APPENDIX B:

OPINION OF THE SEVENTH CIRCUIT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 8, 2021
Decided June 15, 2021

Before

DIANE S. SYKES, *Chief Judge*

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 20-3486

WILLIAM A. WHITE,
Petitioner-Appellant,

v.

DANIEL SPROUL,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois.

No. 19-CV-1217-SPM

Stephen P. McGlynn,
Judge.

ORDER

A federal jury in the Northern District of Illinois convicted William White of one count of solicitation to commit a crime of violence (unlawful influence on a juror) in violation of 18 U.S.C. §§ 373, 1503. No. 08-cr-851 (N.D. Ill.). The district court sentenced White to 42 months' imprisonment. White's first motion to vacate his sentence was denied, No. 13-cv-09042 (N.D. Ill. May 4, 2016), and this court declined to certify an appeal, No. 16-2108 (7th Cir. Feb. 7, 2017). White has twice unsuccessfully sought permission to file a successive collateral attack. No. 17-1143 (7th Cir. Feb. 9, 2017); No. 18-1899 (7th Cir. May 17, 2018).

Now White, imprisoned in the *Southern* District of Illinois, has filed this habeas action under 28 U.S.C. §§ 2255(e), 2241. The district court, however, determined that a

motion to vacate, filed in the sentencing court (i.e., the Northern District), is White's exclusive remedy; habeas review is unavailable. *See* 28 U.S.C. § 2255(e). Of course, a new § 2255 motion would require our advance authorization. *See id.* § 2255(h). Rather than seeking that authorization, however, White appeals, insisting that the district court erred.

Yet the district court was doubtless correct to dismiss White's habeas petition. White seeks to rely on *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the residual clause of 18 U.S.C. § 924(c) is unconstitutionally vague. White says that after *Davis*, the crime of influencing a juror, 18 U.S.C. § 1503, no longer qualifies as a crime of violence under the solicitation statute, *id.* § 373. As the district court reasoned, however, *Davis* is a constitutional case, so claims arising under it are amenable to review in an initial § 2255 motion or, in appropriate cases, a successive motion under § 2255(h). *Higgs v. Watson*, 984 F.3d 1235, 1239–40 (7th Cir. 2021) (concluding that "at bottom, *Davis* announced a constitutional decision," and so "we cannot say there is anything structurally 'inadequate' or 'ineffective' about § 2255 as a remedy for petitioners . . . pursuing relief based on *Davis*'s constitutional holding" (cleaned up)); *see In re Davenport*, 147 F.3d 605, 609–10 (7th Cir. 1998) (outlining general test for saving-clause review under § 2255(e)).

In any event, § 373 does not contain language analogous to the residual clause, so the core holding of *Davis* would not apply here. Section 373 criminalizes solicitation to commit "a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another." In other words, its language closely mirrors that of the elements clause of § 924(c), which *Davis* left untouched.

White counters that he is relying on a different aspect of the *Davis* opinion. He says that *Davis* confirms that courts must apply the categorical approach in analyzing whether a felony offense qualifies as a crime of violence under any part of § 924(c), including its elements clause. Because § 373 has an analogous elements clause, White says, courts are required to apply the categorical approach in analyzing whether the felony solicited has as an element the use, attempted use, or threatened use of physical force. *See United States v. Gillis*, 938 F.3d 1181, 1199–1202 (11th Cir. 2019). And according to White, unlawfully influencing a juror does not categorically require force.

To be sure, in *Davis* the Supreme Court rejected the government's contention that § 924(c)'s residual clause might not require a categorical analysis after all (which, if

accepted, might have saved the clause from a finding of vagueness). But in rejecting that contention, the Court recognized that the categorical approach to § 924(c) was well-established, and that the government's proposed approach was novel: "For years, almost everyone understood § 924(c)(3)(B) to require" the categorical approach. *Davis*, 139 S. Ct. at 2326. And in this circuit specifically, we have long applied the categorical approach in determining whether a statute qualifies as a crime of violence under the *elements* clause of § 924(c). *See United States v. Cardena*, 842 F.3d 959, 996–97 (7th Cir. 2016) (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

In short, *Davis* did not change our application of the categorical approach to statutes containing elements-clause language. So White was previously free to raise an argument—under *Taylor*—that unlawfully influencing a juror is not categorically a crime of violence under § 373 during his trial, direct appeal, or first collateral attack. His failure to do so does not render § 2255 inadequate or ineffective. *See, e.g., Liscano v. Entzel*, 839 F. App'x 15, 17 (7th Cir. 2021) (concluding that "§ 2255 does not suffer from the sort of structural problem that allows [petitioner] to invoke § 2241" where petitioner could have earlier obtained "a decision on the same line of argument he now presents").

Accordingly, we summarily **AFFIRM** the district court's judgment.

APPENDIX C:

OPINION OF THE DISTRICT COURT

2020 US Dist LEXIS 226429 (7th Cir 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

WILLIAM A. WHITE,	
Petitioner,	
v.	**Case No. 19-CV-1217-SPM**
D. SPROUL,	
Respondent.	

MEMORANDUM AND ORDER

McGLYNN, District Judge:

Petitioner William A. White ("White") is incarcerated at the USP-Marion. On February 21, 2013, White was found guilty in the Northern District of Illinois, 08-CR-851, and was sentenced to 42 months, concurrent with sentence imposed in 08-CR-54, Western District of Virginia. White filed this habeas corpus action pursuant to 28 U.S.C. §2241 to challenge the constitutionality of his confinement – in particular his conviction and sentence for solicitation to commit crime of violence/influencing juror, as well as claims of actual innocence. (Doc. 1). White argues, pursuant to *United States v. Davis,* 139 S.Ct. 2319 (2019), that his offense of soliciting a violent felony no longer qualifies as a "violent felony" for purposes of 18 U.S.C. § 373, and as such, he is actually innocent and the conviction must be vacated. *Id.*

On May 6, 2020, Melissa Day, Federal Public Defender appointed in this matter on March 16, 2020 (Doc. 3), filed a Motion to Withdraw as Attorney. (Doc. 6). Within said Motion, Day alleged that her office was appointed to consider the applicability of the Supreme Court's finding that the residual clause of 18 U.S.C. §

924(c) was unconstitutional to White's assertions. *See Davis,* 139 S.Ct. 2319. However, because White was convicted of violating 18 U.S.C. § 373, solicitation to commit a crime of violence, not 18 U.S.C. § 924 (c), Day was granted leave to withdraw. (Doc. 8). White did not voluntarily dismiss this action; instead, he filed his Notice of Intent to Proceed. (Doc. 9).

Respondent moved to dismiss the Petition arguing that White is not entitled to relief under 28 U.S.C. § 2241. (Doc. 11). Respondent further claims that White erroneously relies on *Davis* and that this Court does not have subject matter jurisdiction. *Id.* White filed a Response, arguing that this Court has jurisdiction under 18 U.S.C. § 3231 and requesting that the Court apply *Davis* in a different way, to the elements clause, not the residual clause. (Doc. 13).

Additional Facts and Procedural History

White was found guilty by a jury of one count of solicitation to commit crime of violence/influencing juror in violation of 18 U.S.C. § 373, 1503. (Doc. 11-1). In February 2013, he was sentenced to 42 months in the Northern District of Illinois Case No. 08-cr-851 for soliciting the commission of a violent federal crime against a juror. *Id.* at p. 2. The sentence was ordered to be served concurrently with the sentence in 08-CR-54, Western District of Virginia. *Id.*

The charge was based upon a website, "Overthrow.com", created and maintained by White that purported to be affiliated with the "American National Socialist Workers Party" ("ANSWP"). (Doc. 11-2, p.1). The ANSWP was an organization that, according to the Overthrow.com website, claimed was comprised of a "convergence of former [white supremacy] 'movement' activists who grew

disgusted with the general garbage that 'the movement' has attracted and who formed the ANSWP under the Command of Bill White." (Doc. 11-2, pp. 1-2). Members of the ANSWP were described as "National Socialists ... who fight for white working people." (Doc. 11-2, p. 2).

According to the Indictment, between September 11, 2008 and October 11, 2008, White engaged in felony conduct that has an element the use, attempted use, or threatened use of force against the person of Juror A[1], in violation of the laws of the United States, and under circumstances corroborative of that intent, solicited and otherwise endeavored to persuade another person to injure Juror A on account of a verdict assented to by Juror A, in violation of Title 18, United States Code Section 1503. *Id.* Specifically, as part of the solicitation, inducement and endeavor to persuade, on September 11, 2008 White caused to be displayed on the front page of "Overthrow.com", a posting entitled, "The Juror Who Convicted Matt Hale", which stated: "Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].". *Id.* As further part of the solicitation, inducement, and endeavor to persuade, on September 12, 2008, White caused to be displayed on the frontpage of "Overthrow.com" a posting entitled, "[Juror A] Update – Since They Blocked the first photo". (Doc. 11-2, p. 3). This posting read:

[1] Juror A was foreperson of the jury that convicted Matthew Hale, the leader of a white supremacist organization known as the World Church of the Creator, with multiple counts of solicitation of the murder of United States District Judge Joan Humphrey Lefkow and obstruction of justice in the Northern District of Illinois.

"Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number]. Note that [University A] blocked much of [Juror A's] information after we linked to [his/her] photograph.". *Id.*

Appeal and Resentencing

White unsuccessfully appealed his conviction in a timely fashion. (Doc. 11). He has also filed numerous post-conviction motions attacking his conviction, as well as motions pursuant to Sections 2241 and 2255. *Id.*

Applicable Law

1. Jurisdiction

Generally, petitions for writ of habeas corpus under 28 U.S.C. § 2241 may not be employed to raise claims of legal error in conviction or sentencing; they may only challenge the execution of sentence. *See Valona v. United States,* 138 F.3d 693 (7th Cir 2003). Thus, aside from the direct appeal process, a prisoner who has been convicted in federal court is ordinarily limited to challenging his conviction and sentence by bringing a motion pursuant to 28 U.S.C. § 2255 in the court which sentenced him. *See Kramer v. Olson,* 347 F.3d 214 (7th Cir. 2003). He may not; however, file a "second or successive" § 2255 motion unless a panel of the appropriate court of appeals certifies that such motion contains either: (1) newly discovered evidence "sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"; or (2) "a new

constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Under very limited circumstances, a prisoner may also challenge his federal conviction or sentence under 28 U.S.C. § 2241. Section 2255(e) contains a "savings clause" (also referred to as the "safety-valve" clause, *see Reynolds v. United States,* Case No. 18-cv-691 (M.D. Pa., April 4, 2018)), which authorizes a federal prisoner to file a § 2241 petition where the remedy under § 2255 is "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). *See United States v. Prevatte,* 300 F.3d 792 (7th Cir. 2002). The fact that a petitioner may be barred from bringing a successive §2255 petition is not, in and of itself, sufficient to render it an inadequate remedy. *In re Davenport,* 147 F.3d 605 (7th Cir. 1988)(§ 2255 limitation on filing successive motions does not render it an inadequate remedy for a prisoner who had filed a prior § 2255 motion).

Instead, under § 2241, a petitioner must demonstrate the inability of a § 2255 motion to cure the defect in the conviction because of a structural problem inherent in § 2255. *See Webster v. Daniels,* 784 F.3d 1123 (7th Cir. 2015). "A procedure for postconviction relief can be fairly termed inadequate when it is so configured as to deny a convicted defendant *any* opportunity for judicial rectification of so fundamental defect in his conviction as having been imprisoned for a nonexistent offense." *Davenport,* 147 F3d. at 611 (*emphasis added*).

Following *Davenport* and its progeny, the Seventh Circuit has developed a three-part test for determining whether § 2255 is inadequate or ineffective so as to trigger the savings clause:

(1) The federal prisoner must seek relief based upon a decision of statutory interpretation, as opposed to a decision of constitutional interpretation, which the inmate could raise in a second or successive § 2255 motion;

(2) The statutory rule of law in question must apply retroactively to cases on collateral review *and* could not have been invoked in a first § 2255 motion; and,

(3) A failure to afford the prisoner collateral relief would amount to an error "grave enough" to constitute "a miscarriage of justice".

See Worman v. Entzel, 953 F.3d 1004 (7th Cir. 2020); *Montana v. Cross,* 829 F.3d 775 (7th Cir. 2016); *Beason v. Marske,* 926 F.3d 932 (7th Cir. 2019); *Chazen v. Marske,* 938 F.3d 851 (7th Cir. 2019); *Brown v. Caraway,* 719 F.3d 583 (7th Cir. 2013).

2. Actual Innocence

White claims that he actually innocent and the conviction must be vacated. (Doc.1). A credible claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo,* 115 S. Ct. 851, 865 (1995). The *Schlup* standard permits habeas review of defaulted claims only in the "extraordinary case" where the petitioner has demonstrated that "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell,* 126 S. Ct. 2064, 2077 (2006).

The third element/factor of the three prong *Davenport* analysis regarding "miscarriage of justice" is often equated to actual innocence. *See Sawyer v. Whitley*, 505 U.S. 333 (1992). Additionally, the "miscarriage of justice" exception is concerned with actual as compared to legal innocence. *Id.* at 339.

More recently, the Supreme Court held in *McQuiggin v. Perkins*, that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits, notwithstanding the existence of a procedural bar to relief." 133 S. Ct. 1924, 1931 (2013). In so holding, the Supreme Court reaffirmed the *Schlup* standard for a credible showing of actual innocence, cautioning that "tenable actual-innocence gateway pleas are rare" and describing the *Schlup* standard as "demanding" and "seldom met." *McQuiggin*, 133 S. Ct. at 1928.

Analysis

In the instant case, White's Petition fails to satisfy the first *Davenport* condition and his reliance on *Davis* is misplaced. White was neither convicted of a gun offense nor was he convicted under Section 924(c)(3)(A). (Doc. 11-1). White was charged and convicted of solicitation to commit a crime of violence under U.S.C. §§ 373 and 1503. Section 1503 states in pertinent part:

> "Whoever corruptly, or by threats of force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror ... on account of any verdict or indictment assented to by him ... shall be punished as provided in subsection (b)." 18 U.S.C. § 1503.

Davis held that the residual clause in 18 U.S.C. §924(c)(3)(B) is unconstitutionally vague, violating "the twin constitutional pillars of due process and separation of powers. *Davis,* 139 S.Ct at 2325. Section 924(c)(1)(A) provides for

enhanced penalties for a person who uses or carries a firearm "during and in relation to", or who possesses a firearm "in furtherance of," and federal "crime of violence or drug trafficking crime." Section 924(c)(3) defines the term "crime of violence" as "an offense that is a felony" and:

> (A) Has an element the use, attempted use, or threatened use of physical force against the person or property of another, [the "force clause"];
>
> (B) That by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense [the "residual clause"].

18 U.S.C. §924 (c)(3). After *Davis,* only a crime of violence that fits the definition set out in the force clause of Section 924(c)(3)(A) will support an enhanced penalty.

In *Davis,* the Supreme Court concluded that the residual clause in 18 U.S.C. § 924 (c)(3)(B) was *unconstitutionally* vague. 139 S.Ct. 2324 *(emphasis added).* Therefore, *Davis* is a case of constitutional interpretation. As such, a claim based on *Davis* could be raised in a successive § 2255 motion if permission is timely sought and obtained.[2] His claim cannot be pursued in a §2241 Petition under the "savings clause". Because he fails to satisfy the first condition under *Davenport,* any review of the second and third factors is unnecessary.

Petitioner's assertion that jurisdiction is established in this case under 18 U.S.C. § 3231 is also erroneous and misguided. (Doc. 13). Section 3231 states in pertinent part,

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all

[2] The Court makes no comment on the potential merits of White's claims if he were to bring them in the context of a successive §-2255-motion.

offenses against the laws of the United States." 18 U.S.C. § 3231.

Jurisdiction in the underlying criminal matter, *to wit: U.S.A. v. White,* Case No. 08-cr-851, Dkt. No. 5 (N.D. Ill. October 21, 2008), was appropriate under Section 3231 as it was a criminal matter and fell under the auspices of Criminal Procedure. This pending matter, *White v. Sproul,* Case No. 19-cv-1217, Dkt. No. 1 (S.D. Ill, Nov. 6, 2019) falls under the realm of habeas corpus cases and was filed as such. (Doc. 1)

Finally, White's claims that he is actually innocent of the solicitation of a violent felony are predicated upon the holding in *Davis,* and are not predicated upon newly discovered evidence and/or the factors set forth in *Schlup.* (Doc. 1). It is also irrelevant as he cannot overcome the first *Davenport* factor, so there is no need to examine the third any further.

Conclusion

For the foregoing reasons, William A. White's Petition for writ of habeas corpus under 28 U.S.C. § 2241 (Doc. 1), is **DENIED** and this case is **DISMISSED WITH PREJUDICE.**

The Clerk of Court is directed to enter judgment accordingly.

It is not necessary for Petitioner to obtain a certificate of appealability from this disposition of his § 2241 Petition. *Walker v. O'Brien,* 216 F.3d 626 (7th Cir. 2000). If Petitioner wishes to appeal, he may file a notice of appeal with this Court within 60 days of the entry of judgment. Fed. R. App. P. 4(a)(1)(B)(iii). A proper and timely-filed motion pursuant to Federal Rule of Civil Procedure 59(e) may toll the 60-day

APPENDIX D:

698 F 3d 1005 (7th Cir 2012)

UNITED STATES OF AMERICA, Plaintiff-Appellant, Cross-Appellee, v. WILLIAM WHITE, Defendant-Appellee, Cross-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
698 F.3d 1005; 2012 U.S. App. LEXIS 22229; 40 Media L. Rep. 2589
Nos. 11-2150 & 11-2209
October 26, 2012, Decided
June 8, 2012, Argued

Editorial Information: Subsequent History

Rehearing denied by, Rehearing, en banc, denied by United States v. White, 2012 U.S. App. LEXIS 24969 (7th Cir. Ill., Dec. 3, 2012)US Supreme Court certiorari denied by White v. United States, 569 U.S. 913, 133 S. Ct. 1740, 185 L. Ed. 2d 802, 2013 U.S. LEXIS 2547 (Apr. 1, 2013)Petition denied by White v. United States, 137 S. Ct. 260, 196 L. Ed. 2d 200, 2016 U.S. LEXIS 4798 (U.S., Oct. 3, 2016)Writ of habeas corpus dismissed, Judgment entered by White v. True, 2018 U.S. Dist. LEXIS 116325 (S.D. Ill., July 11, 2018)

Editorial Information: Prior History

{2012 U.S. App. LEXIS 1}
Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 1:08-cr-00851-1-Lynn Adelman, Judge.United States v. White, 779 F. Supp. 2d 775, 2011 U.S. Dist. LEXIS 42026 (N.D. Ill., Apr. 19, 2011)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellant (11-2150): Michael Ferrara, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.
For **WILLIAM WHITE**, Defendant - Appellee (11-2150): Nishay K. Sanan, Attorney, Chicago, IL.
For UNITED STATES OF AMERICA, Plaintiff - Appellee (11-2209): Michael Ferrara, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.
For **WILLIAM WHITE**, Defendant - Appellant (11-2209): Nishay K. Sanan, Attorney, Chicago, IL.

Judges: Before POSNER, FLAUM, and WILLIAMS, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: The U. S. Government appealed from the United States District Court for the Northern District of Illinois, Eastern Division, which granted defendant's Fed. R. Crim. P. 29 motion for acquittal, finding that the government failed to present sufficient evidence for a reasonable juror to conclude that defendant was guilty of criminal solicitation, and that defendant's speech was protected by the First Amendment. Defendant filed a cross-appeal.Fed. R. Evid. 404(b) admission of defendant's white supremacist website posts concerning people other than the target of his alleged criminal solicitation under 18 U.S.C.S. § 373(a) was not an abuse of discretion because the posts were close enough in time to be relevant and the probative value of the posts was particularly strong.

OVERVIEW: The foreperson of a jury that convicted a white supremacist was "Juror A," the target of the alleged solicitation in the case before the court. Reversing, the court concluded that a rational jury could have found beyond a reasonable doubt that, based on the contents of defendant's white supremacist website, its readership, and other contextual factors, defendant intentionally solicited a violent crime against Juror A by posting Juror A's personal information on his website. The court pointed out that criminal solicitation in violation of 18 U.S.C.S. § 373(a) was simply not protected by the First Amendment. The court rejected defendant's challenge to the district court's Fed. R. Evid. 404(b) admission of defendant's website posts concerning people other than Juror A. The probative value of those posts was particularly strong, in that they helped the government to satisfy its burden of producing evidence of circumstances strongly corroborative of defendant's intent. In addition the court ruled that defendant was not entitled to a new trial.

OUTCOME: The judgment of acquittal entered by the district court was reversed, the conviction was reinstated, and the case was remanded for sentencing. Defendant's cross-appeal was dismissed.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > General Overview

See 18 U.S.C.S. § 373.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > General Overview

See 18 U.S.C.S. § 1503.

Criminal Law & Procedure > Trials > Motions for Acquittal
Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > General Overview
Evidence > Procedural Considerations > Burdens of Proof > Allocation

A judgment of acquittal must be granted when the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). The United States Court of Appeals for the Seventh Circuit's review is de novo. The Seventh Circuit's job, however, is not to reweigh the evidence nor second-guess the jury's credibility determinations. Rather, the court views the evidence in the light most favorable to the government and asks whether any rational jury could have found the essential elements of the charged crime beyond a reasonable doubt. The court will set aside a jury's guilty verdict only if the record contains no evidence, regardless of how it is weighed, from which a jury could have returned a conviction. But the defendant bears a heavy burden on appeal, as he must demonstrate that no rational trier of fact could decide beyond a reasonable doubt that he committed the offense charged.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > General Overview
Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Factual Issues
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Scienter > Specific Intent
Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Typically, in a solicitation prosecution, the government will satisfy its burden of strongly corroborating the defendant's intent by introducing evidence showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatened to punish or harm the solicitee for failing to commit the offense; (3) repeatedly solicited the commission of the offense or expressly stated his seriousness; (4) knew or believed that the person solicited had previously committed a similar offense; or (5) acquired weapons, tools or information, or made other preparations, suited for use by the solicitee. These factors are not exclusive or conclusive indicators of intent, but they are representative examples of the types of circumstantial evidence that a rational jury could rely on to corroborate the defendant's intent. The existence of strongly corroborating circumstances is a question of fact for the jury.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > Elements
Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution
Criminal Law & Procedure > Scienter > Specific Intent

18 U.S.C.S. § 373 requires proof of intent "that another person" commit the felony, and a specific person-to-person request is not required.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > General Overview

Criminal solicitations are simply not protected by the First Amendment. Offers to engage in illegal transactions are categorically excluded from First Amendment protection.

Criminal Law & Procedure > Trials > Motions for Acquittal
Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. Fed. R. Crim. P. 29(d)(1).

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Juries & Jurors > General Overview
Criminal Law & Procedure > Juries & Jurors > Voir Dire > General Overview
Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

A court weighing the need for an anonymous jury must balance the defendant's interest in preserving the presumption of innocence and in conducting a useful voir dire against the jurors' interest in their own security and the public's interest in having a jury assess the defendant's guilt or innocence impartially. Factors bearing on the propriety of an anonymous jury include the defendant's involvement in organized crime; his participation in a group with the capacity to harm jurors; whether he previously has attempted to interfere with the judicial process; the severity of the punishment that the defendant would face if convicted; and whether publicity regarding the case presents the prospect that the jurors' names could become public and expose them to intimidation or harassment.

Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Appeals > Reversible Errors > Juries & Jurors
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > General

Overview

The United States Court of Appeals for the Seventh Circuit reviews the decision to use an anonymous jury only for an abuse of discretion, remaining particularly deferential to the district court's substantial discretion in this area. Even if the district court errs in empanelling an anonymous jury, a new trial is unwarranted where such error was harmless, such as when voir dire is extremely thorough, or when the jurors are told that their names are withheld to prevent out-of-court contact, not out of concern for juror safety, in combination with other factors mitigating prejudice.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence
Evidence > Relevance > Prior Acts, Crimes & Wrongs

Fed. R. Evid. 404(b) prohibits the admission of evidence of prior bad acts to show that the defendant's character is consistent with a propensity to commit the charged crime; however, it allows the court to admit evidence of a defendant's prior acts for other permissible, non-propensity purposes, such as intent. In order to be admissible, such evidence must: (1) be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) show that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) be sufficient to support a jury finding that the defendant committed the similar act; and (4) have probative value that is not substantially outweighed by the danger of unfair prejudice. The United States Court of Appeals for the Seventh Circuit reviews a district court's Rule 404(b) admission for abuse of discretion.

Criminal Law & Procedure > Appeals > Deferential Review > General Overview
Evidence > Relevance > Confusion, Prejudice & Waste of Time

The United States Court of Appeals for the Seventh Circuit gives special deference to the district court's assessment of the balance between probative value and prejudice because that court is in the best position to make such assessments.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Jury Instructions

Plain error review applies when counsel fails to object, on the record, to the judge's refusal to tender the defendant's instructions and clearly state the reasons for his or her objections. Fed. R. Crim. P. 30(d).

Criminal Law & Procedure > Jury Instructions > Objections

So long as defense counsel alerts the court and the opposing party to the specific grounds for the objection in a timely fashion, then there is no utility in requiring defense counsel to object again after the court has made its final ruling. But in the case of the court's refusal to give a proposed instruction, some of the cases of the United States Court of Appeals for the Seventh Circuit have suggested that objections must be made after a ruling is made, or at least after the district court indicates how it intends to rule. And counsel can simply object by stating that he or she objects and incorporates arguments previously made.

Criminal Law & Procedure > Jury Instructions > Requests to Charge

Fed. R. Crim. P. 30(b) provides that court must inform the parties before closing arguments how it intends to rule on requested instructions.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense
Evidence > Procedural Considerations > Burdens of Proof > Allocation

To be entitled to a particular theory of defense instruction, the defendant must show the following: (1) the instruction is a correct statement of the law, (2) the evidence in the case supports the theory of defense, (3) that theory is not already part of the charge, and (4) a failure to provide the instruction would deny a fair trial.

Criminal Law & Procedure > Appeals > Reversible Errors > Jury Instructions

The United States Court of Appeals for the Seventh Circuit will not find reversible error in jury instructions if, taken as a whole, they fairly and accurately inform the jury about the law.

Opinion

{698 F.3d 1008} Per Curiam. **William White** was charged with soliciting the commission of a violent federal crime against a juror in violation of 18 U.S.C. § 373. The alleged solicitations at issue were messages that White posted to a website that he created to advance white supremacy, which included White's 2005 statement that "[e]veryone associated with the Matt Hale trial has deserved assassination for a long time," and his 2008 publication of information related to the foreperson, "Juror A," of the jury that convicted Hale. The 2008 post disclosed Juror **{2012 U.S. App. LEXIS 2}**A's home address and mobile, home, and work phone numbers, though it did not contain an explicit request for Juror A to be harmed.

