimum, posting a video of a threat, after being arrested for making that threat, constitutes a reiteration of the threat. The jury was thus entitled to find that petitioner's conduct -- causing Winand to post the YouTube video containing petitioner's earlier threat to kill police officers -- satisfied the elements of Section 875(c).

b. The court of appeals also correctly determined that the letters petitioner mailed to Winand from prison were sufficient to support his convictions under Section 876(c). Pet. App. 9a. As the court explained, the jury was entitled to find that petitioner knew that his statements about shooting law enforcement officers would be viewed as threats; the jury was also entitled to find that petitioner's references in the letters to planning retaliation against those who had harmed him and his directions to Winand to purchase ammunition that he referred to as "cop killer[s]" were objectively threatening. Ibid.

Petitioner contends (Pet. 6) that the prison letters cannot be considered true threats because they were sent privately to his girlfriend. That is incorrect. Under the plain language of Section 876(c), a defendant may be convicted of mailing a threatening communication if he uses the mail to send a "threat to injure the person of the addressee or of another." 18 U.S.C. 876(c) (emphasis added); see United States v. Geisler, 143 F.3d 1070, 1071-1072 (7th Cir. 1998) (affirming conviction under Section 876(c) even though the addressee never opened the defendant's threatening letters, because the defendant need only send the threatening communications through the mail).

Courts have, for example, upheld convictions under statutes prohibiting the interstate transmission of threatening communications where the communications were sent to individuals being enlisted to carry out violence. See, e.g., United States v.

Cotner, 657 F.2d 1171, 1172-1173 (10th Cir. 1981) (affirming conviction under Section 876(c) where defendant mailed instructions for “[t]erminat[ing]” an individual named Henry Johnson to two people who responded to an advertisement for “undercover stateside work”); cf. United States v. Doggart, 906 F.3d 506, 511 (6th Cir. 2018) (upholding conviction under Section 875(c) where defendant called a confidential informant who responded to a request for assistance and stated that “those guys [need] to be killed” and “[t]heir buildings need to be burnt down.”) (citation omitted). Petitioner identifies no authority to support his contention that mailing a letter that threatens violence against a third person cannot violate Section 876(c).

Petitioner also contends (Pet. 6) that the letters to Winand could not constitute true threats because they did not threaten a specific person, but instead advocated violence against law enforcement officers as a group. That contention is misconceived. This Court has defined threats unprotected by the First Amendment to include “serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” Black, 538 U.S. at 359 (emphasis added). Petitioner threatened violence against “law enforcement[],” and the letters were found with a list of local police officers and their families. Pet. App. 4a (citation omitted). The jury was entitled to find that the letters contained language that, particularly in context, objectively threatened death and bodily harm to local law

enforcement officers. Cf. United States v. Stevens, 881 F.3d 1249, 1255 (10th Cir.) (upholding conviction under Section 875(c) where defendant threatened “deadly action at [Tulsa Police Department] officers generally”), cert. denied, 139 S. Ct. 353 (2018). Petitioner also threatened to harm the people who had “caused \* \* \* harm to [himself] and [his] family.” Pet. App. 4a. The statute does not require proof that petitioner identified those he intended to harm by name.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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