White was tried and convicted by a jury. White then filed a Rule 29 motion for entry of a judgment of acquittal, arguing that the evidence was insufficient to convict him of solicitation. The district court granted the motion, finding that the government failed to present sufficient evidence for a reasonable juror to conclude that White was guilty of criminal solicitation, and that White's speech was protected by the First Amendment. The government appeals that ruling, and White has filed a cross-appeal urging a new trial if we reverse the judgment of acquittal. After reviewing the trial record, we conclude that a rational jury could have found beyond a reasonable doubt that, based on the contents of the website, its readership, and other contextual factors, White intentionally solicited a violent crime against Juror A by posting Juror A's personal information on his website. Criminal solicitation is not protected by the First Amendment, and so we reverse White's acquittal and reinstate his conviction. Also, because White is not entitled to a new trial, **{2012 U.S. App. LEXIS 3}**we remand for sentencing.

I. BACKGROUND

To best understand the facts of this case it is helpful to have some basic familiarity with another case involving Matthew Hale, a white supremacist convicted of solicitation under 18 U.S.C. § 373. *See United States v. Hale*, 448 F.3d 971 (7th Cir. 2006) (per curiam).

The defendant in that case led a white supremacist organization known as the World Church of the Creator ("World Church"). A religious organization operating under the name "Church of the Creator" sued World Church for trademark infringement in federal court. Both parties moved for summary judgment and Judge Joan Lefkow granted the motion of Hale's organization, World Church. But we reversed and remanded for judgment to be entered in favor of Church of the Creator. After Judge Lefkow abided by our instructions, Hale informed his followers that they were "in a state of war with this federal judge." *Id.* at 978. He then sent an email to Tony Evola, a cooperating witness who had infiltrated World Church, requesting the home address of Judge Lefkow. One day later, Evola and

Hale met. Evola asked Hale if they were "gonna exterminate the rat." Hale answered, "I'm gonna fight within the law" **{2012 U.S. App. LEXIS 4}**but "that **{698 F.3d 1009}** information's been . . . provided" so "[i]f you wish" to "do anything yourself, you can, you know?" Evola responded, "Consider it done," to which Hale replied, "Good." *Id.* at 979. A jury convicted Hale for, among other things, criminally soliciting harm to Judge Lefkow, and he received a sentence of 40 years in prison. *Id.* at 982. The foreperson of that jury was "Juror A," the target of the alleged solicitation in this case.

William White is an avid supporter of Matthew Hale. An active white supremacist, White created and served as editor of a website, Overthrow.com, which sought to advance that cause. On February 28, 2005, only hours after Judge Lefkow's husband and mother were tragically murdered,1 White applauded the crimes on his website. He wrote, "Everyone associated with the Matt Hale trial has deserved assassination for a long time . . . . In my view, it was clearly just, and I look forward to seeing who else this new white nationalist group of assassins kills next." Not long afterward, in March 2005, White described an email, circulating on the internet, that contained the personal identification information of the FBI agents and prosecutors ("scumbags") who investigated **{2012 U.S. App. LEXIS 5}**and prosecuted Hale. White noted that they might be the "next targets of the unknown nationalist assassin who killed the family of Chicago Judge Joan Lefkow." He explained on his website that he would not disclose the agents' and prosecutors' personal information, however, because there was "so great a potential for action linked to such posting."

On February 13, 2007, White published on his website the address of Elie Wiesel, an internationally known Holocaust survivor, "In Case Anyone Was Looking For Him." White praised Eric Hunt, "a fan of [the] website," as a "loyal soldier" for attacking Wiesel a few days earlier, on February 1. White presented similar information about six black teenagers in Jena, Louisiana in September 2007, suggesting that they be "lynch[ed]" for their involvement in a schoolyard fight that garnered national attention due to its racial overtones. He continued this trend in 2008 by posting the personal information of individuals whom he labeled "anti-racist" or "enemies" of white supremacy. One such post, "Kill Richard Warman," advocated the murder of a noted Canadian **{2012 U.S. App. LEXIS 6}**civil rights lawyer. That particular message could be accessed from any page on the website because it could be retrieved using a hyperlink located in a static column of the site, called "Top Articles." Another post-"Kill This Nigger?"-contained images of and articles about then-presidential candidate Barack Obama. One article displayed a photograph of the presidential candidate with swastika-shaped crosshairs superimposed over his face,2 and stated that "White people must deny [Barack Obama] the presidency . . . by any means necessary."

Those postings, however, were mere prelude to the conduct that got White indicted for criminal solicitation. On September 11, 2008, White authored a post titled, "The Juror Who Convicted Matt Hale." In it, he disclosed personal, identifying information about Juror A. The post read:

> Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt **{698 F.3d 1010}** Hale. Born [date], [he/she] lives at [address] **{2012 U.S. App. LEXIS 7}**with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].The post further stated that the "gay Jewish [Juror A], who has a gay black lover and ties to professional antiracist groups, and who also personally knew [an individual] killed by Ben Smith, a follower of Hale, was allowed to sit on his jury without challenge and played a leading role in inciting both the conviction and harsh sentence that followed." The entry featured a color photograph of Juror A.

One day later, White uploaded an identical message to a different portion of the website. The post carried the title: "[Juror A] Updated-Since They Blocked the first photo." Apparently, Juror A's employer had blocked public access to the page on its website that contained information about

Juror A and the color photograph of the juror that appeared in White's first post. White's second post stated, "Note that [Employer] blocked much of [Juror A's] information after we linked to [his/her] photograph." The photograph of Juror A that appeared was embedded in the Overthrow server so that only White could remove it.

On October 22, **{2012 U.S. App. LEXIS 8}**2008, a grand jury indicted White for soliciting the commission of a violent federal offense against Juror A in violation of 18 U.S.C. § 373. The indictment charged that White had "solicited and otherwise endeavored to persuade another person to injure Juror A on account of a verdict assented to by Juror A, in violation of Title 18, United States Code 1503." *See also* 18 U.S.C. § 1503 (outlawing injuring or threatening to injure a federal juror). A grand jury returned a superseding indictment against White on February 10, 2009. White moved to dismiss the indictment, and the district court granted his motion after finding that White's internet postings were protected speech and that the indictment failed to sufficiently allege "corroborating circumstances" of White's criminal intent.

The government appealed. We reversed because the indictment was facially valid and White's First Amendment rights were protected by the government's burden to prove beyond a reasonable doubt that White had the requisite intent for criminal solicitation. *United States v. White*, 610 F.3d 956, 961 (7th Cir. 2010) (per curiam). As we explained:

> The government informed us at oral argument that it has further evidence **{2012 U.S. App. LEXIS 9}**of the website's readership, audience, and the relationship between White and his followers which will show the posting was a specific request to White's followers, who understood that request and were capable and willing to act on it. This evidence is not laid out in the indictment and does not need to be. The existence of strongly corroborating circumstances evincing White's intent is a jury question. . . . The government has the burden to prove, beyond a reasonable doubt, that White intended, through his posting of Juror A's personal information, to request someone else to harm Juror A. After the prosecution presents its case, the court may decide that a reasonable juror could not conclude that White's intent was for harm to befall Juror A, and not merely electronic or verbal harassment.*Id.* at 962 (internal citations omitted).

On remand, White was tried before an anonymous jury. The government offered as evidence the postings made by White that we described above. The government also called several witnesses. FBI Special Agent Paul Messing testified that he installed highly sophisticated computer software on the computer and server that **{698 F.3d 1011}** agents seized from White. The software allowed **{2012 U.S. App. LEXIS 10}**the FBI to search for specific articles and words that White personally posted on the Overthrow website. Officer John Dziedzic explained that an internet user who visited the Overthrow website before the site had been disabled could have seen all of White's postings.

The government also presented the testimony of Juror A. That testimony established that at approximately 9:30 a.m. on September 11, 2008, Juror A received a phone call from a telephone registered to White's wife. The male caller asked Juror A to confirm Juror A's name, date of birth, address, and service on the jury that convicted Hale. The caller did not, however, threaten Juror A. Less than thirty minutes after the call was disconnected, White posted Juror A's personal information on Overthrow. Juror A almost immediately began receiving harassing text messages. The messages conveyed things like "sodomize Obama," "Bomb China," "kill McCain," and "cremate[] Jews." Juror A testified that these messages were "all . . . really upsetting." Juror A reported receiving text messages of the same nature for the next few days. Juror A was not personally threatened, stalked, or physically harmed after White's initial post.

FBI Special **{2012 U.S. App. LEXIS 11}**Agent Maureen Mazzola also testified at trial. She described what an internet user who viewed the Overthrow website on September 11, 2008 would have seen.

According to her, on that day the site's visitors would have immediately been directed to the post about Juror A. They would not have been able to see White's other posts unless they accessed them via hyperlink or viewed other portions of the website. According to Agent Mazzola, a user would have "to be either looking for it or reading every single article on the website" to access White's other posts.

The last two witnesses the government called to testify were Phil Anderson and Michael Burks. Both were former members of the American National Socialist Workers Party ("ANSWP"), a white supremacist organization that White organized and directed. After his home was searched and his computer seized, White asked Anderson to reach out to other white supremacists to find out if they were aware of any plans to harm Juror A. White expressed concern that "someone may be trying to do something" to Juror A. Anderson reported back that his associates had not seen the Juror A post and were not aware of any plans to harm Juror A.

On October 29, **{2012 U.S. App. LEXIS 12}**2008, White was arrested. After his arrest, he sent letters to both Anderson and Burks. White requested that Anderson testify regarding "the fact that you have never done anything criminal, and do not interpret articles on Overthrow.com as criminal instructions." And White asked Burks to testify about ANSWP's "rejection of criminal activity and violent crime," and thanked him for his support. At trial, both Anderson and Burks maintained that White never instructed them to commit criminal acts and they never interpreted anything he posted on Overthrow as instructions to harm Juror A in particular.

Burks, however, acknowledged that some violent white supremacists-of whom White had knowledge and approved-might have looked to Overthrow for criminal instructions. He cited the Richard Warman post as an example. According to Burks, in addition to authoring that post, White disclosed Warman's information during a radio show and stated at that time that "this bastard has lived way too long. If somebody wants to kill him, here's his address." Burks testified that White repeated this sentiment "two or three times," and White "really didn't care **{698 F.3d 1012}** if something did happen." Burks interpreted the Warman, **{2012 U.S. App. LEXIS 13}**Wiesel, and Jena Six posts as requests that people go out and do violent things. But he expressly denied ever seeing anything on Overthrow or hearing anything from White that he understood as a call to harm Juror A.

At the close of the evidence, the district court instructed the jury that the government must prove the following elements beyond a reasonable doubt:

> First, that the defendant solicited, commanded, induced, or otherwise endeavored to persuade another person to carry out a violent federal crime. Second, with strongly corroborative circumstances, that the defendant intended for another person to commit a violent federal crime.The court also crafted a First Amendment instruction, which combined two of White's six proposed First Amendment instructions. The court explained:
>
> The First Amendment protects vehement, scathing, and offensive criticism of others; however, a solicitation, command, inducement, or endeavor to persuade another to engage in conduct constituting a violent felony as defined in these instructions is not protected by the First Amendment.
>
> If the purpose of the speaker or the tendency of his words are directed to ideas or consequences remote from the commission of **{2012 U.S. App. LEXIS 14}**the criminal act, then the speech is protected by the First Amendment.
>
> Speech is protected unless both the intent of the speaker . . . and the tendency of his words was to produce or incite an imminent lawless act.

An imminent lawless act is one that is likely to occur.

A statement which is mere political hyperbole or an expression of opinion does not constitute a solicitation.

If you find that the defendant's statements were no more than an indignant or extreme method of stating political opposition to the juror in the Matthew Hale case, then you are justified in finding that no solicitation was, in fact, made and you may find the defendant not guilty.

The jury convicted White of soliciting a violent federal crime against Juror A. White filed a post-trial motion for judgment of acquittal, requesting in the alternative a new trial. The district court ruled that the government failed to present sufficient evidence to sustain White's conviction. The court found that White's posts were not objective solicitations and nothing on the website "transformed" them into solicitous instructions. Additionally, the court found that the government failed to present adequate evidence of section 373's "strongly **{2012 U.S. App. LEXIS 15}**corroborative" circumstances, which is necessary under the statute to prove intent. Finally, the court held that because the government did not prove White's criminal intent beyond a reasonable doubt, White's posts were protected speech under the First Amendment. The district court granted White's Rule 29 motion and conditionally denied his request for a new trial. Both the government and White appeal.

II. ANALYSIS

Subsection (a) of 18 U.S.C. § 373 states, in relevant part, that:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors **{698 F.3d 1013}** to persuade such other person to engage in such conduct, shall be imprisoned . . . .

The underlying felony White allegedly solicited was harm to Juror A, which is prohibited by 18 U.S.C. § 1503 ("Whoever . . . by threats or force . . . endeavors to influence, intimidate, or impede any grand or petit juror . . . or injures any such grand or petit **{2012 U.S. App. LEXIS 16}**juror . . . on account of any verdict or indictment assented to by him, or on account of his being or having been such juror . . . shall be punished . . . ."). So to convict White of solicitation, the government had to prove beyond a reasonable doubt: (1) with "strongly corroborative" circumstances that White intended for another person to harm Juror A; and (2) that White solicited, commanded, induced, or otherwise tried to persuade the other person to carry out that crime. 18 U.S.C. § 373(a); *see also Hale*, 448 F.3d at 982 ("[T]he government had to establish (1) with 'strongly corroborative circumstances' that Hale intended for Tony Evola to arrange the murder of Judge Lefkow; and (2) that Hale solicited, commanded, induced, or otherwise tried to persuade Evola to carry out the crime.").

A. The District Court's Judgment of Acquittal Must Be Reversed Because a Reasonable Jury Could Have Convicted White of Criminal Solicitation

A judgment of acquittal must be granted when "the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Our review is *de novo. United States v. Presbitero*, 569 F.3d 691, 704 (7th Cir. 2009). Our job, however, is not to "reweigh the evidence **{2012 U.S. App. LEXIS 17}**nor second-guess the jury's credibility determinations." *United States v. Tavarez*, 626 F.3d 902, 906 (7th Cir. 2010). Rather, we view the evidence in the light most favorable to the government and ask whether *any* rational jury could have found the essential elements of the charged crime beyond a reasonable doubt. *Presbitero*, 569 F.3d at 704. "We will set aside a jury's guilty verdict only if 'the

record contains no evidence, regardless of how it is weighed,' from which a jury could have returned a conviction." *Id.* (quoting *United States v. Moses*, 513 F.3d 727, 733 (7th Cir. 2008)). But the defendant "bears a heavy burden on appeal, as he must demonstrate that no rational trier of fact could decide beyond a reasonable doubt" that he committed the offense charged. *See United States v. Cervante*, 958 F.2d 175, 178 (7th Cir. 1992).

We begin our analysis with our instructions to the district court on remand: "After the prosecution presents its case, the court may decide that a reasonable juror could not conclude that White's intent was for harm to befall Juror A, and not merely electronic or verbal harassment." *White*, 610 F.3d at 962. The government bore not only the burden of proving White's **{2012 U.S. App. LEXIS 18}**intentional solicitation, but it also had to prove beyond a reasonable doubt the objective of that solicitation: harm or the threat of harm to Juror A, not mere electronic or verbal harassment. *Id.*; *cf. United States v. Rahman*, 34 F.3d 1331, 1337 (7th Cir. 1994) (requiring the government to show with "strongly corroborative" circumstances that the defendant "intended for [the solicitee] to *extort and rob* [the victim] of $60,000," and that the defendant "solicited, commanded, induced, or otherwise tried to persuade [the solicitee] to carry out the *extortion and robbery*." (emphasis added)).

A reasonable jury could have found that the government met this burden. Whether White's post was a criminal solicitation depended on context, and the government provided ample evidence of such context from which a rational jury could have concluded that the post was an invitation for others to harm Juror A, though fortunately no one accepted the invitation. **{698 F.3d 1014}** The post attributed to Juror A characteristics intended to make the target loathed by readers of White's neo-Nazi website: a Jew, a homosexual with a black lover, and above all the foreman of the jury that had convicted Overthrow.com's hero, Matthew **{2012 U.S. App. LEXIS 19}**Hale-an anti-Semitic white supremacist-of soliciting the murder of a federal judge. And whereas White previously refrained from "republish[ing] the personal information" of others involved in the Hale trial because, as White acknowledged, "there [was] so great a potential for action linked to such posting," White expressly published Juror A's personal information, including Juror A's photograph, home address, and telephone numbers.

The post has a context created by previous posts on the website that had solicited the murder of Barack Obama, Richard Warman (a Canadian civil rights lawyer and the bane of hate groups), Elie Wiesel, and six black teenagers known as the "Jena 6." Other posts had congratulated murderers or urged the murder of enemies defined in terms that would embrace Juror A. All that was missing was an explicit solicitation to murder Juror A. But the description summarized above would have made Juror A seem to loyal readers of Overthrow.com as being at least as worthy of assassination as Richard Warman, who had been described in a post, published only a few months before the Juror A post, as "Richard, the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's **{2012 U.S. App. LEXIS 20}**Human Rights Tribunal," who "should be drug out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. It won't be hard to do, he can be found, easily, at his home, at [address]." And Juror A could be found at home just as easily because White posted Juror A's personal contact information along with the denunciation.

The "abuses" of the Canadian Human Rights Tribunal had been left unspecified in the denunciation of Warman, whereas Juror A was identified as instrumental in the conviction of the hero Hale: If "all [Juror A] was . . . was another anonymous voice in a dirty Jewish mob, screaming for blood and for the further impoverishment of the white worker . . . [he/she] would hardly be of note. But [Juror A] is something more. [He/She] was not only a juror at the nationally publicized trial of Matt Hale, but the jury foreman, and the architect of both Hale's conviction and his extreme and lengthy 40-year sentence." If Warman should be killed, then *a fortiori* Juror A should be killed, or at least injured. White didn't have to *say* harm Juror A. All he had to do and did do to invite violence was to sketch

the characteristics that made {2012 U.S. App. LEXIS 21}Juror A a mortal enemy of White's neo-Nazi movement and to publish Juror A's personal contact information.

The fact that White made an effort to discourage assassination attempts against Juror A when law enforcement moved against his website shows at a minimum that he knew he was playing with fire. But a reasonable jury could have also interpreted such evidence as intent to solicit violence against Juror A followed by a change of mind when he realized that if someone harmed Juror A he could get in trouble. There was enough evidence of White's intent to solicit the murder of, or other physical violence against, Juror A, to justify a reasonable jury in convicting him.

It's true that the posts that establish the context that makes the solicitation to violence unmistakable were not links to the posts on Overthrow.com about Juror A. That is, they were not words or phrases in blue in the posts that if clicked on by the reader would appear on the reader's computer screen. Some of the explicit solicitations to murder had been published on {698 F.3d 1015} Overthrow.com months, even years, earlier, though others were recent. The Juror A posts had appeared between September 11 and October 3, 2008, the postings {2012 U.S. App. LEXIS 22}regarding Wiesel and the Jena 6 between February 3 and September 20, 2007. But the Warman and Obama death threats were recent-March 26, 2008 and September 9, 2008 respectively-the latter threat having been posted two days before the first threat against Juror A.

Regardless of when these other still-accessible posts were technically created, a reasonable jury cannot be expected to ignore the audience, who may not have been as concerned about such chronological specifics. Readers of Overthrow.com were not casual Web browsers, but extremists molded into a community by the internet-loyal and avid readers who, whether or not they remember every specific solicitation to assassination, knew that Overthrow.com identified hateful enemies who should be assassinated. A reasonable jury could infer that members of the Party were regular readers of the Overthrow website, which prominently displayed links to the Party's own website, to its streaming radio, and to its hotline. One witness testified that he learned of the Party through Overthrow.com. White identified one reader in a post on the website as a "loyal soldier" and "fan of this website," and there is similar language in other posts. Two {2012 U.S. App. LEXIS 23}members of the party who testified made clear their familiarity with the contents of the website over a period of years. Though these members specifically denied interpreting White's post as an invitation to harm Juror A, a reasonable jury could have thought, based on White's reaching out to them for support following the search of White's home, that they were biased in White's favor and therefore skewed their testimony in order to protect a fellow supremacist.

The government also established "strongly corroborative circumstances" of White's intent to urge the killing of, or harm to, Juror A. Typically, the government will satisfy its burden of strongly corroborating the defendant's intent by introducing evidence showing that the defendant: (1) offered or promised payment or some other benefit to the person solicited; (2) threatened to punish or harm the solicitee for failing to commit the offense; (3) repeatedly solicited the commission of the offense or expressly stated his seriousness; (4) knew or believed that the person solicited had previously committed a similar offense; or (5) acquired weapons, tools or information, or made other preparations, suited for use by the solicitee. {2012 U.S. App. LEXIS 24}*United States v. Gabriel*, 810 F.2d 627, 635 (7th Cir. 1987) (citing S. Rep. No. 307, 97th Cong., 1st Sess. 183 (1982)). These factors are not exclusive or conclusive indicators of intent, *id.*, but they are representative examples of the types of circumstantial evidence that a rational jury could rely on to corroborate the defendant's intent. *See Hale*, 448 F.3d at 983 ("The existence of strongly corroborating circumstances is a question of fact for the jury." (citation omitted)).

Such circumstantial evidence, much of which is already recounted above, exists here. In posts on his

website directed at his neo-Nazi readers, White wrote that "everyone associated with the Matt Hale trial has deserved assassination for a long time;" he expressly solicited violence against Obama, Warman, Wiesel, and the Jena 6; he praised Wiesel's assailant and appreciated that White's expressed views "may have played a role in motivating" the assailant; he went to the trouble of obtaining and publishing Juror A's contact information after expressly recognizing the "great [] potential for action" linked to the posting of personal contact information of other "scumbags" involved in the Hale trial; **{698 F.3d 1016}** and after learning **{2012 U.S. App. LEXIS 25}**of the FBI's investigation he demonstrated awareness that his posts might induce readers to commit a violent act against Juror A.

Though the government did not present a specific "solicitee," it was unnecessary to do so given the very nature of the solicitation-an electronic broadcast which, a reasonable jury could conclude, was specifically designed to reach as many white supremacist readers as possible so that *someone* could kill or harm Juror A. 18 U.S.C. § 373 requires proof of intent "that another person" commit the felony, and White's desire for *any* reader to respond to his call satisfies this requirement. *See White*, 610 F.3d at 960 ("a specific person-to-person request is not required" (citing *United States v. Rahman*, 189 F.3d 88, 117-18 (2d Cir. 1999)).

White rightfully emphasizes that the First Amendment protects even speech that is loathsome. But criminal solicitations are simply not protected by the First Amendment. *See id.*; *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) ("[T]hose [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not protected by the First Amendment); *see also United States v. Williams*, 553 U.S. 285, 297, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) **{2012 U.S. App. LEXIS 26}**("Offers to engage in illegal transactions are categorically excluded from First Amendment protection." (citations omitted)). A reasonable jury could have found that White's posts constituted "a proposal to engage in illegal activity" and not merely "the abstract advocacy of illegality." *See id.* at 298-99. Accordingly, the First Amendment provides no shelter for White's criminal behavior.

For the above reasons, White's acquittal must be reversed.

B. White Is Not Entitled to a New Trial

"If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed." Fed. R. Crim. P. 29(d)(1). Upon acquitting White, the district court, pursuant to this rule, conditionally denied White's motion for a new trial, which White now challenges as an abuse of discretion. *See United States v. Wilson*, 237 F.3d 827, 831-32 (7th Cir. 2001). None of White's arguments have merit.

1. Anonymous Jury

White first argues that the district court erred in empanelling an anonymous jury. "A court weighing the need for an anonymous jury must . . . balance the defendant's **{2012 U.S. App. LEXIS 27}**interest in preserving the presumption of innocence and in conducting a useful voir dire against the jurors' interest in their own security and the public's interest in having a jury assess the defendant's guilt or innocence impartially." *United States v. Mansoori*, 304 F.3d 635, 650 (7th Cir. 2002) (citations omitted).

> Factors bearing on the propriety of an anonymous jury include the defendant's involvement in organized crime; his participation in a group with the capacity to harm jurors; whether he previously has attempted to interfere with the judicial process; the severity of the punishment that the defendant would face if convicted; and whether publicity regarding the case presents the

prospect that the jurors' names could become public and expose them to intimidation or harassment. *Id.* at 650-51. "We review the decision to use an anonymous jury only for an abuse of discretion, remaining particularly deferential to the district court's substantial **{698 F.3d 1017}** discretion in this area." *United States v. Morales*, 655 F.3d 608, 621 (7th Cir. 2011) (citations omitted). Even if the district court errs in empanelling an anonymous jury, a new trial is unwarranted where such error was harmless, such **{2012 U.S. App. LEXIS 28}**as when voir dire is "extremely thorough," *Mansoori*, 304 F.3d at 652, or when the jurors are told that their names are withheld "to prevent out-of-court contact, not out of concern for juror safety," *Morales*, 655 F.3d at 623, in combination with other factors mitigating prejudice.

White almost exclusively emphasizes the alleged lack of "some evidence indicating that intimidation is likely." *Mansoori*, 304 F.3d at 651. But such evidence could not be clearer here. It was certainly clear by the time the district court granted the government's motion to empanel an anonymous jury that White had posted the personal contact information-*of a juror*-also in a case involving a white supremacist, which resulted in harassment and intimidation. White also does not challenge the district court's finding that his target audience had previously committed acts of violence against their perceived enemies, particularly those involved in the justice system, or the fact that there had been some publicity of the case, exacerbating the risk that the jurors' identities would become public. The district court's consideration of these factors in deciding to empanel an anonymous jury was therefore not an abuse **{2012 U.S. App. LEXIS 29}**of discretion.

Though unnecessary to address, we also note the absence of harm. White argues that the jury's anonymity predisposed it to believe that White was dangerous and therefore a criminal, and emphasizes Juror 8's expression of concern about putting his name on the juror sign-in sheet. But the district court assured Juror 8 that the sign-in sheet was not public and that it could be sealed, and it confirmed that Juror 8 did not discuss his concern with any other juror. Most importantly, the court asked him whether he could still render a fair verdict, and he responded "Yes." We agree with the district court that "some concerns on the part of jurors were likely unavoidable" given the context, but the district court properly ensured that Juror 8's specific concerns would not give rise to improper bias against White by confirming that he could be impartial. The district court also told the jurors that they were kept anonymous in order to ensure a fair and impartial trial and to prevent contact with the parties and lawyers; it did not mention security as a reason. And White does not challenge the rigor of the district court's voir dire, or any other measure taken by the court to ensure **{2012 U.S. App. LEXIS 30}**him a fair trial. Accordingly, even if the district court erred in empanelling an anonymous jury, such error was harmless.

2. Admission of Rule 404(b) Evidence

Next, White challenges the district court's Rule 404(b) admission of his posts concerning people other than Juror A. Rule 404(b) prohibits the admission of evidence of "prior bad acts to show that the defendant's character is consistent with a propensity to commit the charged crime; however, it allows the court to admit evidence of a defendant's prior [acts] for other permissible, non-propensity purposes," such as intent. *United States v. Perkins*, 548 F.3d 510, 513-14 (7th Cir. 2008). In order to be admissible, such evidence must:

> (1) be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) show that the other act is similar enough and close enough in time to be relevant to the matter in issue; (3) be sufficient to support a jury finding that the defendant committed the similar act; and (4) have probative value **{698 F.3d 1018}** that is not substantially outweighed by the danger of unfair prejudice. *Id.* This court reviews a district court's Rule 404(b) admission for abuse of discretion. **{2012 U.S. App. LEXIS 31}***Id.* at 513.

Taking the last prong first, we note that the probative value of these posts was particularly strong, in that they helped the government to satisfy its burden of producing evidence of circumstances "strongly corroborative" of White's intent (and for that reason, the first prong is also satisfied). Though there was an undeniable danger that the jury would be inflamed against him when exposed to his "noxious views," *Hale*, 448 F.3d at 986, the jury had already been exposed to White's white supremacist views from other evidence that was unquestionably admissible, and White never sought a specific limiting instruction. The district court's conclusion that such danger did not "substantially outweigh" the strong probative value of these posts was therefore not an abuse of discretion. While the admission of prior posts might be improper in another electronic criminal solicitation case, we simply cannot say that the district court, in its consideration of the unique facts and evidentiary context, erred in this one. *See id.* at 985 ("We give special deference to the district court's assessment of the balance between probative value and prejudice because that court is in the best position **{2012 U.S. App. LEXIS 32}**to make such assessments.").

As for the remaining factors, though several of these posts were created a year or more before the Juror A post, they were nonetheless "close enough in time to be relevant" in that they were contemporaneously available at the time of the post about Juror A. And there is no dispute that these posts were made by White. Accordingly, the district court's Rule 404(b) admission of White's posts concerning people other than Juror A was not an abuse of discretion.

3. White's Proposed Jury Instructions Concerning the First Amendment

White finally argues that a new trial is warranted because the district court failed to include four of his proposed jury instructions concerning the First Amendment. Briefly summarized, these include: an instruction that speech is protected when it incites imminent lawless action, an instruction that speech may not be banned simply because it is unpopular, an instruction that speech scrutinizing people involved in the prosecution of crimes (e.g., jurors) is protected, and an instruction that speech approving of past violence by others is protected.

Plain error review applies when counsel fails to "object, on the record, to the judge's refusal **{2012 U.S. App. LEXIS 33}**to tender the defendant's instructions [and] clearly state the reasons for his or her objections." *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987); *see* Fed. R. Crim. P. 30(d). The government points out that after the court expressly made its instructions ruling and asked White's counsel, "Do you have any objections, by the way, . . . or are you otherwise satisfied with the instructions?", counsel responded, "Judge, I'm pretty sure-I haven't looked at the other ones, but I'm satisfied with the elements instruction that I think is the main one." The government therefore argues that no objection was made. White counters that his proposed First Amendment instructions were vigorously debated, albeit before the district court ruled on the instructions.

We have said that, so long as defense counsel "alert[s] the court and the opposing party to the specific grounds for the objection in a timely fashion," then "[t]here is no utility in requiring defense counsel to object again after the court has made its final ruling." *United States v. James*, 464 F.3d 699, 707 n.1 (7th Cir. **{698 F.3d 1019}** 2006). But in the case of the court's refusal to give a proposed instruction, some of our cases have suggested **{2012 U.S. App. LEXIS 34}**that objections must be made *after* a ruling is made, or at least after the district court indicates how it intends to rule.3 *See United States v. Irorere*, 228 F.3d 816, 825 (7th Cir. 2000) (objection not preserved where defendant "did not object on the record at the time the district court refused to give the defendant's proposed instruction"); *United States v. Green*, 779 F.2d 1313, 1320 n.6 (7th Cir. 1985) (objection not preserved where "the defendant originally argued on behalf of his proposed instruction, but offered no further comment, much less an objection" after court adopted other instructions). And counsel can simply object by stating that he or she objects and incorporates arguments previously made. *See*

United States v. Hollinger, 553 F.2d 535, 543 (7th Cir. 1977) ("While the process of stating for the record that such pre-charge objections are incorporated by reference is a somewhat pro forma exercise, we are nevertheless of the opinion that the better practice would be for counsel to see that the record affirmatively shows that counsel has renewed his specific objections by the incorporation method."); *see also United States v. Requarth*, 847 F.2d 1249, 1254 (7th Cir. 1988) **{2012 U.S. App. LEXIS 35}**("Specific objections to instructions that are distinctly made at an instructions conference may be incorporated by reference."). It would have been wise for White's counsel to have at least objected and incorporated his previous arguments by reference when the district court gave him an express opportunity to do so after it had made its ruling on the instructions. *See generally Hollinger*, 553 F.2d at 543 (district court has discretion to determine when the "distinct statement of the matter to which counsel objects and the grounds of the objections are stated" pursuant to Rule 30(d)).

In any event, we need not decide whether plain error review applies, because we find that the district court did not improperly exclude his proposed instructions even on *de novo* review. *See James*, 464 F.3d at 707 (review of district court's refusal to give proposed jury instructions is *de novo*). "To be entitled to a particular theory of defense instruction, the defendant must show the following: (1) the instruction is a correct statement of the law, (2) the evidence **{2012 U.S. App. LEXIS 36}**in the case supports the theory of defense, (3) that theory is not already part of the charge, and (4) a failure to provide the instruction would deny a fair trial." *Id.*

Excluding White's proposed jury instructions was not improper. The district court essentially incorporated White's proposed instruction about speech being protected unless it incites imminent lawless action, and adopting any additional emphasis on that point as White proposed could have been misleading because it would have suggested that the solicitation of a non-immediate crime was protected, when it is not. *See White*, 610 F.3d at 960 ("solicitations[] remain categorically outside [the First Amendment's] protection"). And the district court essentially incorporated White's proposed instruction about unpopular speech when it told the jury that the "First Amendment protects . . . offensive criticism of others," and that speech that is nothing more than an "indignant or extreme method of stating political opposition to the juror in the Matthew Hale case" was not criminal. This latter instruction also captured White's proposed instruction about the First Amendment protecting speech that scrutinizes **{698 F.3d 1020}** people involved in **{2012 U.S. App. LEXIS 37}**the prosecution of crimes, such as jurors. And White was not clearly denied a fair trial by the exclusion of his proposed instruction concerning speech approving of past violence by others. No reasonable juror would interpret the district court's instruction about what solicitation means-"an endeavor to persuade another to engage in conduct constituting a violent felony"-to mean that mere approval of past violence automatically translates into solicitation of future criminal conduct.

The district court's jury instructions concisely described the protections of the First Amendment and correctly informed the jury that criminal solicitations fall outside its protection. *See Trident Inv. Mgmt., Inc. v. Amoco Oil Co.*, 194 F.3d 772, 780 (7th Cir. 1999) ("[w]e will not find reversible error in jury instructions if, taken as a whole, they fairly and accurately inform the jury about the law"). The inclusion of White's proposed instructions would have been unduly cumulative and potentially confusing, and White points to no indication that the jury failed to appreciate the protections of the First Amendment, to the extent they were relevant in this criminal solicitation case. *See DePaepe v. Gen. Motors Corp.*, 33 F.3d 737, 743 (7th Cir. 1994) **{2012 U.S. App. LEXIS 38}**("'Inadequate jury instructions are cause for reversal only if it appears that the jury's comprehension of the issues was so misguided that one of the parties was prejudiced.'" (citation omitted)).

Therefore, the district court's exclusion of White's proposed jury instructions was not erroneous. White's argument that the cumulative impact of all the above alleged errors warrants a new trial is also without merit.

III. CONCLUSION

For the reasons stated above, the judgment of acquittal entered by the district court is Reversed, the conviction is Reinstated, and the case is Remanded for sentencing. White's cross-appeal is Dismissed.

Footnotes

1

Neither Hale nor White (nor anyone connected to either of them) was responsible for the murders.

2

White moved in limine to prevent these posts from reaching the jury, but the district court denied his request because the posts evidenced White's intent, or were direct evidence of the "strongly corroborative circumstances" required under § 373, or both.

3

See Fed. R. Crim. P. 30(b) ("The court must inform the parties before closing arguments how it intends to rule on the requested instructions.").

APPENDIX E:

779 F Supp 2d 775 (ND Ill 2011)

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM WHITE, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
779 F. Supp. 2d 775; 2011 U.S. Dist. LEXIS 42026
Case No. 08-CR-851
April 19, 2011, Decided
April 19, 2011, Filed

Editorial Information: Subsequent History

Reversed by, Remanded by, Appeal dismissed by, in part United States v. White, 698 F.3d 1005, 2012 U.S. App. LEXIS 22229 (7th Cir. Ill., Oct. 26, 2012)

Editorial Information: Prior History

United States v. White, 2011 U.S. Dist. LEXIS 42090 (N.D. Ill., Apr. 19, 2011)

Counsel For William White, Defendant: Nishay Kumar Sanan, LEAD ATTORNEY, Nishay K. Sanan, Esq., Chicago, IL; Chris M. Shepherd, Law Office of Chris Shepherd, Chicago, IL.

For USA, Plaintiff: Michael James Ferrara, William R. Hogan, Jr., LEAD ATTORNEYS, AUSA, United States Attorney's Office (NDIL), Chicago, IL; Pretrial Services; Probation Department.

Judges: LYNN ADELMAN, District Judge.

Opinion

Opinion by: LYNN ADELMAN

Opinion

{779 F. Supp. 2d 777} DECISION AND ORDER

In 2003, a jury in the Northern District of Illinois convicted white supremacist leader Matthew Hale of soliciting the murder of District Judge Joan Lefkow, who had presided over a civil case involving Hale's organization, the World Church of the Creator. The district court sentenced Hale to 480 months in prison, and the Seventh Circuit affirmed Hale's conviction and sentence on direct appeal. See United States v. Hale, 448 F.3d 971 (7th Cir. 2006).

In 2008, Hale filed a motion challenging his conviction and sentence on various grounds, including the alleged ineffectiveness of his trial counsel. Among other errors, Hale alleged that his lawyer botched jury selection, failing to challenge or strike a juror named Mark Hoffman, a gay man with an African-American partner who ended up serving **{2011 U.S. Dist. LEXIS 2}**as the jury foreperson. On September 11, 2008, after an article about Hale's motion appeared in the Chicago Sun-Times, defendant William White (hereafter "defendant"), also a white supremacist and the leader of an organization called the American National Socialist Workers Party ("ANSWP"), posted an article

about Hale's motion on his website, Overthrow.com. The article was entitled "Hale Seeks To Have Sentence Overturned," with the sub-headline "Gay Jewish Anti-Racist Led Jury." (Govt. Ex. 2 at 1.) Below the headline, defendant posted Hoffman's picture with the caption:

> Gay Jewish anti-racist Mark P Hoffmann was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON #A CHICAGO, IL 60645 with his gay black lover and his cat "homeboy". His phone number is (773)274-1215, cell phone is (773)426-5676 and his office is (847) 491-3783.

(Govt. Ex. 2 at 1.) Defendant also displayed Hoffman's picture and the above caption on the blog section of the website. (Govt. Ex. 1.) The following day, after Hoffman's employer removed the picture to which defendant had linked, defendant posted a "Mark P Hoffman Update," with the sub-heading, "Since They Blocked the **{2011 U.S. Dist. LEXIS 3}**First Photo." (Govt. Ex. 4 at 1.) The post contained the same photo and caption, with the additional text: "Note that Northwestern University blocked much of Mr. Hoffman's information after we linked to his photograph." (Govt. Ex. 4 at 1.)

Based on these posts, the government charged defendant with soliciting or otherwise endeavoring to persuade another person **{779 F. Supp. 2d 778}** to injure Hoffman based on his jury service in the Hale case, in violation of 18 U.S.C. § 373. Section 373(a) provides:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than . . .

18 U.S.C. § 373.

I dismissed the indictment on the ground that it failed to allege a solicitation and as contrary to the First Amendment, but the Seventh Circuit reversed, finding that I acted prematurely, and remanded the case for a trial at which **{2011 U.S. Dist. LEXIS 4}**the context of the posts could be considered. United States v. White, 610 F.3d 956 (7th Cir. 2010). The Seventh Circuit acknowledged that the case presented important First Amendment issues and stated that after the government produced its evidence, "the court may decide that a reasonable juror could not conclude that White's intent was for harm to befall [Hoffman], and not merely electronic or verbal harassment." Id. at 962.

I granted the government's motion to try the case to an anonymous jury, which returned a verdict of guilty. Before me now is defendant's motion for acquittal under Fed. R. Crim. P. 29. For the reasons that follow, and based on the entire trial record, I find that the government failed to present sufficient evidence to enable a reasonable juror to conclude either that defendant's posts regarding Hoffman constituted a solicitation to harm Hoffman, or that defendant intended the posts to solicit harm to Hoffman. I further find the posts protected by the First Amendment. Accordingly, I grant defendant's motion.

I. BACKGROUND AND FACTS

A. Procedural History

The government originally indicted defendant in October 2008, alleging that through the posts quoted above he solicited **{2011 U.S. Dist. LEXIS 5}**another person to harm "Juror A," the Hale jury foreperson. As circumstances "strongly corroborative" of defendant's intent that another person harm Juror A the indictment alleged that when he posted these statements defendant was aware that white supremacists, Overthrow.com's target audience, sometimes committed acts of violence against

non-whites, Jews, homosexuals, and others perceived as acting contrary to the interests of the white race. The indictment further alleged that before posting the statements, defendant displayed on Overthrow.com other posts, some of which were still available, containing the home addresses of individuals he criticized on the website, and that in some of these posts defendant expressed a desire that these individuals be harmed. The indictment then listed various examples of such posts.

On February 10, 2009, the government obtained a superseding indictment, which tracked the original indictment but also referred to additional posts allegedly corroborative of defendant's intent that Juror A be harmed, including posts regarding the 2005 murders of Judge Lefkow's husband and mother and an e-mail listing the home address of various federal prosecutors, agents, **{2011 U.S. Dist. LEXIS 6}**and others involved in the Hale matter that had been circulating among white nationalist discussion groups.

After the government filed the superseding indictment, defendant moved to transfer the case to a federal court in **{779 F. Supp. 2d 779}** Virginia (where the government had charged him, in a separate matter, with interstate transmission of threatening communications); to recuse the judges in the Northern District of Illinois based on the references to the Lefkow murders; and to disqualify the United States Attorney's Office in the Northern District of Illinois. The court granted the motion to recuse, and the case was re-assigned to me. I denied defendant's motions to transfer and to disqualify the prosecutors, and authorized defendant to file additional motions relating to the superseding indictment. Defendant subsequently filed motions to exclude certain evidence under Fed. R. Evid. 403 and 404(b), to strike surplusage from the indictment, and to dismiss the indictment on various grounds, including the First Amendment. For its part, the government moved to empanel an anonymous jury at trial.

As indicated above, I granted defendant's motion to dismiss the superseding indictment, holding that defendant's **{2011 U.S. Dist. LEXIS 7}**speech, as alleged in the indictment, was protected by the First Amendment and did not state a violation of § 373. United States v. White, 638 F. Supp. 2d 935 (N.D. Ill. 2009). I noted that defendant's posts regarding Juror A did not expressly solicit or seek to persuade another person to harm Juror A; rather, they disclosed personal information and commented on his sexual orientation and attitude toward race. I further noted that while the posts could reasonably be read as criticizing Juror A's vote to convict Hale, the Supreme Court has long held that scrutiny and criticism of people involved in criminal cases, which may include the disclosure of personal information about them, is protected by the First Amendment. Id. at 944-45 (citing The Florida Star v. B.J.F., 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989); Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979); Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962)). Finally, I concluded that the other circumstances listed in the indictment, including defendant's other posts and his awareness that white supremacists (the website's target audience) sometimes committed acts of violence against **{2011 U.S. Dist. LEXIS 8}**alleged enemies of the white race, could not transform defendant's lawful statements about Juror A into a criminal solicitation. I rejected the government's suggestion that simply because defendant had previously disclosed personal information about individuals and expressed a wish that they be harmed, his lawful statements about Juror A could be found to be a violation of § 373. Id. at 945-46.

In reversing, the Seventh Circuit found the indictment legally sufficient under Fed. R. Crim. P. 7, as it tracked the language of the charging statute, listed each element of the crime, provided corroborating circumstances of defendant's intent, and made defendant aware of the specific conduct against which he had to defend himself at trial. Id. at 959. The court then turned to the constitutional question, stating that any "potential First Amendment concern is addressed by the requirement of

proof beyond a reasonable doubt at trial, not by a dismissal at the indictment stage." Id. The court noted that in the case of a criminal solicitation, the speech - asking another to commit a crime - is the punishable act. The court explained that solicitation is an inchoate crime; the crime is complete once **{2011 U.S. Dist. LEXIS 9}**the words are spoken with the requisite intent, and no further actions from either the solicitor or solicitee are necessary. Nor, the court noted, is a specific person-to-person request required. Id. at 960. The **{779 F. Supp. 2d 780}** court further noted that a request for criminal action can be coded or implicit. Id. at 961.

The court concluded that:

> White's argument boils down to this: his posting was not a solicitation and because it is not a solicitation, it is speech deserving of First Amendment protection. The government sees the posting in the opposite light: the posting and website constitute a solicitation and as such, fall outside the parameters of First Amendment protection. This dispute turns out not to be an argument about the validity of the indictment in light of the First Amendment, but is instead a dispute over the meaning and inferences that can be drawn from the facts. The government informed us at oral argument that it has further evidence of the website's readership, audience, and the relationship between White and his followers which will show the posting was a specific request to White's followers, who understood that request and were capable and willing to act on it. This evidence is **{2011 U.S. Dist. LEXIS 10}**not laid out in the indictment and does not need to be. The existence of strongly corroborating circumstances evincing White's intent is a jury question. Of course, the First Amendment may still have a role to play at trial. Based on the full factual record, the court may decide to instruct the jury on the distinction between solicitation and advocacy, and the legal requirements imposed by the First Amendment. See, e.g., United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985).

Id. at 962 (internal citations omitted).

B. The Trial

The government's first witness was FBI Agent Sara Lopez, who provided background on the Hale case. Lopez testified that in July 1999, while assigned to a domestic terrorism unit which investigated white supremacists, she acted as the case agent in the investigation of a series of shootings committed by a member of Hale's organization, Ben Smith, in which Smith wounded nine people and killed two. All of Smith's victims were Jewish, African-American, or Asian. (Trial Tr. at 44-48.) Lopez testified that Smith belonged to the World Church of the Creator, which Hale ran out of his father's residence in East Peoria, Illinois. (Tr. at 49.)

Following Smith's death **{2011 U.S. Dist. LEXIS 11}**in a shoot-out with law enforcement, Lopez investigated Hale's group, learning that Hale obtained a law degree but had been denied a law license by the State of Illinois on June 30, 1999, days before Smith commenced his shooting spree. (Tr. at 50-51.) Lopez testified that through her experience investigating white supremacist groups she learned of the concept of "lone wolf activism," pursuant to a person is motivated to individually commit criminal acts based on something he has heard or seen. (Tr. at 52.) Lopez developed no evidence that Hale or other members of his group participated directly in the Smith shootings. (Tr. at 55.) Agents continued their investigation, however, developing a confidential informant, Tony Evola, to keep tabs on Hale. Evola, who acted as Hale's head of security, accompanying him to meetings in and out of Illinois, agreed to provide information, at times wearing a wire and recording conversations. (Tr. at 55-56.)

In May 2000, a group called the TE-TA-MA Foundation, which also called itself the Church of the Creator, filed a civil suit in the Northern District of Illinois against Hale and his organization,

requesting that Hale cease using the "Church of the {2011 U.S. Dist. LEXIS 12}Creator" name. (Tr. at 57.) In June 2002, Judge Lefkow ruled in favor of Hale, but in August 2002 the Seventh Circuit reversed and directed Judge Lefkow to {779 F. Supp. 2d 781} rule in favor of TE-TA-MA. (Tr. at 58-59.) On November 19, 2002, Judge Lefkow entered judgment against Hale. Hale refused to comply with the order, and Judge Lefkow issued an order finding him in contempt, setting a hearing for January 8, 2003. Between November 19, 2002, and January 8, 2003, Hale solicited Evola to commit a violent act against Judge Lefkow. Specifically, on December 4, Hale e-mailed Evola, asking Evola to locate Judge Lefkow's home address, and on December 5, Evola and Hale discussed "exterminat[ing] the rat," code for killing Judge Lefkow. (Tr. at 50-60, 74.) As a result of those conversations, on January 7, 2003, Hale was indicted for soliciting the murder of Judge Lefkow. (Tr. at 60-61, 74.)

Hale went to trial on April 7, 2004. One of the jurors selected was Mark Hoffman, who ended up being the foreperson. On April 26, 2004, the jury convicted Hale. (Tr. at 62.) The day Hale was convicted, defendant posted what purported to be Tony Evola's address and phone number on Overthrow.com. (Tr. at 63.) However, the address {2011 U.S. Dist. LEXIS 13}turned out to be for a different person, Antonio Evola. (Tr. at 64, 76.) No charges were filed against defendant related to that posting. (Tr. at 76-77.) Nor did the investigation reveal that defendant was involved with Hale between 2002 and 2005, or that he had anything to do with Ben Smith. (Tr. at 78-79.)

On February 28, 2005, Judge Lefkow's husband and mother were killed. (Tr. at 67.) Lopez, again acting as the case agent, investigated whether someone involved in Hale's group was responsible, but the investigation revealed that the murders were committed by a man named Bart Ross, a disgruntled litigant, and had nothing to do with Hale. (Tr. at 68, 70, 77.) Hale was sentenced in April 2005. (Tr. at 67.)

On September 11, 2008, Lopez received a call from Hoffman, after which she viewed defendant's website, Overthrow.com, where she saw the post relating to Hoffman. (Tr. at 70-72.) Lopez testified that Hoffman's identity as one of the Hale jurors was public knowledge. (Tr. at 79-80.)

The government next called FBI Special Agent Paul Messing, a member of the Richmond, Virginia Computer Analysis Response Team ("CART"), which performed computer forensic analysis on digital media seized by {2011 U.S. Dist. LEXIS 14}the FBI. (Tr. at 80-81.) Messing testified that in October 2008 he assisted in two searches of properties associated with defendant in Roanoke, Virginia, pursuant to which agents seized a variety of items, including the server/computer used to run Overthrow.com. (Tr. at 85-88.) Messing further determined that the Hoffman post was created on a computer seized from defendant's home. (Tr. at 97.) The government also presented a stipulation that, if called to testify, FBI Agent David Church would testify that on October 27, 2008, he spoke to defendant, and defendant indicated that he runs Overthrow.com and made the postings related to Mark Hoffman. (Tr. at 102-03.) Messing testified that prior to sending a copy of the seized materials to agents in Chicago he installed software called Forensic Tool Kit ("FTK"), which would enable them to search for specific articles and words on Overthrow.com. (Tr. at 99-100).

The government then called John Dziedzic, an officer with the Cook County Sheriff's Department and member of the Chicago Regional Computer Forensics Laboratory ("RCFL"). (Tr. at 103-04.) Dziedzic testified that he verified the existence of various posts/articles, marked as government {2011 U.S. Dist. LEXIS 15}exhibits 1-35 at trial, on the server processed by Special Agent Messing. (Tr. at 106-07.) He further testified that, if the server were plugged into the internet, all of those articles would be {779 F. Supp. 2d 782} available to an internet user who visited Overthrow.com. (Tr. at 107-08.)

The government next called Hoffman, who testified that he moved to Chicago with his life partner in

1999, taking a job at Northwestern University. (Tr. at 117-19.) Hoffman indicated that after the Ben Smith shootings Hale wanted to come to the Northwestern campus to speak, leading to student protests, one of which he attended in his capacity as an Associate Dean of Students. The University ultimately decided not to allow Hale to speak. (Tr. at 120-21.)

Hoffman testified that in April 2004 he was summoned for jury duty and ended up serving on the Hale trial. (Tr. at 121-22.) During voir dire, Hoffman disclosed his knowledge of Hale but indicated that he could be objective. (Tr. at 122-23.) He also disclosed his relationship with an African-American man. (Tr. at 124.) Nevertheless, he was selected as a juror. (Tr. at 125.) The next day, an article appeared in the newspaper identifying one of the Hale jurors as an Assistant **{2011 U.S. Dist. LEXIS 16}**Dean at Northwestern, which caused Hoffman to worry about his safety; he removed the sign from his door and the message on his voice-mail saying he was "out for jury duty." (Tr. at 126.) At the conclusion of the trial, which lasted about a week and a half, the jurors retired to deliberate and selected Hoffman as the foreperson. (Tr. at 127-28.) Hoffman testified that after they returned a guilty verdict, the jurors were escorted out of the building by the United States Marshal Service through a tunnel, popping up a block and a half away, so they did not have to go out the front entrance because of the press. (Tr. at 129-30.) Hoffman testified that on September 11, 2008, at about 9:30 a.m. he received a call on his cell phone from a Virginia number. (Tr. at 134, 171.) The male caller asked if he was Mark Hoffman; Hoffman said yes. The man asked if his date of birth was August 24, 1964, and Hoffman asked who was calling. The man then asked if his address was 6915 North Hamilton,1 and Hoffman asked what this was regarding. The man then asked if he was on the jury that convicted Matthew Hale. Hoffman either said he didn't remember or didn't know. The man said, "that's all I need to know" **{2011 U.S. Dist. LEXIS 17}**and hung up. (Tr. at 134, 171-73.) The caller did not threaten Hoffman. (Tr. at 173.)

Hoffman testified that he immediately contacted Northwestern security and Agent Lopez. About ½ hour later, he began receiving text messages on his cell phone, saying things like "sodomize Obama, Bomb China, kill McCain, cremated Jews, all these really upsetting things." (Tr. at 135.) Hoffman indicated that he kept receiving text messages and broke down crying because he thought someone was coming after him. (Tr. at 135.) However, he admitted that none of the texts threatened his life; none said "I'm coming to get you"; and none were even directed towards him. (Tr. at 174-75.)

After speaking to his partner, who calmed him down, Hoffman, who had become a part-time law student after the Hale trial, went to his law school library to study. At about 2:00 or 3:00 p.m., he received an e-mail from a friend stating that he could do a "reverse lookup in Google." He typed in his cell number and "all of a sudden what popped up was a picture of me on overthrow.com, a white supremacist website." (Tr. at 136.) The text messages continued for a **{2011 U.S. Dist. LEXIS 18}**few days. (Tr. at 140.) Again, though, Hoffman testified that none of the texts he saw threatened **{779 F. Supp. 2d 783}** him; nor were any threats later brought to his attention. (Tr. at 175.)

The government then introduced the three Overthrow.com posts pertaining to Hoffman. The first appeared as part of the article defendant wrote discussing Hale's post-conviction motion challenging his conviction based on Hoffman's service on the jury. The article was entitled "Hale Seeks To Have Sentence Overturned. Gay Jewish Anti-Racist Led Jury." (Govt. Ex. 2 at 1.) Below the headline and byline (9/11/2008 10:52 AM, Overthrow Staff), was a picture of Hoffman, with the caption:

> Gay Jewish anti-racist Mark P Hoffmann was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON #A CHICAGO, IL 60645 with his gay black lover and his cat "homeboy". His phone number is (773)274-1215, cell phone is (773)426-5676 and his office is (847) 491-3783.

(Govt. Ex. 2 at 1; Tr. at 142.)2 The article then proceeded to discuss Hale's motion, stating:

A white leader wrongfully imprisoned on charges of "conspiring" to kill a federal judge may have his forty year prison sentence reduced if an Illinois **{2011 U.S. Dist. LEXIS 19}**judge assigned the task of reviewing the qualifications of his jurors finds impropriety in their selection.

According to a motion put forward by Matt Hale yesterday in federal court, a gay Jewish Assistant Dean at Northwestern University, Mark P Hoffmann, who has a gay black lover and ties to professional anti-racist groups, and who also personally knew a Northwestern University basketball coach killed by Ben Smith, a follower of Hale, was allowed to sit on his jury without challenge and played a leading role in inciting both the conviction and the harsh sentence that followed.

Hoffman, who was elected jury Foreman and who led the conviction of Hale, lives in West Rogers Park with his gay black lover and his cat, "Homeboy".

The motion also asserts that Hale's counsel at trial, Thomas Anthony Durkin, failed to put on evidence that Hale had praised Judge Joan Lefkow, referred to her as an "ally" of the cause, and had referred to Jewish attorney James Amend as a "Jew rat" he would like to "exterminate", not Lefkow.

Hale also states that his attorney failed to challenge a government search warrant, stipulated to the accuracy of an inaccurate transcript, and put on evidence designed to convict **{2011 U.S. Dist. LEXIS 20}**Hale.

It has long been believed among white organizations that Durkin was bribed by Jewish groups or the federal government into deliberately sabotaging Hale's case.

{779 F. Supp. 2d 784} Hale was accused of conspiring with a federal informant, Tony Evola, to murder Judge Lefkow, who had been hearing a copyright infringement case against Hale.

However, during the trial, it came out that Hale did not conspire with Evola, but when Evola, at the instruction of the FBI, had tried to solicit the assassination of Lefkow, Hale had responded by saying that he didn't care what Evola did one way or another.

Hale has appealed and sought a reduction of his criminally long sentence since the trial, without avail, but his latest appeal may overturn the court's decision.

A cryptic article in the Chicago Sun-Times refused to identify which court Hale had filed his appeal in or any details of the case, but documents filed in Illinois District Court Civil 1:08-cv-00094 by his attorney, Clifford J. Barnard, document Hale's claims.

(Govt. Ex. 2 at 1-2.)3 The article ended with the notation:

Emailed to you by:

Overthrow.com

ATTN: Bill White, Editor

(Govt. Ex. 2 at 2.)

Hoffman testified that the first phone number listed in the caption about him (the 274 number) was his phone number when he lived at the Hamilton address, but he had moved from there about a year before. (Tr. at 143.) The cell number listed was his actual cell phone number, as was the office number listed. Regarding the balance of the caption, Hoffman indicated that he was not Jewish, and that his name was not spelled with a double "n." (Tr. at 143-44.)

On the left hand side of the Hoffman post were links to other articles referred to as "Top Articles (2008)", the first of which was entitled "Nigger Candidate Comes Out Against The Constitution." (Govt. Ex. 2 at 1; Tr. at 146.) Article number 11 on the list was entitled "Kill Richard Warman." (Govt. Ex. 2 at 2; Tr. at 146-47, 320.) Also to the left of the Hoffman post was a depiction of the cover of "National Socialist" magazine, which bore a picture of then-presidential candidate Barack Obama with crosshairs over his head and bearing the title: "Kill This Nigger? Negro Deification And the 'Obama Assassination' Myth." (Govt. **{2011 U.S. Dist. LEXIS 23}**Ex. 2 at 1; Tr. at 147.) Hoffman testified that if you clicked on the Obama picture you were taken "further back into the website to additional materials," including a portion of the "official Blog of Overthrow.com." (Tr. at 148; Govt. Ex 1.) That portion of the site also contained a post entitled, "The Juror Who Convicted Matt Hale." Below the same picture of Hoffman, the post included the same information:

> Gay Jewish anti-racist Mark P Hoffmann was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON #A CHICAGO, IL 60645 with his gay black lover and his cat "homeboy". His phone number is (773) 274-1215, cell phone is (773) 426-5676 and his office is (847) 491-3783.

(Govt. Ex. 1 at 1; Tr. at 148.) Following a post about defendant's appearance on a Columbia, South Carolina radio show (Govt. Ex. 1 at 1-2), the blog section contained **{779 F. Supp. 2d 785}** a post entitled, "'Kill This Nigger - Obama Assassination Magazine," followed by another photo of the magazine's cover and a statement that the American National Socialist Workers Party was seeking donors to help them raise money to print 20,000 copies of the new magazine:

> for distribution in certain "swing markets" **{2011 U.S. Dist. LEXIS 24}**just prior to the November election.
>
> The controversial cover for a story on "Negro Deification And The 'Obama Assassination' Myth", looks at the role of Barack Obama's radical communist politics and Jewish backers have played in making his electoral career and how he plans genocide against white working people.
>
> The article also looks into the phony "Obama assassination" conspiracies that have circulated in the Jewish press, and how major Jewish newspapers, like the Washington Post, tried to promote white supremacist opposition to Obama through planted and staged newspaper articles.
>
> The ANSWP will print 10,000 copies of a 12-page magazine if it receives $3800 by October 1st, and will print 20,000 copies of a 16-page magazine if it receives $10,000 by that time. (20,000 copies of a 12-page magazine will run about $7,000 - $7,500).
>
> Those willing to contribute to this project should send donations to:
>
> ANSWP
>
> PO Box 8601
>
> Roanoke, VA 24014
>
> As little as ten donors putting up $380 each, or twenty donors contributing $190, will make this project happen.

(Govt. Ex. 1 at 2-4.)

This section of the blog contained various other stories, followed by links to "White Blogs." (Govt. Ex. 1 at 4-11; Tr. at 149.) **{2011 U.S. Dist. LEXIS 25}**At the end was a "Recent Comments" section, which included two comments about the Hoffman post, one stating "This is why I advocate every white racist/realist/nationalist register to vote so . . ." and the other stating: "Wanna take bets on how

quick his cell phone turns off/number changes? My bet is by at least 5pm." (Govt. Ex. 1 at 11; Tr. at 150.) Hoffman testified that he initially refused to change his number but decided to do so about a week later after he got a disturbing phone call.4 (Tr. at 150, 154.)

Hoffman testified that after he saw these posts he had Northwestern remove all of his identifying information from its website. (Tr. at 150.) The school's IT people replaced Hoffman's photo with a picture of a swastika in a red circle with a slash through it, which then appeared on the Overthrow.com web page. (Tr. at 152.) However, the next day, September 12, 2008, at about 6:21 p.m., a new post **{2011 U.S. Dist. LEXIS 26}**appeared on Overthrow.com, entitled: "Mark P Hoffman Update," with the sub-heading, "Since They Blocked the First Photo." (Govt. Ex. 4 at 1.) The post contained the same photo of Hoffman, with the text:

> Gay Jewish anti-racist Mark P Hoffman was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON #A CHICAGO, IL 60645 with his gay black lover and his cat "homeboy". His phone **{779 F. Supp. 2d 786}** number is (773) 274-1215, cell phone is (773) 426-5676 and his office is (847) 491-3783.
>
> Note that Northwestern University blocked much of Mr. Hoffman's information after we linked to his photograph.

(Govt. Ex. 4 at 1; Tr. at 152-53.) On the left hand side, the site again contained links to the top articles of 2008 and a picture of the Obama magazine cover. (Govt. Ex. 4 at 1; Tr. at 153.)

The government obtained a copy of the magazine, which also contained an article about Hoffman, entitled "Hale's Jew-ror." (Govt. Ex. 5 at 4-6; Tr. at 156-58.)5 The article began:

> Mark P Hoffman is typical of the trash you might see carrying signs and throwing urine bags at a local rally against "racism," "sexism," or "homophobia". A former professor at Chicago's Northwestern University who **{2011 U.S. Dist. LEXIS 27}**lives at 6915 Hamilton #A in Chicago, Illinois, 60645, he's a homosexual Jew with a black lover and a cat named "homeboy." You can call him at (773) 274-1215, cell phone is (773) 426-5676 and his office is (847) 491-3783.
>
> If that was all that Hoffman was - another anonymous voice in a dirty Jewish mob, screaming for blood and for the further impoverishment of the white worker - he would hardly be of note. But Hoffman is something more - he was not only a juror at the nationally publicized trial of Matt Hale, but the jury foreman, and the architect of both Hale's conviction and his extreme and lengthy forty year sentence.

(Govt. Ex. 5 at 6.) The article then discussed suspicions that Hale's lawyer threw the case and may have been bribed, other issues at Hale's trial, and Hale's recent court filing challenging Hoffman's service on the jury. (Id.)

Nowhere in any of the Overthrow.com posts or the magazine article did defendant call for anyone to kill or hurt Hoffman, his life partner, or his cat. (Govt. Ex. 1, 2 & 4; Tr. at 181, 183, 185-86, 190.) Hoffman testified that from September 11, 2008, the date of the **{2011 U.S. Dist. LEXIS 28}**first post, to the date of defendant's trial, no one threatened to kill him, showed up at his house, stalked him, or physically harmed him in any way. (Tr. at 190-91.)

The government next called FBI Special Agent Maureen Mazzola, who acted as the case agent in defendant's prosecution. (Tr. at 196-97.) Mazzola testified that as part of her investigation she obtained phone records for Mark Hoffman's cell phone and the cell phone of Megan White, defendant's wife, which reflected a call from Megan White's phone to Hoffman's on September 11, 2008, at 10:34. (Tr. at 201-02.) Mazzola further testified that as part of her investigation she reviewed the Overthrow.com website in great detail. (Tr. at 202.) The government then introduced

through Mazzola various older posts, marked as exhibits 1-35,6 from the Overthrow.com server. (Tr. at 202-03.) In these posts, defendant displayed what purported to be the addresses of the "Jena Six," a group of black teens accused of beating a white boy (Govt. Ex. 8, 10), along with an article entitled "Lynch The Jena Six" (Govt. Ex. 35); discussed an attack on Holocaust survivor and author Elie Wiesel by a white supremacist named Eric Hunt and displayed addresses **{2011 U.S. Dist. LEXIS 29}**for Wiesel "in **{779 F. Supp. 2d 787}** case anyone was looking for him" (Govt. Ex. 9); excoriated Canadian civil rights lawyer Richard Warman, posting what purported to be Warman's address and stating that Warman "should be drug out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists" (Govt. Ex. 11, 18, 19); discussed the murders of Judge Lefkow's husband and mother, which defendant considered "justice" (Govt. Ex. 13-15); mentioned an e-mail allegedly containing the home addresses of other persons involved in the Hale case circulating among white nationalist discussion groups, but which defendant declined to republish because "we feel there is so great a potential for action . . . at this time" (Govt. Ex. 16); discussed an attack on the former home of an individual who allegedly cooperated with federal authorities against a white supremacist named Jake Laskey (Govt. Ex. 23); displayed the home address and phone number of newspaper columnist Leonard Pitts after Pitts wrote a column defendant did not like (Govt. Ex. 30), and which he refused to remove upon the request of Pitt's editor, stating "if some loony took the info and killed him, I wouldn't shed **{2011 U.S. Dist. LEXIS 30}**a tear" (Govt. Ex. 31).

Mazzola, who viewed Overthrow.com when it was "live" on the internet, testified that a user who visited the website on September 11, 2008 would first see the Hoffman post, exhibit 2. (Tr. at 287, 296.) However, such a user would not immediately see the other articles introduced by the government; he would have to click on a link or otherwise visit another portion of the site to reach those articles. (Tr. at 287-88, 290, 295, 301, 303.) To find a particular article, the user would have "to be either looking for it or reading every single article on the website." (Tr. at 292.) And if one clicked on a link to another article, Hoffman's information would disappear and no longer be on the same page.7 (Tr. at 297, 299, 312.) Mazzola testified that she went through a "fair number" of the articles on the site prior to trial and picked the ones that would be presented to the jury. (Tr. at 292-93.) She stated that it was not difficult for her **{2011 U.S. Dist. LEXIS 31}**to find what she was looking for on the site. (Tr. at 321.) However, in locating specific posts Mazzola had the assistance of the FTK program installed by Messing; someone visiting the website would not have such a tool. (Tr. at 326.) Nowhere on the Overthrow.com website or blog did Mazzola see any statement suggesting that Hoffman be harmed. (Tr. at 317.) Nor did the National Socialist magazine article suggest that Hoffman be harmed. (Tr. at 318.)

The government next called two former members of the ANSWP. Philip Anderson, a twenty-two **{2011 U.S. Dist. LEXIS 32}**year old resident of Peoria Heights, Illinois, testified that he left the ANSWP after defendant's arrest, about two years before trial. (Tr. at 327.) He stated that he presently worked at McDonald's and lived with his parents. (Tr. at 328.)

Anderson testified that he was eighteen when he joined defendant's organization, which he discovered through the internet, specifically the website Overthrow.com. (Tr. at 328.) In June 2007, he obtained an **{779 F. Supp. 2d 788}** application for membership either from the website or the back of the ANSWP magazine, filled it out, and sent it in. (Tr. at 329, 337; Govt. Ex. 55.) A few weeks later, defendant called him and left a voice mail stating that he wanted to talk to Anderson about activism and joining. (Tr. at 330-31.) Anderson attempted to return the call but didn't get through. He then received an e-mail from defendant or one of the other members advising him of a conference call. (Tr. at 332.) Anderson phoned in to join the conference call, which included other members, Mike Downs from Virginia, Mike Burks from Kentucky, and a woman from Texas. (Tr. at

333-34.)

Shortly thereafter, in the summer of 2007, defendant appointed the eighteen-year-old Anderson Illinois **{2011 U.S. Dist. LEXIS 33}**State leader. (Tr. at 332, 337.) Anderson testified that his responsibilities as state leader included distributing fliers and recruiting others. (Tr. at 339.) However, Anderson said that he was able to enroll just one other ANSWP member in the State of Illinois, a high school friend who also lived in Peoria Heights and with whom Anderson listened to white supremacist music. (Tr. at 333.)

Anderson testified that he personally met with defendant twice, the first time at the ANSWP Congress in Kentucky in the summer of 2007, and the second at a Hitler celebration in Chicago in April 2008. (Tr. at 334-35.) He also participated in regular, bi-weekly conference calls conducted by defendant. (Tr. at 336-37, 370.) During these calls, defendant discussed the status of the organization, finances and how the magazine was doing, and each unit leader would then provide a report on the activities in his area. (Tr. at 337, 370-71.) Defendant would also ask the participants to do certain things. However, at no time during such calls did defendant advocate violence. (Tr. at 340, 371.) Anderson testified that defendant never asked him to raise money or sell magazines; he did ask Anderson to recruit others, **{2011 U.S. Dist. LEXIS 34}**but, as noted, Anderson was able to recruit just one other person, his high school friend. (Tr. at 340.) Anderson testified that he also attended rallies including one at St. Xavier College at which Elie Wiesel spoke. (Tr. at 340.)

Anderson testified that he saw the Hoffman post on Overthrow.com in September 2008. (Tr. at 341.) He also saw the "Hale's Jew-ror" magazine article. (Tr. at 343.) Anderson testified that shortly after these posts appeared, defendant called him and explained that the FBI had searched his home and that he believed it may have something to do with the posts about the Hale juror. (Tr. at 343-44.) Defendant asked Anderson if he had heard anything about anyone wanting to do something or if someone had already done something to the Hale juror. Anderson said he hadn't. Defendant asked Anderson to call around to others involved in the white supremacist movement, including Tom McLaughlin, Steve Johnson, and Art Jones, to find out if they had heard anything. (Tr. at 344, 347.) Anderson testified that defendant sounded shaken up and worried that someone would do something to the juror. (Tr. at 344-46.) Anderson called Johnson, who indicated that he had not seen the post **{2011 U.S. Dist. LEXIS 35}**about Hoffman. (Tr. at 347, 366.) Anderson testified that he made these calls because defendant asked him to and because he was concerned about harm being done to the juror. (Tr. at 353.) Anderson reported back to defendant during a conference call a few days later. During that call, defendant described to the other participants what he had earlier told Anderson - the FBI raided his house regarding the Hale juror. (Tr. at 354.) Defendant said "someone may be trying to do something." (Tr. at 354.) Anderson told defendant he had gotten ahold of Art and Steve and neither of them knew anything **{779 F. Supp. 2d 789}** about it, but they would listen to see if they heard anything. (Tr. at 355.) Defendant said "okay." (Tr. at 356.) Defendant did not at that time sound anxious and concerned, as he had in the previous one-on-one call with Anderson. (Tr. at 356.) Shortly thereafter, Anderson learned that defendant had been arrested. (Tr. at 356.)

On October 29, 2008, about ten days after defendant's arrest, Anderson received a letter from defendant. (Tr. at 357; Govt. Ex. 53.) The letter stated:

> Phil, as you know, I've been arrested, and you are a very important witness in my case. I am writing to you to remind you to **{2011 U.S. Dist. LEXIS 36}**please stay in touch with my wife and my attorneys and let us know if your address changes or anything happens to you during the course of this trial. You will be asked to testify to the following:
>
> . . .

(1) to my phone call to you on or about Sunday, October 12th, in which I discussed the FBI search warrant with you and asked you to contact Art Jones, Steve Johnson, and John McLaughlin to discover what happened to this juror and to stop anyone, particularly the Creators, who may have any plans against him.

. . .

(2) to our phone conference on or about Wednesday, October 15, in which I repeat the same instructions and at which Dan Jones, Rudy Orr, Mike Burks, yourself and I were in attendance. . .

.

(3) you may be asked about other aspects of ANSWP activism and your reading of the overthrow.com website. The key there will be to focus on the fact that you have never done anything criminal, and do not interpret articles on overthrow.com as criminal instructions. . . .

(4) you should answer all questions truthfully, honestly, and with the fullness of the answer required. Do not guess or theorize.

(Tr. at 358-61, 369.) Asked how he interpreted this letter, Anderson answered: "I figured that's **{2011 U.S. Dist. LEXIS 37}**just what he's asking me to testify about." (Tr. at 361.) Anderson testified that he turned the letter over to the FBI, heard nothing further from defendant, and had not spoken to defendant since. (Tr. at 361.)

Anderson testified that between September 11, 2008, when the Hoffman post first appeared, and October 12, 2008, the date of the FBI search of defendant's house, defendant did not contact him about the matter. (Tr. at 364-65.) During the October 12 conversation, defendant asked Anderson to contact the Creators to find out if anything was going on; but defendant did not say that he had told them to do anything to Hoffman. (Tr. at 366.)

Anderson testified that defendant never asked him to harm anyone or do anything criminal. (Tr. at 368.) Anderson stated that he had conversations with defendant prior to the Chicago conference where Elie Wiesel spoke, which defendant did not attend, and defendant did not tell Anderson to hurt Wiesel in any way. (Tr. at 369-70.) And defendant did not tell him to harm anyone else as part of his ANSWP duties, including Mark Hoffman. (Tr. at 371.)

Anderson testified that in order to become a member of ANSWP an applicant had to have "good morals," which **{2011 U.S. Dist. LEXIS 38}**the application defined as:

not having a spouse or custody of children of non-white racial heritage within five years of the date of application;

Not having had sexual relations with a person of non-white racial heritage within five years of the date of the application;

{779 F. Supp. 2d 790} Having not been convicted, incarcerated, or under probation or parole for any infamous crime within five years of the date of application;

Having not been treated for a mental illness with delusionary, hallucinatory, paranoid, or severe abnormal personality characteristics within five years of the date of application;

Having not been treated for substance or alcohol abuse within five years of the date of application;

Having not had an abortion within five years of the date of application;

Being heterosexual and without any public display of sexual fetish or deviance;

Providing maintenance for one's children;

Being gainfully employed insofar as one is capable of being so, though this shall not exclude the right of those disabled by injury or disease to join the party;

Not being employed in an infamous profession;

And not being active in any organizations whose goals run contrary to those of the party.

(Tr. at 376-77.) The ANSWP **{2011 U.S. Dist. LEXIS 39}**also performed a criminal background check on applicants, with a portion of the $50 membership fee going to the cost of the check. (Tr. at 377.) Generally, if something showed up on the check, the person was denied membership. (Tr. at 378.)

Regarding the Hoffman post, Anderson said he first saw it on the internet on September 11, 2008; there was no prior discussion among the members about putting this information up. (Tr. at 378-79.) The post did not say to harm Hoffman, and Anderson never saw anything on the website which said to harm Hoffman. (Tr. at 379.) Regarding other articles on the site, Anderson testified that one had to click on a link to see them. If one clicked on a link on September 11, 2008, the Hoffman information would go away, and the linked article would appear. Regarding the "Kill This Nigger?" magazine cover, which appeared next to the Hoffman post, Anderson testified that he had no knowledge that any ANSWP member intended to kill Barack Obama. (Tr. at 380.) Anderson testified that this was a catchy headline, and Overthrow.com was filled with catchy headlines. (Tr. at 380-81.)

The other ex-ANSWP member, Michael Burks, testified that he was twenty-nine, lived in Louisville, **{2011 U.S. Dist. LEXIS 40}**Kentucky, and worked as a security guard. (Tr, at 381.) Burks testified that at age nineteen he joined his first white supremacist group, participating in several before joining the ANSWP, headed by defendant, in January 2007. (Tr. at 382-83.) Burks said he was aware of defendant before then, having read defendant's website, Overthrow.com, since 2005 or 2006. (Tr. at 383.) Burks testified that defendant was a member of the National Socialist Movement ("NSM") before splitting off to form the ANSWP. (Tr. at 384.)8

Burks testified that when he decided to join he first e-mailed the Kentucky leader, Michael Garrett, then e-mailed defendant. (Tr. at 384-85.) Defendant responded, asked Garrett to speak with Burks, and Burks joined after meeting with Garrett. (Tr. at 385.) In order to join, an applicant could download an application from the website, answer the questions, and send in $50; defendant would then do a background check. (Tr. at 385.) Burks testified **{779 F. Supp. 2d 791}** that after going through this process he became a member, and within two months became the Kentucky state leader, as he **{2011 U.S. Dist. LEXIS 41}**had more experience in the white power movement than Garrett. (Tr. at 385-86.) Defendant later nominated Burks the Midwest regional director, which included Kentucky, Indiana, Iowa, Ohio, and Michigan, perhaps Missouri. At most, Burks had twenty to twenty-five people under him in that position, and in some of the states in his region they had no members. (Tr. at 386.) In September 2008, the group's contact list contained 300-400 names but only twenty to thirty paid members under him. Burks was unable to say how many people total were in ANSWP, as he never saw the membership lists for the other regions. (Tr. at 387.) Burks testified that at the time of trial he was not a member of any white supremacist organization, and that his beliefs had changed within the previous year and half. (Tr. at 388.)

Burks testified that after he joined the ANSWP he spoke to defendant on a weekly basis by phone. Later, the group held bi-weekly conference calls, where members would call in; these calls would include as few as three or four, sometimes as many as ten to twelve people. (Tr. at 388.) The calls were conducted through Skype, and members would call a number in Oklahoma or Nebraska to be

connected. **{2011 U.S. Dist. LEXIS 42}**(Tr. at 389.) During the calls, defendant would start by talking about fund raising and things going on at the national level, then the regional leaders would talk about things going on in their areas. (Tr. at 390.) As a regional leader, Burks could speak to the press or field questions from state leaders. He would go to defendant with membership problems. (Tr. at 390.) Ultimately, defendant would decide what to do about the problem member. (Tr. at 391.)

Burks testified that he saw the Hoffman posts on Overthrow.com on or around September 11, 2008. (Tr. at 391-92.) Later that month, during an ANSWP conference call, which also included Phil Anderson, Dan Jones, and Michael Downs, defendant stated that he had been advised by one of his lawyers that nobody contact Hoffman. (Tr. at 393-94.) Burks testified that in October 2008, he learned from a neo-Nazi website called Vanguard News Network that defendant had been arrested. (Tr. at 394.) Sometime thereafter, defendant's wife called Burks (Tr. at 395) and in late October or early November 2008 he received a letter from defendant. (Tr. at 396; Govt. Ex. 52.) The letter began: "I want to thank you for your support and your willingness to testify **{2011 U.S. Dist. LEXIS 43}**in the face of the Government's efforts against us. Your loyalty is not forgotten." (Tr. at 398.) Despite this introduction, Burks stated that he had not agreed to testify or do anything on defendant's behalf with respect to his arrest. (Tr. at 398.) Regarding the letter's use of the plural, i.e., "the Government's efforts against us," Burks testified that he understood this to refer to the entire ANSWP, or what defendant would refer to as white working class people in general. (Tr. at 398.) Burks said that this was not the only time defendant referred to himself in the plural; sometimes on Overthrow.com the article would be attributed to "staff," but defendant told Burks that only he wrote articles for the site. (Tr. at 399.)

The letter continued:

> I do not know what my wife has told you about the case, but the key elements to which we need you to testify are as follows:
>
> (1) To the October 15th, 2008, phone conference, attended by Phil Anderson, Randy Orr, Dan Jones, yourself, and myself . . . you were at a baseball game **{779 F. Supp. 2d 792}** during the call, I do not know how much you followed, where I asked Phil how his efforts in Chicago to determine what had occurred . . . to Mr. Hoffman and to stop any **{2011 U.S. Dist. LEXIS 44}**efforts to harm him were going, and Phil responded he was working on it.

(Tr. at 399-400.) Burks testified that he did not participate in this conference call. He stated that on October 15, 2008, he was at a minor league baseball game with his dad, and while he was there Michael Downs called him and asked why he was not on the conference call; he replied that he was at a baseball game, and the conversation lasted less than thirty seconds. (Tr. at 400.) Accordingly, Burks did not hear defendant ask about Anderson's efforts in Chicago. (Tr. at 401.)

The next paragraph of the letter stated:

> if Justin Boyer is to be called as a witness against me, to our difficulties with him, . . . your desire for me to remove him, my statements to you in response, and . . . to his e-mails to you regarding the events in Lima, Ohio.

(Tr. at 401.) Burks testified that Justin Boyer was the state ANSWP leader in Ohio. (Tr. at 401.) Burks said that in 2007 and 2008 he had conversations with defendant about Boyer, in which he (Burks) told defendant that he wanted Boyer removed as state leader and kicked out of the organization. (Tr. at 402.) Burks testified that he wanted Boyer kicked out because he failed to show **{2011 U.S. Dist. LEXIS 45}**up for events and allegedly abused the mother of his children. (Tr. at 402-03.) Burks also advised defendant that Boyer was stupid, would disappear for weeks or months at a time, and that his phone was often disconnected. He told defendant more than once that he

thought Boyer was unstable. Defendant normally responded that they had nobody else suitable for a leadership role in Ohio and "just go with the flow." (Tr. at 404.) Ultimately, defendant told Burks he was going to leave Boyer in place. (Tr. at 405.)

The third paragraph of the letter indicates that Burks was to testify:

> To the general activities of the ANSWP and to your reading of overthrow.com, particularly to our rejection of criminal activity and violent crime and as to how our profiles of various personalities in the news are intended to inform and educate and not to incite violent criminal activity.

(Tr. at 405.) Asked what he understood defendant to be asking here, Burks replied: "To make it seem that everything that ANSWP was was legal, that there was no illegal activities or anything illegal in some of the writings off overthrow.com." (Tr. at 405.) Burks said that he had a different understanding of Overthrow.com. (Tr. **{2011 U.S. Dist. LEXIS 46}**at 405.) When asked to elaborate, Burks testified:

> He did a few - he also did a radio show. He wrote an article once called, Kill Richard Warman, and also on the radio show he gave out the address of Richard Warman. He said this bastard has lived way too long. If somebody wants to kill him, here's his address. And he repeated that two or three times.

(Tr. at 406.) Burks said that although the third paragraph of the letter asked him to testify that nothing on the website was intended to incite violent criminal activity, he had a different understanding:

> Q And what was that?
>
> A He really didn't care if something did happen. It would be kind of like with the, I know I'm going to say his name wrong, but Ollie Wiesel.
>
> Q Elie Wiesel?
>
> A Yes. For instance, he was attacked and Bill bragged that the person that attacked him was a loyal soldier and follower of his.
>
> **{779 F. Supp. 2d 793}** Q So is it fair to say that on certain occasions, you actually understood the defendant's words and, both spoken words and written words, on overthrow.com to actually be requests that people go out and go violent things? . . .
>
> . . .
>
> THE WITNESS: Yes
>
> Q And so that is true with Richard Warman?
>
> A That's correct.
>
> Q And it's true with Elie Wiesel?
>
> A **{2011 U.S. Dist. LEXIS 47}**Correct.
>
> Q And do you remember any other instances where you understood it to be an actual request for people to do violence?
>
> A The Jena Six case.
>
> Q Could you explain very briefly what your understanding of the Jena Six case is?
>
> A He did a radio show on that topic, too, and he said they should be brought to town square and hung and sacrificed to the pagan god Odin.

Q And did it provide addresses for the people that the defendant referred to as the Jena Six?

A Yes, he did.

(Tr. at 407-08.)

The fourth paragraph of defendant's letter to Burks stated that "in all matters you should tell the truth and fully answer questions without evasion. However, you should not guess or theorize or testify beyond your certain knowledge." (Tr. at 408.) Burks said that he could not follow the first three paragraphs and paragraph number four, because the first three paragraphs contained lies, such as him being on the conference call when he was at a baseball game, and that there was no criminal activity on Overthrow.com or defendant's radio show. (Tr. at 408-09.)

The next paragraph of the letter stated that defendant had been in discussions with Willis Carto and Eric Gliebe "regarding a merger of the ANSWP and the **{2011 U.S. Dist. LEXIS 48}**National Alliance. I think such talks should continue. Now is the time for making friends, building bridges, and seeking alliances. We should seek refuge from the storm." (Tr. at 409.) Burks testified that Willis Carto had been involved in the white power movement for many years, was in his 70s or 80s, and ran a publishing company that promoted books and other white power material. (Tr. at 409.) Burks testified that defendant normally spoke in favor of Carto, but found him a "little too old-fashioned." (Tr. at 415-16.) Defendant normally viewed Gliebe "more negatively that he did Carto." (Tr. at 416.) Defendant thought that Gliebe (and the chairman of the National Alliance before him) had caused the downfall of the Alliance. (Tr. at 416.)

Burks further testified, based on conversations with defendant or reading defendant's statements, that defendant referenced "the Order," a white supremacist organization from the early 80s, which committed numerous crimes in the Northwest. (Tr. at 417.) Defendant "referred to what they did as justice to an extent; but, you know, he didn't totally agree with how they handled certain things." (Tr. at 417.) Defendant was aware of two particular members **{2011 U.S. Dist. LEXIS 49}**of the Order, David Lane and Bruce Matthews. Lane died in prison while serving a murder sentence, and the white power movement viewed him as a hero and a martyr to the cause; Matthews was killed in a gunfight with federal agents. (Tr. at 418-19, 422.) Defendant's views of Matthews "were normally positive." (Tr. at 419.) Defendant referred to Eric Hunt - the man who attacked Elie Wiesel - "as a loyal soldier." (Tr. at 419.) Asked if defendant considered others to be martyrs to the cause, Burks said that defendant **{779 F. Supp. 2d 794}** spoke highly of Hale and Laskey. (Tr. at 423.) However, Burks also testified that Carto, Gliebe, Lane, and Matthews were not members of the ANSWP, and that defendant's articles about Elie Wiesel were written after Eric Hunt attacked Wiesel. (Tr. at 426.)

Defendant's letter concluded that Burks was to work with Dan Jones and Chris Drake, the south regional leader. However,

> Chris is taking a hiatus because of his daughter's birth. The future of the ANSWP is with you there. And remember that I have only been gone 13 days and may be released as early as November 12th. I will not be continuing overthrow.com and will be able to do little activity with the charge pending, but that does **{2011 U.S. Dist. LEXIS 50}**not mean that the world falls apart in my absence.
>
> . . .
>
> [T]rust both my wife and Robert Campbell. Robert in particular will speak for me in my absence. Help build the legal defense fund and stay in touch with my wife so that we can bring you in to testify.

. . .

[R]emember that they cannot hold me forever and that these nuisance arrests are part of the business of sticking your thumb in the eyes of the powerful. Injury is part of struggle and struggle is necessary for victory.

. . .

PS . . . keep me informed of the November 13th grand jury.

. . .

PPS . . . if I am moved to Chicago, correspond with me through my wife.

(Tr. at 420-21.) Burks testified that by the time he received this letter, he had been subpoenaed to testify before the Roanoke grand jury. (Tr. at 421.)

Burks testified that the FBI approached him in 2007 about a mail fraud matter involving Dan Jones, and that he was "a little afraid" they would also come after him. (Tr. at 428.) The FBI also approached him regarding this case, and he turned over the letter defendant wrote him without hesitation. (Tr. at 428-30.) He also admitted that the letter defendant sent him said to tell the truth "in all matters." (Tr. at 431.) The letter **{2011 U.S. Dist. LEXIS 51}**did not tell Burks to contact other people, either about a merger or to make sure nothing happened to Hoffman. (Tr. at 432.) Regarding Boyer, Burks said that Boyer told him he had been arrested for abuse, but Burks did not obtain any reports or otherwise verify that Boyer had in fact been arrested. (Tr. at 433.) As soon as the ANSWP determined that there was a warrant for Boyer's arrest, Boyer was put on a leave of absence (Tr. at 433), and he later quit on his own (Tr. at 434).

Burks testified that an applicant for membership in the ANSWP could not have a criminal background. Small, distant crimes might be overlooked, but major offenses would result in rejection. (Tr. at 438-39.) The three goals of the ANSWP were to (1) gain a healthy following, (2) obtain political position to gain power, and (3) divide the U.S. by race and deport non-whites back to their country of origin. (Tr. at 439-40.) There was no goal to harm people or commit violence. (Tr. at 440, 442.) Defendant never told Burks to harm anyone. (Tr. at 443-44.) Nor did Burks ever do anything illegal for defendant. (Tr. at 444.) During the conference calls between September 11, 2008, and October 12, 2008, defendant did not **{2011 U.S. Dist. LEXIS 52}**mention Hoffman other than the one statement about what his lawyer told him to do. (Tr. at 445.) No one posted anything on Overthrow.com saying they were going to do anything to Hoffman. Nor, during his **{779 F. Supp. 2d 795}** time as a member of the ANSWP, did Burks learn that anybody was going to hurt Hoffman. (Tr. at 445-46.)

On re-direct, Burks confirmed that the ANSWP's stated goals did not include violence.

Q Nonetheless, what was your understanding of the posting such as, Kill Richard Warman?

. . .

THE WITNESS: I don't know any other definition of the word "kill." When somebody says kill this bastard, I don't know what else that can possibly mean. When he gives out his address and says somebody should kill this bastard. I don't know how else you can interpret that to mean.

. . .

Q How else other than what?

A To actually kill him. I mean, there's only one, like I said - word "kill" means to end somebody's

life.

Q What about lynch the Jena Six?

A Same concept. Like I said, when he did the radio show, he said they should be brought to the town square and sacrificed to the god Odin.

(Tr. at 448.)

The government then rested. (Tr. at 451.) Subject to making a Rule 29 motion, defendant rested without presenting evidence **{2011 U.S. Dist. LEXIS 53}**and then argued the motion outside the presence of the jury. (Tr. at 451-52, 456.) I reserved decision and submitted the case to the jury. (Tr. at 455.)

The jury deliberated from 4:17 p.m. to 6:04 p.m. on January 4, then went home for the evening. (Tr. at 559.) It recommenced deliberation at 9:00 a.m. on January 5 and at about 11:25 a.m. sent me a note stating:

Requests from the jury. And then the first thing is the courtroom be cleared of visitors/press.

Second thing is the jurors be taken out through a different exit building.

Third, jurors have reached a verdict.

(Tr. at 563.) After soliciting the views of counsel, I advised the jury that they would be escorted out through a different exit, but that I had no authority to clear the courtroom of visitors and press. I also advised that there were no photographers or sketch artists in the courtroom. (Tr. at 565-66.)9 The jury then returned a verdict of guilty. (Tr. at 567.)

{779 F. Supp. 2d 796} II. RULE 29 STANDARD

Rule 29 provides that the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In considering a challenge to the sufficiency of the evidence, the court determines whether, viewing the evidence in the light most favorable to the government and bearing in mind that it is the exclusive function of the jury to determine the credibility of the witnesses, resolve evidentiary conflicts, and draw reasonable inferences, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See, e.g., United States v. Lewis, Nos. 09-3954, 09-3961, 10-1204, 641 F.3d 773, 2011 U.S. App. LEXIS 6879, 2011 WL 1261146, at *5 (7th Cir. Apr. 6, 2011); United States v. Allen, 383 F.3d 644, 646 (7th Cir. 2004); United States v. Payne, 102 F.3d 289, 295 (7th Cir. 1996); **{2011 U.S. Dist. LEXIS 56}**United States v. Reed, 875 F.2d 107, 111 (7th Cir. 1989).

If the court reserved ruling on a motion made during trial, it decides the motion based on the evidence at the time ruling was reserved. Charles A. Wright, Federal Practice and Procedure § 462, at 282 (2000). Here, defendant moved for acquittal at the close of the government's case, at the close of all evidence, and again after the verdict. I reserved decision on defendant's motion during the trial. However, because the defense presented no evidence the evidence relevant to all of the motions is the same.

III. DISCUSSION

In order to obtain a conviction in this case, the government had to prove two things. First, the government had to show that defendant solicited, commanded, induced or otherwise endeavored to persuade another person to commit a violent federal crime against Mark Hoffman. As I instructed the jury and as the parties agreed, whether a particular statement is a solicitation is determined by an objective standard. That is, a statement is a solicitation if a reasonable person hearing or reading it

and familiar with its context would understand it as a serious expression that another person commit a violent felony. Second, **{2011 U.S. Dist. LEXIS 57}**the government had to prove, with strongly corroborative evidence, that defendant intended that another person commit a violent federal crime against Hoffman. (Tr. at 551-54.)

After a careful review of all the evidence, I find that the government failed to present sufficient evidence from which a reasonable jury could find either element.10 I further find that defendant's statements about Hoffman were protected by the First Amendment. Accordingly, and as the Seventh Circuit acknowledged I could do if the evidence warranted it, White, 610 F.3d at 962, I will grant defendant's motion for a judgment of acquittal.

A. Whether There Was a Solicitation

The words defendant used in his three posts about Mark Hoffman did not expressly solicit anyone **{2011 U.S. Dist. LEXIS 58}**to harm Hoffman. **{779 F. Supp. 2d 797}** Indeed, they did not suggest or imply that anyone do anything to Hoffman. In its decision in this case, the Seventh Circuit noted that a solicitation can be coded or implicit and remanded for consideration of the context of the posts based on a complete presentation of the evidence. Having now heard all the evidence, I am convinced that no reasonable factfinder considering the posts and the context in which they were made could conclude, based on an objective standard, that they constitute a solicitation. If anything, the evidence presented at trial weakened the government's case, as it is now clear that (1) the context of the posts was that they were part of an article that defendant wrote on the occasion of Matthew Hale's post-conviction motion relating to Hoffman's selection as a juror, as discussed in the local media five years after Hale's conviction; (2) the posts were based entirely on publicly available information, much of it drawn from Hoffman's own bio on the Northwestern University website; and (3) there is no evidence that the posts could reasonably be regarded as a coded solicitation to harm Hoffman or that any member of defendant's organization or target **{2011 U.S. Dist. LEXIS 59}**audience read them as a coded solicitation or that defendant had any followers who were ready and willing to commit violence based on his writings.

Some of the other posts the government introduced did contain violent imagery, but most did not appear contemporaneously with the Hoffman posts. Further, many of them, read in their entirety and in context, consist of little more than inflammatory statements of opinion. And the few that cross the line show only that defendant knew how to call for violence when he wanted to; such posts cannot reasonably transform the Hoffman posts which do not solicit violence into a violation of § 373.

1. The Context of the Initial Post

On September 11, 2008, the Chicago Sun-Times printed an article discussing Hale's post-conviction motion, in which Hale challenged Hoffman's selection as a juror. In particular, Hale criticized his lawyer for allowing Hoffman - a gay man with an African-American partner employed by Northwestern University, where one of Ben Smith's shooting victims had also worked - to serve on the jury. The evidence showed that defendant created the posts containing the alleged solicitations in response to that article. In the initial post, **{2011 U.S. Dist. LEXIS 60}**defendant discussed the particulars of Hale's motion, including Hale's lawyer's failure to challenge Hoffman, a government search warrant, and an inaccurate transcript. The post also mentioned the belief "among white organizations" that Hale's lawyer threw the case.

2. The Contents of the Post

The post also contained a photo of Hoffman drawn from the Northwestern website, along with the caption the government contends constituted a solicitation. Again, that caption reads:

> Gay Jewish anti-racist Mark P Hoffmann was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON #A CHICAGO, IL 60645 with his gay black lover and his cat "homeboy". His phone number is (773)274-1215, cell phone is (773)426-5676 and his office is (847) 491-3783.

As indicated above, neither this post, nor the two virtually identical posts that followed (one on the blog portion of the site, the other appearing the next day after Northwestern blocked Hoffman's photo), contained any express threat or solicitation. Further, the evidence at trial revealed that all of the information in the post was in the public domain; indeed, **{779 F. Supp. 2d 798}** much of it came from the Northwestern website containing **{2011 U.S. Dist. LEXIS 61}**the photo.11 At the Hale trial, Hoffman revealed his sexual orientation and the race of his life partner, issues Hale also raised in his post-conviction motion. Hoffman testified that he listed his cat's name on his on-line Northwestern bio,12 along with his office and cell phone numbers. His (former) home address and phone number could be found in any number of locations, from the white pages to county records.

3. Defendant's Followers and "Target Audience"

In remanding the case, the court of appeals indicated that the government advised at oral argument that it had further evidence of the website's readership, audience, and the relationship between defendant and his **{2011 U.S. Dist. LEXIS 62}**followers, which would show that the posting was a specific request to defendant's followers, who understood that request and were capable and willing to act on it. White, 610 F.3d at 962. No such evidence was presented.

The government presented testimony from two former members of defendant's group, Anderson and Burks, neither of whom testified that they read the Hoffman posts as a solicitation.13 The government presented no testimony from anyone in defendant's "target audience" that they read the Hoffman posts as a solicitation.14 Nor did the government present any evidence that any member of defendant's audience was prepared to act on the Hoffman posts. To the contrary, the evidence showed that when Anderson contacted other members of the white supremacist community in the Chicago area, none had even seen the Hoffman post, much less made plans to act on it.

Nor did the evidence show that defendant commanded some dangerous group ready to act on his wishes. Hoffman lived in Chicago, and the evidence showed that the Illinois chapter of the ANSWP, headed by the teen-aged Anderson, had two members: Anderson and the high school friend with whom he listened to racist music. The entire Midwest region, under the command of Burks, had twenty to twenty-five members. When the group would hold nationwide conference calls, just a handful of people typically participated. Further, Burks and Anderson testified that defendant never directed that anyone be harmed. It is true that Burks testified about illegal **{2011 U.S. Dist. LEXIS 64}**activities associated with the ANSWP, but when pressed for specifics he **{779 F. Supp. 2d 799}** mentioned only defendant's inflammatory statements about Warman, Wiesel, and the Jena Six. When asked directly, Burks testified that the ANSWP's goals did not include violence, and he was never asked to engage in violence for defendant.

The government presented evidence that defendant was aware of and at times spoke favorably of others who engaged in violence, including Hunt, Laskey, and "Order" members Matthews and Lane. But none of these people were members of the ANSWP, and the government presented no evidence that they read Overthrow.com: Laskey was in prison, and Matthews and Lane were dead (as was Ben Smith). Defendant praised Hunt - and tried to take credit for inspiring him - but the evidence showed that defendant's articles about Elie Wiesel came after Hunt attacked Wiesel; the government presented no evidence of any post soliciting an attack on Wiesel before Hunt did so.15 The government also presented evidence that defendant initially resisted efforts to remove the allegedly

"unstable" Boyer from the Ohio leadership post, but the record contains no evidence that Boyer ever saw the Hoffman posts or did {2011 U.S. Dist. LEXIS 65}anything illegal on behalf of the ANSWP. To the contrary, Burks's testimony cast Boyer as an unreliable screw-up, not a soldier willing to act on defendant's words.

This leaves the possibility that some unidentified "loan wolf" might read the posts as a solicitation and act on them. But such speculation cannot take the place of proof beyond a reasonable doubt. See United States v. Perez-Melendez, 599 F.3d 31, 45 (1st Cir. 2010).

The government makes much of defendant's post-arrest request that Anderson reach out to the Creators to make sure nobody harms Hoffman. The government argues that there would be no need to ask them to stand down if he had not first asked them to stand up. But as the government agreed at trial, whether a statement is a solicitation is judged by an objective standard; {2011 U.S. Dist. LEXIS 66}further, as the Seventh Circuit stated in its opinion in this case, the crime of solicitation is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary. White, 610 F.3d at 960. Thus, what defendant did afterwards is irrelevant to the first element of this offense.16

4. The Other Posts

With no evidence that the Hoffman posts themselves solicited violence against Hoffman, or any evidence that the target audience read them as a solicitation, that leaves the other posts introduced by the government, some of which contained inflammatory statements and/or calls for violence. A careful look at these others posts shows that they cannot reasonably transform the Hoffman posts into a solicitation.17 The fact that a person has previously {779 F. Supp. 2d 800} listed an individual's name and address along with a call for violence cannot mean that any time he subsequently names a person on the same website such post is reasonably read as a solicitation of violence. Moreover, most of these posts were far {2011 U.S. Dist. LEXIS 67}removed from the Hoffman posts; only the Obama magazine cover and a link to the "Kill Richard Warman" article appeared at the same time as the Hoffman posts. Thus, a reader who did not have the benefit of the FBI's Forensic Tool Kit software would have to look around to find articles about, say, the Lefkow murders, the Jena Six, Elie Wiesel, or Leonard Pitts.

Turning first to the contemporaneous post: The "Kill This Nigger?" magazine, which appeared next to Hoffman's picture in exhibit 2, contains an inflammatory headline, but when one actually reads the article, it is clear that defendant was not advocating any harm to Barack Obama (much less to Hoffman). Rather, as indicated in the blog post (Govt. Ex. 1), defendant sought donations to print the magazine for distribution in "swing markets" prior to the presidential election. {2011 U.S. Dist. LEXIS 68}The article attacked Obama's "radical communist politics" and looked "into the phony 'Obama Assassination' conspiracies that have circulated in the Jewish press." Nowhere does it call for anyone to harm Obama. The magazine cover appears to depict crosshairs on Obama's head, but this type of imagery is not uncommon in our politics. See, e.g., David M. Herszenhorn, After Attack, Focus in Washington on Civility and Security, N.Y. Times, Jan. 10, 2011 (discussing former Republican vice-presidential candidate's web post placing crosshairs over targeted congressional districts and her call for supporters to "reload" rather than "retreat," and whether such posts contributed to the later shooting of one of the representatives so targeted); see also Brian Stelter, Spotlight From Glenn Beck Brings Threats, N.Y. Times, Jan. 22, 2011, at A14 (discussing comments on Glenn Beck's website threatening the life of Frances Fox Piven, whom Beck had called "an enemy of the Constitution"). In any event, defendant placed no crosshairs over Hoffman's photo.

Appearing beside the Hoffman post were links to various articles, including number 11 on the list - "Kill Richard Warman." (Govt. Ex. 2.) Within that {2011 U.S. Dist. LEXIS 69}article, posted on

March 26, 2008, defendant states that Warman "should be drug out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists," stating that it "won't be hard to do, he can be found, easily, at his home, at [address.]" (Govt. Ex. 11.) The article then proceeds to discuss defendant's feud with Warman, and the alleged double standard whereby calls for the death of Saddam Hussein or Osama bin Laden are permitted but calls for Warman's death are not. Defendant was not in this case charged with soliciting harm to Warman, so it is unnecessary to fully explore the context of this article. For purposes of the instant charge it suffices to note that nowhere in this article does defendant mention Hoffman or the Hale trial, or advocate that any other "enemies" be harmed, and the testimony showed that when a user clicked on the link to this article the Hoffman post disappeared from the page.

Nor did defendant mention Hoffman in any of the other posts introduced by the government, which, as indicated above, are set forth in the appendix.18 The closest **{779 F. Supp. 2d 801}** any of these prior posts came was a March 1, 2005 article about the Lefkow murders, **{2011 U.S. Dist. LEXIS 70}**wherein defendant stated (among other things) that "everyone associated with the Matt Hale trial has deserved assassination for a long time." (Govt. Ex. 14 at 1.) This is far too remote to transform the September 2008 Hoffman posts into a solicitation. Mazzola was able to find this post by using the FBI's FTK software, but an ordinary reader in September 2008 would have had to scroll through years of entries, comprising thousands of posts, to find this article. The government presented no evidence that anyone connected these posts or otherwise read both of them. Further, this post was created long before the ANSWP came into being, at a time when defendant held no leadership position in any white supremacist group.

For all of these reasons, the evidence was insufficient to establish that defendant's posts about Hoffman constituted a solicitation of a violent crime.

B. Whether the Government Presented Strong Corroboration of Intent

While the issue of defendant's intent is a slightly closer question than whether there was a solicitation, I conclude that no reasonable juror could find that the government **{2011 U.S. Dist. LEXIS 71}**proved that defendant intended the Hoffman posts as requests that someone harm Hoffman. On the issue of intent, Burks probably said it best: "[Defendant] really didn't care if something did happen." (Tr. at 407; see also Govt. Ex. 31 at 2: "Frankly, if some loony took the info and killed [Pitts], I wouldn't shed a tear.")

The government presented no direct evidence that defendant intended harm to Hoffman. Rather, the government argues that the other Overthrow.com posts it introduced demonstrated defendant's desire that harm come to his perceived enemies. That defendant may have intended others, such as Richard Warman and the Jena Six, be harmed, only shows that defendant knew how to speak directly when he wanted to. The absence of any language calling for harm to Hoffman, contrasted to what he said in these others posts - "kill" Warman, "lynch" the Jena Six - cuts strongly against a finding of intent.

The government further argues that Burks and Anderson's testimony showed that defendant was aware of white supremacists willing and capable of performing acts of violence, and his intent to reach such people to harm his enemies. But defendant's mere awareness that violent individuals exist **{2011 U.S. Dist. LEXIS 72}**does not equate to specific intent that one of those individuals act on defendant's post. Knowledge, suspicion, or even hope that something might happen to Hoffman is not enough. The government had to show, through "strongly corroborative circumstances," that defendant intended for another person to harm Hoffman.

Further, as discussed above, the Burks/Anderson testimony on this point was sparse. The

government presented no evidence that any member of defendant's organization or target audience was ready and willing to act on the Hoffman posts. The evidence instead showed that the other members of Chicago's white supremacist community Anderson contacted had not even seen the Hoffman post, much less made any plans to act on it. As also discussed above, the evidence showed that the ANSWP was hardly a fearsome, disciplined, or violent organization. And the specific, violent individuals Burks said defendant was aware of - Smith, Hunt, Laskey, Matthews, and Lane - were either dead or in prison, and so far as the record shows none of them ever read Overthrow.com at any time. Burks's testimony about former Ohio ANSWP leader Boyer **{779 F. Supp. 2d 802}** also says little about defendant's intent, as Boyer was out of **{2011 U.S. Dist. LEXIS 73}**the group at the time of the Hoffman posts and so far as the record shows never saw them and never committed any acts of violence on behalf of the ANSWP or against defendant's "enemies."

As indicated, the government had to present circumstances "strongly corroborative" of defendant's intent, and the jury was provided a list of relevant corroborating factors (Tr. at 552-53), a review of which shows that the government failed to meet its burden. First, the government presented no evidence that defendant offered or promised payment or some other benefit to anyone if he would commit the offense. Nor did the government present any evidence that defendant threatened harm or other detriment to anyone if he would not commit the offense.

Second, the government failed to show that defendant repeatedly solicited the commission of the offense, held forth at length in soliciting the commission of the offense, or made express protestations of seriousness in soliciting the commission of the offense. Defendant first displayed the Hoffman post on September 11, 2008 (on the main page and blog sections of Overthrow.com), and re-posted it on September 12, 2008, after Northwestern blocked Hoffman's photo. **{2011 U.S. Dist. LEXIS 74}**Thereafter, he said nothing further about Hoffman on the website. This hardly qualifies as a "repeated" solicitation. Nor did defendant at any time before he posted Hoffman's information discuss the matter with the ANSWP or its members (or anyone else so far as the record shows).

Defendant's communications with ANSWP members after the post included his statement during a conference call that no one was to contact Hoffman, and his request that Anderson find out if anyone was planning to harm Hoffman and, if so, to stop them. The government argues that there would be no need to prevent an attack unless one had first been provoked. But this is not strongly corroborative evidence that defendant, at the time he posted Hoffman's information, intended someone commit a crime of violence against this juror. See White, 610 F.3d at 960 (noting that the crime is complete once the words are spoken with the requisite intent). Rather, it is evidence that in October 2008, after the posts had been created, defendant came to believe that, after years of similar posts, which provoked no searches or arrests, or actual attacks on the people defendant named, something different and unforeseen may be occurring **{2011 U.S. Dist. LEXIS 75}**here. His attempts to prevent any attacks or further contact with Hoffman more likely shows that he did not want anything to happen to Hoffman than the converse. It is also important to note that this was not a situation where defendant had secretly solicited a crime, came to believe that the law may be on to him, then tried to stop the attacker from acting. Here, the alleged solicitation appeared on the world wide web for all to see; any later attempt to "take it back" would be less than ineffectual and thus very weak corroboration of intent. It is also important to note that when defendant, shortly after the Lefkow murders, came into possession of personal identifying information about people involved in the Hale case, he declined to republish it because "at this time we feel there is so great a potential for action linked to such posting that we are not going to post email and its details at this time." (Govt. Ex. 16; Tr. at 237-38.)

Third, the government presented no evidence that defendant believed or was aware that the person he solicited had previously committed similar offenses. The government, through Burks, showed that

defendant was aware that white supremacists like Smith, **{2011 U.S. Dist. LEXIS 76}**Hunt, Matthews, **{779 F. Supp. 2d 803}** and Lane committed acts of violence, but it failed to show that any of those individuals read Overthrow.com or saw the Hoffman posts. As discussed above, the violent individuals the government discussed at trial were either dead or in prison at all relevant times. The possibility that "some loony" - as defendant stated in one of the Pitts posts - might act on defendant's posts is simply insufficient to show the "strongly corroborative circumstances" the statute requires.

Fourth, the government presented no evidence that defendant acquired weapons or tools suited for use by the person solicited in the commission of the offense, or made other apparent preparations for the commission of the offense by the person solicited. And the re-posting of publicly available information about Hoffman cannot constitute the sort of "information" required to strongly corroborate defendant's intent that someone attack Hoffman on account of his jury service in the Hale case. The government argues that defendant "went to great lengths" to acquire Hoffman's information (R. 153 at 5), but the record does not support that claim; as discussed, most of the information came from Hoffman's bio **{2011 U.S. Dist. LEXIS 77}**on the Northwestern website, and all was publicly available.

For all of these reasons, the evidence was insufficient to show that defendant intended his posts to be a solicitation for someone to harm Hoffman.

C. The First Amendment

In my previous decision dismissing the indictment, I discussed in detail the First Amendment's protection of speech that allegedly incites violence. White, 638 F. Supp. 2d at 942-58. As I indicated there - and as I instructed the jury at trial - the First Amendment protects vehement, scathing, and offensive criticism of others, including individuals involved in the criminal justice system, such as Juror Hoffman. See id. at 945 (collecting cases). Speech is "protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur." Freeman, 761 F.2d at 552 (citing Brandenburg v. Ohio, 395 U.S. 444, 447-48, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)). Knowledge or belief that one's speech, even speech advocating law breaking, might cause others to act does not remove the speech from the protection of the First Amendment, unless the speech is directed to inciting imminent lawless action and is likely to produce such action. **{2011 U.S. Dist. LEXIS 78}**See Brandenburg, 395 U.S. at 447; see also Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."). Nor may the government, consistent with the First Amendment, penalize speech approving of past violence by others. Planned Parenthood of Colombia/Willamette, Inc. v. American Coalition of Life Activists (hereafter PPCW), 290 F.3d 1058, 1091 n.3 (9th Cir. 2002) (Kozinski, J., dissenting) (citing Hess v. Indiana, 414 U.S. 105, 108-09, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973); Brandenburg, 395 U.S. at 447; Edwards v. South Carolina, 372 U.S. 229, 237-38, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963); Noto v. United States, 367 U.S. 290, 297-99, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961)). And this highly protective standard applies to the type of speech at issue here - internet communications disclosing personal information about others - even when that speech may tend to alarm or intimidate the persons so identified or expose them to unwanted attention from others. See White, 638 F. Supp. 2d at 952-58 (citing United States v. Carmichael, 326 F. Supp. 2d 1267 (M.D. Ala. 2004); Sheehan v. Gregoire, 272 F. Supp. 2d 1135 **{779 F. Supp. 2d 804}** (W.D. Wash. 2003); City of Kirkland v. Sheehan, No. 01-2-09513-7, 2001 WL 1751590 (Wash. Super. Ct. May 10, 2001)).

Applying **{2011 U.S. Dist. LEXIS 79}**these standards, it is clear that defendant's posts about Hoffman are protected by the First Amendment. Even reading them within the overall context of Overthrow.com, the Hoffman posts are not directed to inciting or producing imminent lawless action.

Neither these posts - nor any of the other content on Overthrow.com - solicit, command, request, or even suggest that anyone do anything to Hoffman, presently or in the future. The fact that the posts may have singled Hoffman out for the attention of unrelated, potentially violent third parties does not remove them from the protection of the First Amendment. Sheehan, 272 F. Supp. 2d at 1150 (citing Planned Parenthood of Columbia/Willamette, Inc., 290 F.3d at 1063). Like the Sheehan court, I do not "intend to minimize the real fear of harm and intimidation" that those involved in the court system may experience based on disclosure of personal information about them.

> However, we live in a democratic society founded on fundamental constitutional principles. In this society, we do not quash fear by increasing government power, proscribing those constitutional principles, and silencing those speakers of whom the majority disapproves. Rather, **{2011 U.S. Dist. LEXIS 80}**as Justice Harlan eloquently explained, the First Amendment demands that we confront those speakers with superior ideas:
>
> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual **{2011 U.S. Dist. LEXIS 81}**distasteful abuse of a privilege, these fundamental societal values are truly implicated.

Id. at 1150 (quoting Cohen v. California, 403 U.S. 15, 24-25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971)).

Quoting from a portion of the Seventh Circuit's decision in this case, the government argues that the jury, by finding a solicitation, "removed any involvement of the First Amendment in this case." (R. 153 at 7.) But the government ignores the fact that the Seventh Circuit also stated that, after the government presented its case, the court may conclude a reasonable jury could not find that defendant's intent was for harm to befall Hoffman, as opposed to mere electronic or verbal harassment. White, 610 F.3d at 962. For the reasons stated, no reasonable jury could have found defendant's posts about Hoffman unprotected, and I conclude based on the entire trial record that as a matter of law they were covered by the First Amendment. **{779 F. Supp. 2d 805}** Therefore, defendant's Rule 29 motion must be granted.

A final note: In remanding the case, the court of appeals stated that if defendant's intent was to make a political point about sexual orientation or to facilitate opportunities for other people to make such views known to the Juror, or to permit electronic **{2011 U.S. Dist. LEXIS 82}**or verbal harassment, he would not be guilty of solicitation because he did not have the requisite intent required for the crime. White, 610 F.3d at 961-62. While it is true that the crime of solicitation is complete at the time the words are spoken with the requisite intent, and no further action need follow, it is worth noting that "electronic and verbal harassment" is exactly what happened here. Hoffman received crude text massages and one harassing phone call. But no one threatened him, and no attempts were made to harm him.

IV. CONCLUSION

THEREFORE, IT IS ORDERED that defendant's motion for acquittal is **GRANTED**.19

Dated at Milwaukee, Wisconsin, this 19th day of April, 2011.

/s/ Lynn Adelman

LYNN ADELMAN

District Judge

Footnotes

1

Hoffman testified that this was his previous address. (Tr. at 133-34.)

2

The photo displayed as part of this post came from Hoffman's bio on **{2011 U.S. Dist. LEXIS 21}**the Northwestern website. (Tr. at 152, 176.) Asked how defendant could have learned his cat's name, Hoffman testified that he wrote on the Northwestern web page that he lived in West Rogers Park with his life partner, and that they had a cat, Homeboy. (Tr. at 151, 163-64.) Hoffman also testified that the Northwestern website listed his office and cell phone numbers. (Tr. at 162, 180.) Hoffman further testified that his name and sexual orientation were publicly disclosed during the Hale trial; Hale also mentioned those facts in his post-conviction motion. (Tr. at 166-67.) Hoffman also disclosed the race of his partner during the trial. (Tr. at 167.) Hoffman could not recall whether his home phone number was listed in the white pages (or listed under his name or his partner's) (Tr. at 165), but he did testify that the press called him on his home phone after the Hale trial, indicating that the number was publicly available (Tr. at 168).

3

Hoffman testified that he later learned that an article appeared in the Chicago Sun-Times, the same day as the first Overthrow.com post about him, discussing Hale's court filing about the foreman of the jury. Specifically, the Sun-Times article indicated **{2011 U.S. Dist. LEXIS 22}**that Hale sought a new trial based on information about the foreman's sexuality and issues of race. (Tr. at 169-71.)

4

Hoffman testified that the caller left a voice mail, stating "hey, you fuckin' Jew bastard, are you too busy fucking your nigger buddy, pick up the phone." (Tr. at 154, 175.) Hoffman testified that he never received a message that someone was coming to kill or hurt him. (Tr. at 175-76.)

5

It is unclear whether the magazine was ever distributed to others. (Tr. at 284.)

6

Exhibits 1-35 were not sequential; certain numbers were skipped. (Tr. at 203.) For the reader's convenience, rather than detailing all of these posts in the body of the opinion, I have placed them in the appendix to the decision.

7

Once the user clicked on the link, the older article would appear, but the left side of the screen - where, as depicted in several of the exhibits, the "Obama assassination" magazine appeared - might remain the same (Tr. at 288); on some of the exhibits, however, the left side of the screen was different, i.e. it depicted a different cover of National Socialist magazine (Tr. at 294; e.g., Govt. Ex. 9

at 1 & 3 and Ex. 35 at 1). Mazzola further admitted that the article entitled "'Kill This Nigger?' Goes To Print," exhibit 5, which was dated October 3, 2008, was not on Overthrow.com when Hoffman's information was posted on September 11, 2008. (Tr. at 288-89.)
8

Burks testified that defendant operated Overthrow.com before the ANSWP was created in late 2006. (Tr. at 440-42.)
9

During the trial, one of the jurors also expressed concerns that his identity would be revealed. Specifically, Juror 8 alerted the court security officer ("CSO") to his concern about placing his name on the juror sign-in sheet used to track attendance and pay the jurors. **{2011 U.S. Dist. LEXIS 54}**(Tr. at 259-62.) On the agreement of the parties, I questioned Juror 8 in chambers (Tr. at 263), advising him that the sign-in form was internal and not available to the public, and asked if he was comfortable knowing that. He replied: "No, I'm not comfortable, no. I'm concerned about the names being distributed on the form and it was displayed on the table and -" (Tr. at 264.) I told the Juror that the "form is not available to the public. And if there's any concerns that you have about that, I think I have the authority to seal it so that it could be - so that no one could ever ask for it and obtain it." (Tr. at 264.) Juror 8 replied: "I would appreciate that." (Tr. at 264.) On questioning from the government, Juror 8 indicated that he did not discuss the issue with any other juror, and that no one else was present when he raised it with the CSO. (Tr. at 264-65, 266.) Defense counsel asked what Juror 8 was concerned about, and he replied: "My concerns are about my name being associated with this trial." (Tr. at 265.) Counsel asked: "Based on fear or something else?" Juror 8 replied: "Based on what the trial is about." (Tr. at 265.) I asked Juror 8, given the fact that I would seal **{2011 U.S. Dist. LEXIS 55}**the list of juror names, whether he was "in a position to render a fair verdict to both - to consider the evidence and to decide the case solely on the evidence and the law as I instruct you?" He replied: "Yes." (Tr. at 266.) Defendant moved that Juror 8 be removed and replaced with an alternate; I reserved decision at the time (Tr. at 267) and later denied the request (Tr. at 545).
10

In their post-verdict briefs, the parties focus on the second (intent) element. However, as the parties agreed, the government had to first prove that the Hoffman posts, viewed objectively and in context, constituted a solicitation. It cannot be the case, as the government seems to suggest, that proof of defendant's intent is sufficient to prove both elements of the offense. If this were so, what defendant actually said would be entirely irrelevant.
11

Hoffman testified that he is not Jewish. Ostensibly, defendant assumed that he was because of his sur-name.
12

Perhaps the most troubling component of the Hoffman posts, as they appeared in the indictment, was the reference to Hoffman's cat. What legitimate purpose would printing Hoffman's pet's name serve? What sort of investigation into Hoffman's private life did defendant perform to learn his cat's name? We now know that defendant simply pulled this name, like much of the other information, off the Northwestern website.
13

Anderson testified that the post did not say to harm Hoffman, and he never saw anything on the website that said to harm Hoffman. (Tr. at 379.) Burks testified that he did read certain other posts - about Richard Warman, the Jena Six, and Elie Wiesel - as solicitations to violence, but he did not testify that he read the Hoffman **{2011 U.S. Dist. LEXIS 63}**posts the same way.

14

Two readers of the Overthrow.com blog commented on the Hoffman post. One stated that this was why he advocated that racists register to vote, presumably so they could serve on juries. The other asked for bets on how quickly Hoffman would turn off his phone. Apparently, neither considered the post as a solicitation of violence: the first took it as a call for racists to get themselves on juries, and the second assumed that Hoffman would receive phone harassment based on the post (which, as it turned out, is exactly what happened).
15

The government asked Burks about defendant's willingness to merge with Carto and Gliebe, but nothing in the record suggests that the elderly Carto read Overthrow.com or was willing to act on what he read. Defendant and Gliebe apparently didn't get along, and defendant blamed Gliebe for the downfall of the National Alliance. And the government presented no evidence that Gliebe engaged in acts of violence.
16

Defendant's actions after he posted Hoffman's information might be relevant to his intent, an issue I discuss later in this decision.
17

It is important to note that I permitted the government to introduce these posts as evidence of defendant's intent. (R. 133 at 7-8.) Defendant was not in this case charged with soliciting violence against anyone other than Hoffman, and it would be improper to infer that defendant has a propensity to engage in threatening conduct based on these previous posts.
18

Anderson specifically testified that he saw nothing on Overthrow.com threatening Hoffman.
19

In his Rule 29 motion, defendant argues that his jury did not represent a reasonable fact-finder, as its verdict was based on fear rather than the evidence and the law. He points to Juror 8's concerns about the sign-in sheet, and the jury's note requesting that the courtroom be cleared before the verdict was read and that they be escorted out through a different exit. However, defendant cites no authority supporting the notion that this sort of claim supports entry of a judgment of acquittal (as opposed to perhaps a new trial before a different jury, see United States v. O'Neal, 180 F.3d 115, 118 (4th Cir. 1999), **{2011 U.S. Dist. LEXIS 83}**an argument defendant does not make). In any event, because I grant the motion based on the sufficiency of the evidence I need not further address this claim.
20

Unlike the other exhibits, this document indicates at the top: "This is Google's cache of . It is a snapshot of the page as it appeared on Oct 11, 2008 06:42:32 GMT. The **{2011 U.S. Dist. LEXIS 92}**current page could have changed in the meantime. Learn more" (Govt. Ex. 10 at 1; Tr. at 298.) On cross-examination, Agent Mazzola testified that she did not know if this article was deleted off the website but still available on Google. (Tr. at 299.)
21

The older posts from 2005, such as exhibits 13-16, reference "Libertarian Socialist News" rather than ANSWP on the ending byline. **{2011 U.S. Dist. LEXIS 100}**(Tr. at 303.) The ANSWP did not come into existence until 2006. (Tr. at 304, 440-42.)
22

At the bottom of the page, exhibit 15 indicates that it comes from . (Govt. Ex. 15 at 1; Tr. at 305-06.) Nowhere on the document does it say that it came from Overthrow.com. (Tr. at 306.)
23

Although this article was posted in 2007, given the "dynamic environment" of the website, the "Obama assassination" magazine appeared next to it on the print-out introduced in evidence. (Tr. at 271.)

APPENDIX F:

610 F 3d 956 (7th Cir 2010)

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. WILLIAM WHITE, Defendant-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
610 F.3d 956; 2010 U.S. App. LEXIS 13166; 38 Media L. Rep. 2045; 49 A.L.R. Fed. 2d 689
No. 09-2916
June 28, 2010, Decided
January 12, 2010, Argued

Editorial Information: Subsequent History

Rehearing denied by, Rehearing, en banc, denied by United States v. White, 2010 U.S. App. LEXIS 27487 (7th Cir. Ill., Aug. 6, 2010)On remand at, Motion denied by United States v. White, 2010 U.S. Dist. LEXIS 146264 (N.D. Ill., Dec. 16, 2010)

Editorial Information: Prior History

{2010 U.S. App. LEXIS 1}
Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08-CR-851--Lynn S. Adelman, Judge.United States v. White, 638 F. Supp. 2d 935, 2009 U.S. Dist. LEXIS 65085 (N.D. Ill., July 21, 2009)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellant: William E. Ridgway, Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Chicago, IL.
For WILLIAM WHITE, Defendant - Appellee: Nishay K. Sanan, Attorney, Chicago, IL.

Judges: Before POSNER, FLAUM, and WILLIAMS, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: A federal grand jury returned an indictment alleging that defendant solicited a juror's murder in violation of 18 U.S.C.S. § 373. The United States District Court for the Northern District of Illinois, Eastern Division, dismissed the indictment. The government appealed.A district court erred in dismissing an indictment alleging that defendant's website solicited a juror's murder in violation of 18 U.S.C.S. § 373, because the First Amendment, U.S. Const. amend. I, did not protect the internet posting if the evidence at trial showed that defendant's intent was to request that one of his readers harm the juror.

OVERVIEW: The indictment alleged that defendant's white supremacist website named a juror on the panel that convicted a white supremacist leader of soliciting the murder of a federal district court judge, and posted the juror's photo, address, and phone numbers. The district court dismissed the indictment on grounds the internet posting was protected by the First Amendment, U.S. Const. amend. I. The appellate court held that the indictment, which tracked the language of § 373, properly charged solicitation because (1) injuring a juror for rendering a verdict was a federal offense under 18 U.S.C.S. § 1503; and (2) by adding factual allegations and dates, the indictment made defendant aware of the conduct against which he would have to defend himself. The potential First Amendment concern was addressed by the requirement of proof beyond a reasonable doubt at trial, not by dismissal of the indictment. Whether the

First Amendment protected defendant's right to post personal information about the juror turned on his intent in posting that information. If the trial evidence proved his intent was to request one of his readers to harm the juror, then the crime of solicitation would be complete.

OUTCOME: The dismissal of the indictment was reversed and the case was remanded for further proceedings.

LexisNexis Headnotes

Criminal Law & Procedure > Accusatory Instruments > Indictments

An appellate court reviews questions of law in a district court's ruling on a motion to dismiss an indictment de novo.

An indictment is legally sufficient if it (1) states all the elements of the crime charged; (2) adequately informs the defendant of the nature of the charges so that he may prepare a defense; and (3) allows the defendant to plead the judgment as a bar to any future prosecutions. Fed. R. Crim. P. 7(c)(1). An indictment is reviewed on its face, regardless of the strength or weakness of the government's case. One that tracks the words of a statute to state the elements of the crime is generally acceptable, and while there must be enough factual particulars so the defendant is aware of the specific conduct at issue, the presence or absence of any particular fact is not dispositive.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > Elements

See 18 U.S.C.S. § 373(a).

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > Elements
Criminal Law & Procedure > Scienter > Specific Intent

In a solicitation prosecution, the government must establish (1) with strongly corroborative circumstances that a defendant intended for another person to commit a violent federal crime, and (2) that a defendant solicited or otherwise endeavored to persuade the other person to carry out the crime. 18 U.S.C.S. § 373(a). A list of non-exhaustive corroborating circumstances of the defendant's intent include whether the defendant repeatedly solicited the commission of the offense, the defendant's belief as to whether the person solicited had previously committed similar offenses, and whether the defendant acquired the tools or information suited for use by the person solicited.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Obstruction of Justice > Elements

Injuring a juror for rendering a verdict is a federal offense under 18 U.S.C.S. § 1503.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview

The First Amendment, U.S. Const. amend. I, removes from the government any power to restrict expression because of its message, its ideas, its subject matter, or its content. Even speech that a vast majority of its citizens believe to be false and fraught with evil consequences cannot be punished. The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Speech related to the expression and advocacy of unpopular, and even violent ideas, receives protection under Brandenburg v. Ohio.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > General Overview
Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > Elements

Although the speech protections of the First Amendment, U.S. Const. amend. I, are far-reaching, there are limits. Speech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside its protection. In the case of a criminal solicitation, the speech--asking another to commit a crime--is the punishable act. Solicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the solicitor or the solicitee are necessary. Also, a specific person-to-person request is not required. That a request for criminal action is coded or implicit does not change its characterization as a solicitation.

Opinion

{610 F.3d 957} PER CURIAM. A superseding indictment alleged that William White was the founder and content provider of a website that posted personal information about a juror who served on the Matthew Hale jury, along with postings calling for the use of violence on enemies of white supremacy. In connection with these postings, White was charged with soliciting a crime of violence in violation of 18 U.S.C. § 373. The district court dismissed the indictment, holding that White's internet posting could not give rise to a violation under § 373 because it was protected by the First Amendment. Because we find that the indictment is legally sufficient to state an offense, we reverse the district court's dismissal.

I. BACKGROUND

According to the government's indictment, William White created and maintained the **{2010 U.S. App. LEXIS 2}**website Overthrow.com. Overthrow.com was affiliated with the "American National Socialist Workers Party," an organization comprised of white supremacists who "fight for white working people" and were "disgusted with the general garbage" that the white supremacist movement had attracted. White used the website to popularize his views concerning "non-whites, Jews, homosexuals, and persons perceived by white supremacists as acting contrary to the interests of the white race." On multiple occasions, White advocated that violence be perpetrated on the "enemies" of white supremacy and praised attacks on such enemies.

A repeated topic on his website was Matthew Hale, the leader of a white supremacist organization known as the World Church of the Creator. In January 2003, Hale was charged with soliciting the murder of a federal district court judge and obstruction of justice. Hale was convicted of two counts of obstruction of justice and one count of solicitation and sentenced to 480 months' imprisonment.

Specifically related to the Matthew Hale trial, White wrote on his website in March 2005 that "everyone associated with the Matt Hale trial has deserved assassination for a long time." He **{2010 U.S. App. LEXIS 3}**also wrote a posting naming individuals involved or related in some way to Hale's conviction, such as federal agents and prosecutors and other citizens advocating for Hale's arrest, stating that any of them may be the next targets of an "unknown nationalist assassin." White did not publish their personal information in that post because he felt "there is so great a potential for action."

On September 11, 2008, White posted personal information about the foreperson of the jury in the Hale trial ("Juror A"). At the time of the posting, Overthrow.com was an active website, and as such, each link and posting was contemporaneously accessible. So, a reader of this September 11 posting would have had access to the past posts about Hale, Hale's trial, and other calls for violence against "anti-racists." The September 11 entry by White was entitled "The Juror Who Convicted Matt Hale." It identified Juror A by name, featured a color photograph of Juror A and stated the following:

> Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], **{2010 U.S. App. LEXIS 4}**cell phone **{610 F.3d 958}** [phone number], and [his/her] office is [phone number].

On the following day, White posted a follow-up entry entitled "[Juror A] Update--Since They Blocked the first photo." This posting contained all the same information as above, with the added sentence, "Note that [University A] blocked much of [Juror A's] information after we linked to [his/her] photograph."

On October 21, 2008, a federal grand jury returned a one-count indictment charging White with soliciting a crime of violence against Juror A, in violation of 18 U.S.C. § 373. On February 10, 2009, the grand jury returned a superseding indictment, maintaining the single charge of solicitation and adding additional examples of the circumstances corroborating the defendant's intent to solicit a crime of violence against Juror A. The superseding indictment charged that:

> 2. From on or about September 11, 2008, through at least on or about October 11, 2008, in the Northern District of Illinois, Eastern Division, and elsewhere, WILLIAM WHITE, defendant herein, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of force against the person **{2010 U.S. App. LEXIS 5}**of Juror A, in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicited and otherwise endeavored to persuade such other person to engage in such conduct; in that defendant solicited and otherwise endeavored to persuade another person to injure Juror A on account of a verdict assented to by Juror A, in violation of Title 18, United States Code Section 1503.
>
> 3. It was part of the solicitation, inducement, and endeavor to persuade that on or about September 11, 2008, defendant WILLIAM WHITE caused to be displayed on the front page of "Overthrow.com" a posting entitled, "The Juror Who Convicted Matt Hale."
>
> . . .
>
> 5. The above-described solicitation, inducement, and endeavor to persuade occurred under the following circumstances, among others, strongly corroborative of defendant WILLIAM WHITE's intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of force against the person of Juror A . . . .

White moved to dismiss the superseding indictment on the grounds that it violated the First

Amendment, and on July 22, 2009, the district court granted White's motion **{2010 U.S. App. LEXIS 6}**to dismiss. The government timely appealed.

II. ANALYSIS

A. Indictment Valid on Its Face

The government argues on appeal that the superseding indictment is legally sufficient to charge the offense of solicitation. We review questions of law in a district court's ruling on a motion to dismiss an indictment de novo. *United States v. Greve*, 490 F.3d 566, 570 (7th Cir. 2007); *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988). An indictment is legally sufficient if it (1) states all the elements of the crime charged; (2) adequately informs the defendant of the nature of the charges so that he may prepare a defense; and (3) allows the defendant to plead the judgment as a bar to any future prosecutions. *See* Fed. R. Crim. P. 7(c)(1); *United States v. Smith*, 230 F.3d 300, 305 (7th Cir. 2000). An indictment is reviewed on its face, regardless of the strength or weakness of the government's case. *Risk*, 843 F.2d at 1061. One that "tracks" the words of a statute to state the elements of**{610 F.3d 959}** the crime is generally acceptable, and while there must be enough factual particulars so the defendant is aware of the specific conduct at issue, the presence or absence of any particular fact is not dispositive. **{2010 U.S. App. LEXIS 7}***Smith*, 230 F.3d at 305.

Applying these standards, the indictment here is legally sufficient. Title 18 of the United States Code, section 373(a) provides, in pertinent part:

> Whoever, with intent that another person engage in conduct constituting a felony that as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct.In a solicitation prosecution, the government must establish (1) with strongly corroborative circumstances that a defendant intended for another person to commit a violent federal crime, and (2) that a defendant solicited or otherwise endeavored to persuade the other person to carry out the crime. 18 U.S.C. § 373(a); *see United States v. Hale*, 448 F.3d 971 (7th Cir. 2006). A list of non-exhaustive corroborating circumstances of the defendant's intent include whether the defendant repeatedly solicited the commission of the offense, the defendant's belief as to whether the person solicited had previously **{2010 U.S. App. LEXIS 8}**committed similar offenses, and whether the defendant acquired the tools or information suited for use by the person solicited. *United States v. Gabriel*, 810 F.2d 627, 635 (7th Cir. 1987) (citing S. REP. NO. 97-307, at 183 (1982)).

The indictment here tracks the language of the statute, and lists each element of the crime. It charges White with having the intent for another person to injure Juror A, and soliciting another person to do so. It provides corroborating circumstances of White's intent. As one example of his intent, the government points to the re-posting of the information once action was taken by Juror A's employer to remove his picture from public access. As another, the government argues that White knew the persons solicited were prone to violence. The indictment properly charges a federal solicitation because injuring a juror for rendering a verdict is a federal offense under 18 U.S.C. § 1503. Finally, by adding factual allegations and dates, it makes White aware of the specific conduct against which he will have to defend himself at trial. In judging the sufficiency of this indictment, we do not consider whether any of the charges have been established by evidence or **{2010 U.S. App. LEXIS 9}**whether the government can ultimately prove its case. *United States v. Sampson*, 371 U.S. 75, 78-79, 83 S. Ct. 173, 9 L. Ed. 2d 136 (1962); *Smith*, 230 F.3d at 305. We only look to see if an offense is sufficiently charged, and on its face, this indictment adequately performs that function.

B. No First Amendment Violation

Having found that the face of the indictment is legally sufficient to charge White with solicitation, our inquiry would ordinarily end. But the district court held that the indictment's allegations could not support a prosecution under 18 U.S.C. § 373 because White's internet posting was speech protected by the First Amendment. As detailed below, this potential First Amendment concern is addressed by the requirement of proof beyond a reasonable doubt at trial, not by a dismissal at the indictment stage.

The First Amendment removes from the government any power "to restrict expression because of its message, its ideas, its subject matter, or its content."**{610 F.3d 960}** *Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002) (quotation marks omitted). Even speech that a "vast majority of its citizens believe to be false and fraught with evil consequence[s]" cannot be punished. *Whitney v. California*, 274 U.S. 357, 374, 47 S. Ct. 641, 71 L. Ed. 1095 (1927). This **{2010 U.S. App. LEXIS 10}**broad protection ensures that the right of the Nazi party to march in front of a town hall is protected, *Collin v. Smith*, 578 F.2d 1197, 1202 (7th Cir. 1978), as is the right of an individual to express an unpopular view against the government, *Texas v. Johnson*, 491 U.S. 397, 419-20, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (holding that the First Amendment protects the expressive act of flag burning). In *Brandenburg v. Ohio*, the Supreme Court invalidated a state statute targeting people who "advocate or teach the duty, necessity, or propriety" of violence as a means of accomplishing reform, and held that even certain statements advocating violence had social value and received First Amendment protection. 395 U.S. 444, 448, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). At issue were Ku Klux Klan members' statements such as, "we're not a revengent organization, but if our President . . . continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. The Supreme Court held that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to inciting or producing imminent lawless **{2010 U.S. App. LEXIS 11}**action and is likely to incite or produce such action." *Id.* at 447. Speech related to the expression and advocacy of unpopular, and even violent ideas, receives *Brandenburg* protection.

Although First Amendment speech protections are far-reaching, there are limits. Speech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside its protection. *United States v. Williams*, 553 U.S. 285, 297, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."). This type of speech "brigaded with action" becomes an overt act or conduct that can be regulated. *Brandenburg*, 395 U.S. at 456 (Black, J., concurring). For this reason, a state cannot forbid individuals from burning crosses to express an opinion, but it can forbid individuals from burning crosses with the intent to intimidate others. *See Virginia v. Black*, 538 U.S. 343, 365-66, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). In the case of a criminal solicitation, the speech--asking another to commit a crime--is the punishable act. Solicitation is an inchoate crime; the crime is complete once the words are spoken with the requisite intent, and no further actions from either the **{2010 U.S. App. LEXIS 12}**solicitor or the solicitee are necessary. *See* Wayne R. LaFave, 2 *Substantative Criminal Law* § 11.1 (2d ed. 2009). Also, a specific person-to-person request is not required. *United States v. Rahman*, 189 F.3d 88, 117-18 (2d Cir. 1999).

For example, in *United States v. Sattar*, a district court, without requiring any evidence or allegations of further acts, found sufficient an indictment where the alleged solicitation consisted of a generally issued fatwa urging Muslims to "fight the Jews and to kill them wherever they are." 272 F. Supp. 2d 348, 373-74 (S.D.N.Y. 2003). In *United States v. Rahman*, Rahman was convicted of soliciting

violence based on his public speeches calling for an attack on military installations and the murder of an Egyptian president. 189 F.3d at 117. Furthermore, that a request for criminal action is coded or implicit does not change its characterization as a solicitation. In**{610 F.3d 961}** *United States v. Hale*, this court held sufficient evidence existed to uphold a solicitation conviction where Hale never explicitly asked his chief enforcer to do anything. He simply asked his chief enforcer to locate a judge's home address and made statements such as "that information's been pro-, **{2010 U.S. App. LEXIS 13}**provided. If you wish to, ah, do anything yourself, you can, you know?" 448 F.3d 971, 979 (7th Cir. 2006). Hale's multiple attempts to distance himself from any illegal actions with statements such as "I'm gonna fight within the law" and "I can't take any steps to further anything illegal," were not enough to overturn the solicitation conviction. *Id.* We held that a rational jury could have inferred his true intention from the evidence, regardless of any coded or disguised language. *Id.* at 984-85.

So, whether or not the First Amendment protects White's right to post personal information about Juror A first turns on his intent in posting that information. If White's intent in posting Juror A's personal information was to request that one of his readers harm Juror A, then the crime of solicitation would be complete. No act needed to follow, and no harm needed to befall Juror A. If, on the other hand, White's intent was to make a political point about sexual orientation or to facilitate opportunities for other people to make such views known to Juror A, then he would not be guilty of solicitation because he did not have the requisite intent required for the crime.

White argues that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), **{2010 U.S. App. LEXIS 14}**stands for the proposition that the only permissible view of his posting is to see it as a constitutionally protected expression and subject to the *Brandenburg* test. In *Claiborne*, black citizens of Claiborne County, Mississippi, sent a letter to white merchants with a list of particularized demands for racial equality and integration. After receiving an unsatisfactory response, they began a boycott that lasted years. Several of the white merchants sued members of the boycott to recover losses and enjoin further boycott activity, and won. The Mississippi Supreme Court upheld liability as to 92 participants by finding that members had agreed to use force, violence and threats to ensure compliance with the boycott, but the Supreme Court reversed, holding that an individual could not be held liable for his mere association with an organization whose members engage in illegal acts. *Id.* at 920. *Claiborne* primarily focused on the constitutionality of group-based liability, but it also concluded that Charles Evers, the field secretary of the NAACP and chief proponent of the boycott at the time, could not be held liable based on his "emotionally charged rhetoric." *Id.* at 928. In speeches given **{2010 U.S. App. LEXIS 15}**before and during the boycott, Evers stated that there would be "discipline" coming to those who did not participate in the boycott, and that any "uncle toms" would "have their necks broken." *Id.* at 900 n.28.

White reads too much into *Claiborne*. A careful reading of the Court's analysis of Evers's liability does not provide the support White believes it does. Given that the speeches were mainly an "impassioned plea" for unity, support, and nonviolent participation in the boycott, and the few choice phrases were the only example of threatening language, the Court found there was no evidence that Evers authorized violence or threatened anyone. In this context, the speeches did not exceed the bounds of *Brandenburg*-protected advocacy and could not be the basis of liability. But, the Supreme Court acknowledged that there would be no constitutional problem with imposing liability for losses caused by violence and threats of **{610 F.3d 962}** violence, *id.* at 916, and that if there was evidence of such "wrongful conduct" the speeches could be used to corroborate that evidence, *id.* at 929.

White's argument boils down to this: his posting was not a solicitation and because it is not a solicitation, it is speech **{2010 U.S. App. LEXIS 16}**deserving of First Amendment protection. The government sees the posting in the opposite light: the posting and website constitute a solicitation and as such, fall outside the parameters of First Amendment protection. This dispute turns out not to

be an argument about the validity of the indictment in light of the First Amendment, but is instead a dispute over the meaning and inferences that can be drawn from the facts. The government informed us at oral argument that it has further evidence of the website's readership, audience, and the relationship between White and his followers which will show the posting was a specific request to White's followers, who understood that request and were capable and willing to act on it. This evidence is not laid out in the indictment and does not need to be. *Sampson*, 371 U.S. at 78-79; *Smith*, 230 F.3d at 306. The existence of strongly corroborating circumstances evincing White's intent is a jury question. *Hale*, 448 F.3d at 983. Of course, the First Amendment may still have a role to play at trial. Based on the full factual record, the court may decide to instruct the jury on the distinction between solicitation and advocacy, and the legal requirements **{2010 U.S. App. LEXIS 17}**imposed by the First Amendment. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). The government has the burden to prove, beyond a reasonable doubt, that White intended, through his posting of Juror A's personal information, to request someone else to harm Juror A. After the prosecution presents its case, the court may decide that a reasonable juror could not conclude that White's intent was for harm to befall Juror A, and not merely electronic or verbal harassment. But, this is not a question to be decided now. We have no idea what evidence or testimony will be produced at trial. The government has laid out the elements of the crime and the statute that White is accused of violating, along with some specific factual allegations for support, and that is all it is required to do. The question of White's intent and the inferences that can be drawn from the facts are for a jury to decide, as the indictment is adequate to charge the crime of solicitation. The indictment is legally sufficient and should not have been dismissed.

III. CONCLUSION

We REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX F:

638 F Supp 935 (ND Ill 2009)

UNITED STATES OF AMERICA, Plaintiff, v. WILLIAM WHITE, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
638 F. Supp. 2d 935; 2009 U.S. Dist. LEXIS 65085
Case No. 08-CR-851
July 21, 2009, Decided

Editorial Information: Subsequent History

Reversed by, Remanded by United States v. White, 610 F.3d 956, 2010 U.S. App. LEXIS 13166 (June 28, 2010)Habeas corpus proceeding at White v. True, 2017 U.S. Dist. LEXIS 207455 (S.D. Ill., Dec. 15, 2017)Writ of habeas corpus dismissed White v. True, 2018 U.S. Dist. LEXIS 118134, 2018 WL 3427783 (S.D. Ill., July 16, 2018)

Editorial Information: Prior History

Te-Ta-Ma Truth Foundation-Family of URI, Inc. v. World Church of the Creator, 2005 U.S. Dist. LEXIS 10363 (N.D. Ill., May 23, 2005)United States v. Hale, 448 F.3d 971, 2006 U.S. App. LEXIS 13318 (7th Cir. Ill., May 30, 2006)

Counsel For **William White**, Defendant (1): Nishay Kumar Sanan, LEAD ATTORNEY, Nishay K. Sanan, Esq., Chicago, IL; Chris M. Shepherd, Law Office of Chris Shepherd, Chicago, IL.

For USA, Plaintiff: Michael James Ferrara,William R. Hogan, Jr., LEAD ATTORNEYS, AUSA, United States Attorney's Office (NDIL), Chicago, IL; Pretrial Services.

Judges: LYNN ADELMAN, District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: The government charged defendant with violating 18 U.S.C.S. § 373 by soliciting another person to harm the foreperson of the federal jury that convicted white supremacist leader Matthew Hale. Defendant moved to dismiss the indictment.Indictment charging defendant with violating 18 U.S.C.S. § 373 by soliciting another person to harm a former juror was dismissed because defendant's speech on his website, while intimidating and distasteful, contained no threat, did not solicit violence, and therefore was protected by the First Amendment and did not state a violation of § 373.

OVERVIEW: Defendant operated a website on which he expressed white supremacy, anti-Semitic, and sometimes violent views. He was indicted on a charge of violating 18 U.S.C.S. § 373 for soliciting or otherwise endeavored to persuade another person to harm the jury foreperson in a high-profile case in which an individual was convicted of soliciting the murder of a federal district court judge. Defendant moved to dismiss the indictment, arguing that the indictment did not charge a punishable offense. The postings at issue disclosed personal information about the juror, including the juror's home address, and commented on the juror's sexual orientation and attitude toward race. However, the court concluded that the postings contained no threat and did not solicit violence. The alleged corroborating circumstances set forth in the indictment were insufficient to transform the postings into a solicitation of violence and also

failed to provide the strong corroboration necessary for a lawful prosecution under § 373 and the First Amendment. Noting that recent case law supported the conclusion that the indictment did not charge a punishable offense, the court ordered the indictment dismissed.

OUTCOME: The court granted defendant's motion to dismiss the indictment.

LexisNexis Headnotes

Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > General Overview

See 18 U.S.C.S. § 373.

Criminal Law & Procedure > Accusatory Instruments > Dismissal

Under Fed. R. Crim. P. 12(b)(3)(B), a defendant may move to dismiss an indictment for failure to state an offense. A defendant may likewise move to dismiss an indictment when it seeks to punish speech protected by the First Amendment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview
Criminal Law & Procedure > Accusatory Instruments > Dismissal

When the government prosecutes a person based on the content of his speech, the inquiry into the sufficiency of the indictment is often intertwined with the First Amendment analysis.

In ruling on a motion to dismiss an indictment, the court focuses on the allegations in the indictment, which it must accept as true. While the indictment should be tested solely by its sufficiency to charge an offense, regardless of the strength or weakness of the government's case, if the allegations in the indictment are insufficient to state a violation of the governing statute, the court may dismiss.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview

The First Amendment provides that Congress shall make no law abridging the freedom of speech. In a democratic society, it is axiomatic that the Amendment's protections are not limited to the genteel, the enlightened or the tasteful. Thus, the government may not ban speech that even a vast majority of its citizens believes to be false and fraught with evil consequence.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

The First Amendment's protections are not absolute and legislative bodies may proscribe certain categories of expression. Such categories include advocacy of the use of force or of violation of the law where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, "true threats," i.e. those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and offers to engage in illegal transactions. There is an important distinction between a

proposal to engage in illegal activity and the abstract advocacy of illegality.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > General Overview

Scrutiny and criticism of people involved in the investigation and prosecution of crimes is protected by the First Amendment. Such scrutiny may involve disclosure of information about the people involved.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Knowledge or belief that one's speech, even speech advocating law breaking, may cause others to act does not remove the speech from the protection of the First Amendment, unless the speech is directed to inciting imminent lawless action and is likely to produce such action. The approval of past violence by others cannot be made illegal consistent with the First Amendment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

Even when the circumstances surrounding a disclosure are intimidating, the speech may not be punished consistent with the First Amendment unless it is directed to inciting imminent lawless action and likely to produce such action.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > General Overview

18 U.S.C.S. § 373, construed consistently with the First Amendment and congressional intent, does not criminalize general calls to action.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action
Criminal Law & Procedure > Criminal Offenses > Crimes Against Persons > General Overview

In order to ensure that 18 U.S.C.S. § 373 only punishes speech that is intended to incite imminent lawless action and is likely to produce such action, as required by the First Amendment and contemplated by Congress, courts considering solicitation cases should construe the statute to require (1) that the solicitation be communicated to a specific person or group of persons, rather than to a general audience or the public at large, and/or (2) that the corroborating circumstances relate specifically to the alleged solicitation at issue and not consist of unrelated threats, general calls for violence, and other intemperate statements.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Advocacy of Illegal Action

Brandenburg stands for the proposition that, as a general rule, the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation. To fall outside the First Amendment's protection, advocacy of violence must be directed to inciting or producing imminent lawless action and be likely to incite or produce such action.

Computer & Internet Law > Censorship > First Amendment Protections

The Supreme Court has held that speech on the internet is subject to no greater or lesser constitutional protection than speech in more traditional media. The general rule in the case law is that speech that is broadcast to a broad audience is less likely to be a true threat, not more.

Computer & Internet Law > Criminal Offenses > General Overview
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

The posting of personal information about an individual involved in a judicial proceeding, even under circumstances that are intimidating or unsettling, cannot, absent a true threat or an incitement to imminent lawless action, be criminalized consistent with the First Amendment.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Political Speech
Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Speech > Scope of Freedom

In the absence of a credible specific threat of harm, the publication of lawfully obtained addresses and telephone numbers, while certainly unwelcome to those who had desired a greater degree of anonymity, is traditionally viewed as having the ability to promote political speech. Publication may arguably expose wrongdoers and/or facilitate peaceful picketing of homes or worksites and render other communication possible.

Opinion

Opinion by: LYNN ADELMAN

Opinion

{638 F. Supp. 2d 937} ***DECISION AND ORDER***

The government charged defendant **William White** with violating 18 U.S.C. § 373 by soliciting another person to harm the foreperson of the federal jury that convicted white supremacist leader Matthew Hale. 1 Defendant now moves to dismiss the indictment, to strike surplusage, and to vacate the orders of the judge, since recused, who was originally assigned to the case. I conclude that I must dismiss the indictment. I will, therefore, not address defendant's other motions.

I. BACKGROUND

In 2003, a jury in the Northern District of Illinois convicted Hale of soliciting the murder of District Judge Joan Lefkow, who had presided over a civil case involving Hale's organization. *See TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator,* 392 F.3d 248 (7th Cir. 2004). Hale was sentenced to 480 months in prison. *See United States v. Hale,* 448 F.3d 971 (7th Cir. 2006).

On October 21, 2008, the government indicted defendant, alleging that on his website, Overthrow.com, he solicited or otherwise endeavored to persuade another person to harm "Juror A," the Hale jury foreperson. Specifically, the government alleged that on or about September 11, 2008,

defendant displayed on the front page of his website a post entitled, "The Juror Who Convicted Matt Hale." The post read:

> Gay anti-racist [Juror A] was a juror who played a key role **{2009 U.S. Dist. LEXIS 3}**in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].(Indictment [R. 5] at 2 P3, alterations in original.) The post did not expressly advocate that Juror A be harmed.

The indictment further alleged that on September 12, 2008, defendant displayed on the front page of his website a post entitled: "[Juror A] Update -- Since They Blocked the first photo" and stating:

> Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number]. Note that [University A] blocked much of [Juror A's] information after we linked to [his/her] photograph.(Indictment at 3 P 4, alteration in original.) This post also did not expressly advocate that Juror A be harmed.

As "circumstances strongly corroborative of [defendant's] intent" that another person harm Juror A, the indictment alleged that when he posted the above **{2009 U.S. Dist. LEXIS 4}**statements, defendant was aware that white supremacists, Overthrow.com's target audience, sometimes committed acts of violence against non-whites, Jews, homosexuals and others perceived as acting contrary to the interests of the white race. (Indictment **{638 F. Supp. 2d 938}** at 3 P5.a.) The indictment also alleged that before he posted the above statements, defendant displayed on Overthrow.com other posts, some of which were still available, purporting to contain the home addresses of and/or other identifying information about individuals who had been criticized on the website, and that in certain of these posts, defendant expressed a desire that the individuals be harmed. (Indictment at 3-4 P5.b.)

For example, the indictment quoted a March 26, 2008 post regarding "Individual B," a Canadian civil rights lawyer who had published material regarding the use of the internet in hate crimes:

> Kill [Individual B] Man Behind Human Rights Tribunal's Abuses Should Be Executed.
>
> Commentary -- [Individual B], the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's Human Rights Tribunal should be drug out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. **{2009 U.S. Dist. LEXIS 5}**It won't be hard to do, he can be found, easily, at his home, at [Address] . . .
>
> We may no longer have the social cohesion and sense of purpose necessary to fight as a country, but those of us who have the social cohesion and sense of purpose necessary to unify as a race must take notice of an irreconcilable fact: [Individual B] is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree: [Address](Indictment at 4 P5.c.)

The indictment further alleged that on February 13, 2007, defendant posted material regarding Elie Wiesel, an internationally known Holocaust survivor and author, who had been attacked on February 1, 2007 by a man named Eric Hunt. The material was entitled "Where Elie Wiesel Lives -- In Case Anyone was Looking For Him," and it listed three addresses. The indictment also alleged that on February 21, 2007, defendant posted the following statement:

> Elie Wiesel should be afraid to walk out his front door but for the rightful vengeance of white working people he and his holocaust lies have exploited.

. . . .

For decades, the Jews and the liars have used physical force, violent attacks on peaceful demonstrators **{2009 U.S. Dist. LEXIS 6}**and peaceful meetings, and the violent physical force of unjust and tyrannical laws to silence those who question the holocaust lie. If white people are going to undo this system, we have to be ready to adapt and use the tactics of our exploiters.

Insofar as my views may have played a role in motivating Mr. Hunt, I can only say that I hope to inspire a hundred more young white people to sacrifice themselves for our collective racial whole. The only thing more noble than sacrifice is victory.

Heil Hitler(Indictment at 5 P5.d.) The indictment further alleged that on or about September 25, 2008, defendant displayed a post stating: "Last year, a fan of this website kidnapped Wiesel and tried to force him to confess his books on the 'Holocaust' were knowing lies." (Indictment at 6 P5.d.)

Finally, the indictment alleged that in September 2007, defendant posted an article entitled, "Addresses of the Jena 6 Niggers -- In case Anyone Wants To Deliver Justice." (Indictment at 6 P5.e.) The article listed the names and addresses of six individuals involved in a highly publicized matter in Jena, Louisiana. And in response to a Virginia newspaper's criticism of the post, defendant posted a second article **{2009 U.S. Dist. LEXIS 7}**stating:

When the courts start enforcing laws against Internet threats and actual violence **{638 F. Supp. 2d 939}** against anti-racists and the mainstream, Jewish owned media which finances and encourages them, I will stop broadcasting people's names and address[es] with the opinion they should be lynched. However, as long as we live in a society in which laws are not enforced against Jews, Marxists and other privileged members of the bourgeoisie, I will take advantage of that and use the lawless chaos they've created to push my view, which is that all Jews and Marxists (including their fellow traveling neo-cons, neo-liberals, Zionists and Judaized-Christians in both Republican and Democratic Parties) should be shot, rather than debated -- along with their fellow travelers and chosen pets in the Negro 'rights' movement.(Indictment at 6-7 P5.e.)

The case was originally assigned to Judge Hibbler, who on January 26, 2009, denied defendant's motions to dismiss, to strike surplusage from the indictment, and for a change of venue. On February 10, 2009, the government obtained a superseding indictment, which tracked the original indictment but also referred to additional posts allegedly corroborative of defendant's **{2009 U.S. Dist. LEXIS 8}**intent that Juror A be harmed, including a 2005 post relating to the February 28, 2005 murders of Judge Lefkow's husband and mother, which stated as follows:

The husband and mother of the judge who shut down the World Church of the Creator have been assassinated by white nationalists who are promising to kill every federal agent and Jewish official associated with the case. According to a statement released tonight to white nationalist news service, individuals identifying themselves as members of the World Church of the Creator took responsibility for the killings and promised that other bodies would follow . . .

The killing is not the first linked to the Creator group. Benjamin Smith, the most prominent, killed nine people and wounded two others in a 1999 shooting rampage . . .

According to a statement released to the white-oriented press, other individuals associated with the case, most likely federal informer Tony Evola . . . and other minor anti-racists who taunted and encouraged the frame-up of Hale, may be future targets.

After the Hale trial, this website published personal information on Tony Evola, the federal

informer who originally set Hale up, leading FBI officials to say **{2009 U.S. Dist. LEXIS 9}**that they would do 'whatever was in their power' to shut this website down -- something they have still not succeeded in doing. . .(Superseding Indictment [R. 54] at 7-8 P5.f.)

The superseding indictment also quoted defendant's March 1, 2005 post entitled "I Don't Feel Bad About The Hit On Judge Lefkow -- And I Don't Think Others Should, Either." (Superseding Indictment at 8 P5.g), as follows:

I don't feel bad that Judge Lefkow's family was murdered today. In fact, when I heard the story I laughed. 'Good for them!' was my first thought.

Everyone associated with the Matt Hale trial has deserved assassination for a long time. At the time, I believe I said that if I were Hale and I was railroaded like this I would kill -- not the judge -- but the ADL officers involved and their witnesses. In general, I would not kill a judge's family -- it strikes me as overly harsh -- but in this case the family members were Jews (well, in one case a converso), and really I can't mourn over dead Jews. . . .

But the abstract question of the ethics of killing Jews in general must be set aside **{638 F. Supp. 2d 940}** here, because the meat of this question is whether it was just or unjust in this specific case for people who have **{2009 U.S. Dist. LEXIS 10}**been persecuted and denied their religion by the dictates of Judge Lefkow and the system she promotes to retaliate and wreck vengeance against her. In my view, it was clearly just, and I look forward to seeing who else this new white nationalist group of assassins kills next.

Judge Lefkow was the instrument by which the Jewish system of government in this country took from thousands of people in the religious creed which they held to be the truth. The ADL, through their lackeys in the TE-TA-MA foundation, were the specific group of Jews that directed and stage managed this persecution. What these people did to Matt Hale and the Creativity movement was evil, and they deserved to experience the consequences of the evil they had done. . .

Yesterday, when the ADL officials and FBI agents and federal prosecutors and federal judges who are responsible for the persecution of the white race went to bed, they had no fear that they would ever be held accountable for any unreasonable or immoral ruling against a white activist. White activists were ridiculed. They were mocked. They were the kind of silly Jewish-television-show bad guy that anyone could kick around and know they could get away with **{2009 U.S. Dist. LEXIS 11}**it. For all the propaganda alleging white activists were 'violent' 'terrorist' or 'dangerous,' to the Jewish system white nationalists were nothing more than a bunch of fringe losers, not to be taken seriously.

Tonight, as these same ADL officials and FBI agents and federal prosecutors and federal judges go to bed, they have to think that tomorrow they may wake up and find their families murdered. Just as anti-racists routinely terrorize the families of white activists, threatening rape and murder against people who have nothing but a relative who is a dissident, and the same ADL officials and FBI agents and federal prosecutors and federal judges can go to bed with the same vague feeling of unease and fear that they have inflicted and perpetuated through their miscarriage of justice, their subservience to evil, and their refusal to enforce the law.

I do not mourn the assassination of Judge Lefkow's family, and I hope the killer wrecks more havoc among the enemies of humanity, and the killer is never found. I do not say that because I have personal animosity for Judge Lefkow, or because I sick [sic] have a love of violence or death. What I love is justice, and this act of violence, publicized **{2009 U.S. Dist. LEXIS 12}**as it is to millions of those who passively engage in evil in the name of the Jew, sends a message of

justice to those who thought they could be protected in the performance of evil.

Killing people -- killing people's families -- is not good. It is not a right thing to do. In a world that was right there would be no murder. But an eye for an eye is justice, and such acts of justice make me think, sometimes, that maybe there are some things still right with the world.(Superseding Indictment at 9-10, P5.g.)

The superseding indictment further alleged that on March 1, 2005, defendant posted a statement that an e-mail with the home address of various federal prosecutors, agents and others involved in the Hale matter had been circulating among white nationalist discussion groups, and that it indicated that they could be the next targets of the killer of Judge Lefkow's husband and mother. The post further stated:

{638 F. Supp. 2d 941} While Overthrow would usually not hesitate to republish the personal information of these scumbags in full, at this time we feel there is so great a potential for action linked to such posting that we are not going to post email and its details at this time.

. . .

Whether the email represents **{2009 U.S. Dist. LEXIS 13}**a legitimate threat, or just some angry activists blowing off steam, remains to be seen. After the unexpected assassination of Judge Lefkow's family, it seems that anything may be possible.(Superseding Indictment at 11 P5.h.)

Finally, the superseding indictment alleged that on or about May 22, 2008, defendant posted an article entitled "Feeling Better," in which he stated:

Things have become progressively worse, day by day, and I have woke up more and more often feeling the need to kill, kill, kill, and I have tried to get through my day while ignoring the need to destroy the wicked. Its not been easy.

I realized the other day that I have, almost without realizing it -- though that may seem a bit strange -- developed a very intricate plot for the murder of about a score of Roanoke City's negro nuisances and their annoying counterparts at the Roanoke Times. I know everything about these assholes, where they live, who they live with, what they look like, where they go, when they go there. I estimate I could probably in the course of a few hours kill 15, 19 out of the 20 easy if I pick the right day and time, and still lived long enough to travel the country and begin picking off the ridiculous **{2009 U.S. Dist. LEXIS 14}**'independent journalists' that staff the Southern Poverty Law Center's Intelligence Report. I have a list of those as well.(Superseding Indictment at 11-12 P5.i.)

After the government filed the superseding indictment, defendant moved to transfer the case to a federal court in Virginia, 2 to recuse all judges in the Northern District of Illinois and to disqualify the United States Attorney's Office in the Northern District of Illinois. The government did not contest defendant's motion to recuse, and Judge Hibbler granted it. On behalf of the Executive Committee, Chief Judge Holderman then recused all judges in the Northern District of Illinois, and the case was re-assigned me. I denied defendant's motions to transfer and to disqualify the prosecutors, and authorized defendant to file motions relating to the superseding indictment; as indicated, such motions are before me now. 3

II. APPLICABLE LEGAL STANDARDS

A. Motion to Dismiss

Under Fed. R. Crim. P. 12(b)(3)(B),. **{2009 U.S. Dist. LEXIS 15}**a defendant may move to dismiss an indictment for failure "to state an offense." A defendant may likewise move to dismiss an indictment

when it seeks to punish speech protected by the First Amendment. *E.g., United States v. Baker,* 890 F. Supp. 1375, 1385 (E.D. Mich. 1995), *aff'd sub nom., United States v. Alkhabaz,* 104 F.3d 1492 (6th Cir. 1997); *see also United States v. Bly,* 510 F.3d 453, 457-58 (4th Cir. 2007) (stating that whether "a written communication contains either constitutionally protected 'political hyperbole' or an unprotected 'true threat' is a question of law," as is the issue of whether "an indictment properly charges a criminal offense"); *United* **{638 F. Supp. 2d 942}** *States v. Popa,* 187 F.3d 672, 674-75, 337 U.S. App. D.C. 411 (D.C. Cir. 1999) (reviewing de novo the defendant's pre-trial motion arguing that application of a statute to his speech violated the First Amendment). 4

In ruling on a motion to dismiss, the court focuses on the allegations in the indictment, which it must accept as true. *E.g., United States v. Moore,* 563 F.3d 583, 586 (7th Cir. 2009). While the indictment should be tested solely by its sufficiency to charge an offense, regardless of the strength or weakness of the government's case, if the allegations in the indictment are insufficient to state a violation of the governing statute, the court may dismiss. *See United States v. Risk,* 843 F.2d 1059, 1061 (7th Cir. 1988). In the present case, the parties treat the question of whether the government's allegations are sufficient to support a conviction under § 373 as one of law; neither side argues that further factual development is necessary. Therefore, I may properly determine whether the facts set forth in the indictment state an offense. *See id.* (holding that the district court properly dismissed an indictment where the parties argued the applicability of a statute based on a set of undisputed facts).

B. Section 373 and the First Amendment

The First Amendment provides that "Congress shall **{2009 U.S. Dist. LEXIS 17}**make no law . . . abridging the freedom of speech." In a democratic society, it is axiomatic that the Amendment's protections are not limited to the genteel, the enlightened or the tasteful. *See, e.g., Texas v. Johnson,* 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"). Sixty years ago, the Supreme Court explained that:

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room **{2009 U.S. Dist. LEXIS 18}**under our Constitution for a more restrictive view.*Terminiello v. City of Chicago,* 337 U.S. 1, 4-5, 69 S. Ct. 894, 93 L. Ed. 1131 (1949) (internal citations omitted). Thus, the government may not ban speech that even "'a vast majority of its citizens believes to be false and fraught with evil consequence.'" *Virginia v. Black,* 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) (quoting *Whitney v. California,* 274 U.S. 357, 374, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring)).

The Court recognizes that the Amendment's protections are not absolute and that legislative bodies may proscribe certain categories of expression. *Black,* 538 U.S. at 358. As is relevant here, such categories include advocacy **{638 F. Supp. 2d 943}** of the use of force or of violation of the law "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), "true threats," *Watts v. United States,* 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), i.e. "those statements where the speaker means to communicate a serious expression of

an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Black,* 538 U.S. at 359, and offers to engage in illegal transactions, *United States v. Williams,* 553 U.S. 285, 128 S. Ct. 1830, 1841, 170 L. Ed. 2d 650 (2008). **{2009 U.S. Dist. LEXIS 19}**5 As the *Williams* Court stated, there is "an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality." 128 S. Ct. at 1842 (citing *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 928-929, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982); *Brandenburg,* 395 U.S. at 447-448).

In its report on the Bill which became § 373, the Senate Judiciary Committee explained that it crafted the statute with these First Amendment limitations in mind. The Committee noted that some cases speak of:

> the need for a relatively high degree of proximity, probability, or seriousness in the evil the state seeks to prevent by the regulation of speech. Others have emphasized the need for incitement to unlawful activity, as opposed to abstract advocacy of the propriety **{2009 U.S. Dist. LEXIS 20}**of such activity. Still others have combined these themes, as in *Brandenburg v. Ohio,* where the standard was said to be that advocacy of the use of force or law violation could be proscribed only where it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."S. Rep. 97-307, at 180 (1981). The Committee quoted with approval a commentator's explanation of why the crime of solicitation would not ordinarily create a First Amendment issue:
>
> "Solicitation involves a hiring or partnership arrangement, designed to accomplish a specific action in violation of law, where the communication is an essential link in a direct chain leading to criminal action, though the action may have been interrupted. In short, the person charged with solicitation must, in a direct sense, have been a participant in an abortive crime of violence."*Id.* at 181 (quoting Emerson, *Toward a General Theory of the First Amendment* 83 (1966)).

The Committee further explained that the proof required to establish the elements of the offense would, in most cases, obviate First Amendment issues. The government would first have to establish that the offender had the intent that **{2009 U.S. Dist. LEXIS 21}**another person commit a violent crime, and that the intent was manifested by circumstances strongly corroborative thereof. *Id.* at 182. "Included expressly in the first element is a requirement that the circumstances show that the actor is serious in his intention." *Id.* The Committee listed a number of circumstances that would be highly probative of intent, including an offer of payment or other promise of benefit to the person solicited if he would commit **{638 F. Supp. 2d 944}** the offense; a threat to the person solicited if he would not commit the offense; repeated solicitations or express protestations of seriousness in soliciting the commission of the offense; the defendant's knowledge that the person solicited previously committed similar offenses; and the fact that the defendant acquired weapons, tools or information suited for use by the person solicited, or made other preparations for the commission of the offense by the person solicited. *Id.* at 183.

Second, the government would have to establish that the defendant commanded, entreated, induced or otherwise endeavored to persuade the other person to commit the crime of violence. Congress specifically rejected words such as "counsels," "encourages" **{2009 U.S. Dist. LEXIS 22}**or "requests" because they suggest equivocation too close to casual remarks. *Id.* at 182. For example, an order to commit an offense made by a person to another with whom he stands in a relation of influence or authority would constitute a "command"; and threatening another if he will not commit an offense, or offering to pay him if he will, would constitute "inducement." *Id.* at 183. "The phrase 'otherwise endeavors to persuade' is designed to cover any situation where a person seriously seeks

to persuade another person to engage in criminal conduct." *Id.* at 183-84. 6

The Committee concluded that because **{2009 U.S. Dist. LEXIS 23}**the typical case would involve activity such as an heir soliciting the murder of a relative from whom he expected to inherit, a person importuning another to commit arson on his business so he can collect insurance money, or an organized crime boss directing a subordinate to kill a rival gang leader, First Amendment issues were unlikely to arise. *Id.* at 181. However, in an unusual case in which such issues did arise, the Committee understood that the First Amendment principles discussed above would "operate as supplementary restrictions on the applicability of the section." *Id.* at 182. 7

III. ANALYSIS

For the following reasons, I conclude that defendant's speech, as alleged in the indictment, is protected by the First Amendment and does not state a violation of § 373.

A. Posts Regarding Juror A

Defendant's posts regarding Juror A do not expressly solicit or endeavor to persuade another person to harm Juror A. Rather, they disclose personal **{2009 U.S. Dist. LEXIS 24}**information about Juror A and comment on his/her sexual orientation and attitude toward race. Although the posts may be reasonably read as criticizing Juror A's vote to convict Hale, nowhere in them does defendant expressly advocate that Juror A be harmed. 8

{638 F. Supp. 2d 945} Scrutiny and criticism of people involved in the investigation and prosecution of crimes is protected by the First Amendment. *See Wood v. Georgia,* 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962) (holding that the First Amendment protects the right to criticize a grand jury investigation); *see also Globe Newspaper Co. v. Superior Court for Norfolk County,* 457 U.S. 596, 605-06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (discussing the importance of public access to, and scrutiny of, criminal trials). 9 Such scrutiny may involve disclosure of information about the people involved. *See The Florida Star v. B.J.F.,* 491 U.S. 524, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (holding that the imposition of damages on a newspaper for publishing the name of a rape victim, lawfully obtained from a publicly released police report, in violation of a Florida **{2009 U.S. Dist. LEXIS 25}**statute and the newspaper's own internal policy, violated the First Amendment); *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979) (finding unconstitutional the indictment of two newspapers for violating a state statute barring publication, without written approval of the juvenile court, the name of any youth charged as a juvenile offender); *see also* Eugene Volokh, *Crime-Facilitating Speech,* 57 Stan. L. Rev. 1095, 1142-43 (2005) (discussing how the publishing of names and addresses can help people evaluate and participate in public debate, as well as facilitate lawful remonstrance and social ostracism).

B. Alleged Corroborating Circumstances

In order to state an offense under § 373, the indictment must allege that defendant intentionally solicited or endeavored to persuade another person to harm Juror A, under circumstances strongly corroborative of defendant's intent that the person commit **{2009 U.S. Dist. LEXIS 26}**a violent crime against Juror A. As stated, defendant's posts about Juror A do not expressly solicit or endeavor to persuade another person to harm him/her. Moreover, as discussed, defendant's posts about Juror A, in themselves, are protected by the First Amendment. Thus, the corroborating circumstances alleged must, consistent with the First Amendment, transform defendant's lawful statements about Juror A into a criminal solicitation. The corroborating circumstances alleged in the indictment fail to do so.

1. Defendant's Awareness That White Supremacists Sometimes Commit Violent Acts

The first alleged corroborating circumstance is that when he posted information about Juror A, defendant was aware that white supremacists, the target audience of Overthrow.com, sometimes committed acts of violence against persons viewed as acting against the interests of the white race. However, the fact that defendant knew that white supremacists sometimes viewed his website and sometimes harmed people they perceived as enemies is insufficient to transform his lawful statements about Juror A into criminal advocacy, i.e., advocacy directed to inciting or producing imminent lawless action, as required by **{2009 U.S. Dist. LEXIS 27}**the First Amendment and § 373. *See Brandenburg,* 395 U.S. at 447. Knowledge or belief that one's speech, even speech advocating law breaking, may cause others to act does not remove the speech from the protection of the First Amendment, unless the speech is directed to inciting imminent lawless action and is likely to produce such action. **{638 F. Supp. 2d 946}** *See id.* (holding that the First Amendment protected an incendiary speech by a Ku Klux Klan leader to a Klan gathering); *see also Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 245, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002) ("The prospect of crime . . . by itself does not justify laws suppressing protected speech."). 10

2. {2009 U.S. Dist. LEXIS 28}Defendant's Pre-Juror A Posts

The second alleged corroborating circumstance is that on several occasions ranging in time from six months to three years before his posts about Juror A, defendant posted information, sometimes including home addresses, about other individuals criticized on his website and sometimes expressed a desire that these individuals be harmed. Several of these posts were accessible to persons visiting Overthrow.com at the time defendant posted about Juror A. The government's theory with respect to defendant's pre-Juror A posts appears to be that because defendant previously disclosed personal information about individuals and expressed a wish that they be harmed, his lawful statements about Juror A could be found to be a violation of § 373. This theory is untenable. Defendant's other posts were created well before his Juror A posts, and none of them mention Juror A. The post closest in time to defendant's posts about Juror A, his May 22, 2008 "Feeling Better" post, discusses defendant's plot to personally kill people in Roanoke, Virginia, but like defendant's other pre-Juror A posts, it has no apparent connection to defendant's statements about Juror A. Further, **{2009 U.S. Dist. LEXIS 29}**the fact that in some of his pre-Juror A posts, defendant may have expressed a wish that the individuals named be harmed is hardly sufficient to transform his lawful statements about Juror A into advocacy directed to inciting imminent lawless action and likely to cause such action as is required for the indictment to allege an offense under § 373 and the First Amendment.

C. Case Law

It may not be necessary to discuss First Amendment case law any more than I already have. However, I find it significant that the cases relating to disclosure of personal information, even under threatening or intimidating circumstances, uniformly support the proposition that defendant's speech is protected. 11 In the interest of completeness, I will, therefore, discuss the *Claiborne Hardware* case, which was decided in 1982, and the more recent cases dealing with issues similar to those presented here.

In *Claiborne Hardware,* the Supreme Court considered a boycott by black citizens of white-owned businesses in Claiborne County, Mississippi. **{2009 U.S. Dist. LEXIS 30}**As is pertinent here, the boycott involved stationing individuals, known as "enforcers," "deacons" or "black hats," near white-owned businesses for the purpose of reporting blacks who violated the boycott. Boycott supporters read the names of such persons at meetings of the Claiborne County NAACP **{638 F. Supp. 2d 947}** and at church services and published them in a mimeographed paper entitled the "Black Times." Such persons "were branded as traitors to the black cause, called demeaning names,

and socially ostracized for merely trading with whites." 458 U.S. at 903-04. Some also became targets of violence. *Id.* at 904.

While acknowledging that persons who committed acts of violence could be held liable, the Supreme Court held that others involved in the boycott, including the leader, Charles Evers, could not be. This was so despite Evers's statements that "blacks who traded with white merchants would be *answerable to him," id.* at 900 n.28, that "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people," *id.* at 900 n.28, that if "we catch any of you going in any of them racist stores, we're gonna break your damn neck," *id.* at 902, that "boycott violators would be 'disciplined' **{2009 U.S. Dist. LEXIS 31}**by their own people" and "that the Sheriff could not sleep with boycott violators at night," *id.* at 902.

Regarding this aspect of the boycott, the Court noted that speech does not lose its protected character "simply because it may embarrass others or coerce them into action." *Id.* at 909-10. Even when the speech arguably contains threats of violence, "in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id.* at 916-17 (quoting *NAACP v. Button,* 371 U.S. 415, 438, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)). The Court thus held that, although the "black hats" who engaged in violence could be punished, there "is nothing unlawful in standing outside a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others." *Id.* at 925.

Finally, the Court held that Evers could not be held liable for his statements about the boycott violators:

> While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators **{2009 U.S. Dist. LEXIS 32}**at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.
>
> It is clear that "fighting words" -- those that provoke immediate violence -- are not protected by the First Amendment. Similarly, words that create an immediate panic are not entitled to constitutional protection. This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." **{2009 U.S. Dist. LEXIS 33}***Id.,* at 447, 89 S. Ct., at 1829. *See Noto v. United States,* 367 U.S., at 297-298, 81 S. Ct., at 1520 ("the mere abstract teaching . . . **{638 F. Supp. 2d 948}** of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action").
>
> The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg.* . . . Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To

rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."*Id.* at 927-28 (internal citations and footnotes omitted). 12

In the present case, defendant also disclosed the identity of a person, Juror A, with whom he disagreed on a matter of social importance, i.e. the conviction of Hale in a high profile criminal case. Although he did so under potentially intimidating circumstances, as *Claiborne Hardware* holds, even when the circumstances surrounding a disclosure are intimidating, the speech may not be punished consistent with the First Amendment unless it is directed to inciting imminent lawless action and likely to produce such action. Defendant's speech lacked both of these characteristics.

In *PPCW,* a case which split the en banc Ninth Circuit Court of Appeals 6-5, the majority upheld a damages award and injunctive relief against anti-abortion activists under the Freedom of Access to Clinics Entrances Act ("FACE"). The defendants in *PPCW* created "wanted" posters, some of which included personal information about the abortion providers depicted, including home addresses, and operated a website called the "Nuremberg Files," which also included personal information about the **{2009 U.S. Dist. LEXIS 35}**providers -- with lines drawn through the names of doctors killed or wounded. 290 F.3d at 1062-63.

PPCW supports my conclusion here. First, unlike the present case, which involves a solicitation to commit a crime of violence, *PPCW* was a "true threat" case. Realizing that they could not show that the defendants' communications were likely to produce the imminent unlawful action required by *Brandenburg,* the *PPCW* plaintiffs did not even attempt to support their claims under an incitement theory. *Id.* at 1092 n.5 (Kozinski, J., dissenting). Second, under both the *PPCW* majority and dissenting opinions, defendant's disclosures about Juror A are protected under the First Amendment.

The *PPCW* majority held that under the circumstances present there, which included statements by the defendants supporting violence against abortion providers, a backdrop of actual violence against the providers depicted on the posters (including murders), and the posters themselves, which carried a historical connotation of "wanted -- dead or alive," the posters represented a true threat. *Id.* at 1071, 1079-80. However, the majority found the website "somewhat different." *Id.* at 1080. It stated that the defendants **{2009 U.S. Dist. LEXIS 36}**created the site for the purpose of:

> "collecting dossiers on abortionists in anticipation that one day we may be able **{638 F. Supp. 2d 949}** to hold them on trial for crimes against humanity." The web page states: "One of the great tragedies of the Nuremberg trials of Nazis after WWII was that complete information and documented evidence had not been collected so many war criminals went free or were only found guilty of minor crimes. We do not want the same thing to happen when the day comes to charge abortionists with their crimes. We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of this nation's opinion turns against child-killing (as it surely will)." However offensive or disturbing this might be to those listed in the Files, being offensive and provocative is protected under the First Amendment. But, in two critical respects, the Files go further. In addition to listing judges, politicians and law enforcement personnel, the Files separately categorize "Abortionists" and list the names of individuals who provide abortion services, including, specifically, Crist, Hern, and both Newhalls. Also, names of abortion providers who have been murdered because of their **{2009 U.S. Dist. LEXIS 37}**activities are lined through in black, while names of those who have been wounded are highlighted in grey. As a result, we cannot say that it is clear as a matter of law that listing Crist, Hern, and the Newhalls on both the Nuremberg Files and the GUILTY posters is purely protected, political expression.
>
> Accordingly, whether the Crist Poster, the Deadly Dozen poster, and the identification of Crist, Hern, Dr. Elizabeth Newhall and Dr. James Newhall in the Nuremberg Files as well as on

"wanted"-type posters, constituted true threats was properly for the jury to decide. *Id.* at 1080. 13

Thus, the majority found that simply identifying and providing personal information about the providers on the website, while offensive and disturbing, was protected by the First Amendment. Liability was possible *only* because the defendants (1) highlighted the names of the doctors who had been killed or injured, and (2) also **{2009 U.S. Dist. LEXIS 38}**depicted the doctors on the wanted posters that the court had found threatening. The speech alleged in the present case is not comparable. Defendant did not threaten Juror A either directly or through wanted posters. He did nothing more than disclose personal information regarding Juror A and criticize him.

The *PPCW* dissenters concluded that both the posters and the website were protected by the First Amendment. Speaking for the dissenters, Judge Kozinski explained that neither the website nor the posters were overtly threatening and that speech does not lose its protected character because it may embarrass, frighten or intimidate. *Id.* at 1089-90. Regarding the highlighting of names on the website, Judge Kozinski wrote: "At most, the greying out and strikeouts could be seen as public approval of those actions, and approval of past violence by others cannot be made illegal consistent with the First Amendment." *Id.* at 1091 n.3.

Judge Kozinski further noted that the providers' fear came not from the defendants who created the posters or the website, or those acting in direct concert with them, "but from being singled out for attention by abortion protesters across the country," *id.* at 1091, **{2009 U.S. Dist. LEXIS 39}**and that although from the providers' perspective it made **{638 F. Supp. 2d 950}** little difference whether the violence came from the defendants or others, it did make a difference under the First Amendment.

> Where the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals. Absent such an unmistakable, specific threat, there must be evidence *aside from the political statements themselves* showing that the public speaker would himself or in conspiracy with others inflict unlawful harm. 458 U.S. at 932-34, 102 S. Ct. 3409. The majority cites not a scintilla of evidence -- other than the posters themselves -- that plaintiffs or someone associated with them would carry out the threatened harm.
>
> Given this lack of evidence, the posters can be viewed, at most, as a call to arms for other abortion protesters to harm plaintiffs. However, the Supreme Court made it clear that under *Brandenburg,* encouragement or even advocacy of violence is protected by the First Amendment: "[M]ere *advocacy* of the use of force or violence does not remove speech from the protection of **{2009 U.S. Dist. LEXIS 40}**the First Amendment." *Claiborne Hardware,* 458 U.S. at 927, 102 S. Ct. 3409 (citing *Brandenburg,* 395 U.S. at 447) (emphasis in the original). *Id.* at 1092. In the present case, defendant's posts about Juror A are disturbing because of the possibility that others might respond to them, but the cases hold that the government may not, consistent with the First Amendment, criminalize general calls to action.

Nor does § 373, construed consistently with the First Amendment and congressional intent, criminalize general calls to action. Because defendant's posts about Juror A, standing alone or considered in conjunction with the other posts referenced in the indictment, do not include a solicitation or entreaty that Juror A be injured, I need not decide whether § 373 may ever be used to punish a general call to action. However, the legislative history of § 373 indicates that Congress contemplated -- and the reported cases generally involve -- the solicitation of specific individuals.

In order to ensure that § 373 only punishes speech that is intended to incite imminent lawless action and is likely to produce such action, as required by the First Amendment and contemplated by Congress, courts considering **{2009 U.S. Dist. LEXIS 41}**solicitation cases should construe the

statute to require (1) that the solicitation be communicated to a specific person or group of persons, rather than to a general audience or the public at large, and/or (2) that the corroborating circumstances relate specifically to the alleged solicitation at issue and not consist of unrelated threats, general calls for violence and other intemperate statements. 14 In the present case, defendant **{638 F. Supp. 2d 951}** communicated his statements about Juror A on a website available to the general public rather than to a specific person or group of persons, and the alleged corroborating posts do not mention or relate to Juror A. Thus, even assuming that § 373 may criminalize some general calls to action and that defendant's posts about Juror A could be construed as such a call, the corroborating circumstances set forth in the indictment are plainly insufficient. 15

The dissent in *PPCW* made a related point that is also relevant to the present case, noting:

> There is no allegation that any of the posters in this case disclosed **{2009 U.S. Dist. LEXIS 44}**private information improperly obtained. We must therefore assume that the information in the posters was obtained from public sources. All defendants did was reproduce this public information in a format designed to convey a political viewpoint and to achieve political goals. The "Deadly Dozen" posters and the "Nuremberg Files" dossiers were unveiled at political rallies staged for the purpose of protesting *Roe v. Wade* . . . . The Nuremberg Files website is clearly an expression of a political point of view. The posters and the website are designed both to rally political support for the views espoused by defendants, and to intimidate plaintiffs and others like them into desisting abortion-related activities. This political agenda may not be to the liking of many people -- political dissidents are often unpopular -- but the speech, including the intimidating message, does not constitute a direct threat because there is no evidence other than the speech itself that the speakers intend to resort to physical violence if their threat is not heeded.*Id.* at 1092-93. In the present case, the indictment does not allege that defendant obtained the information about Juror A improperly. Further, **{2009 U.S. Dist. LEXIS 45}**although Juror A undoubtedly found the posting of his/her name and address unsettling, for the reasons stated above, the speech cannot be criminalized. 16

{638 F. Supp. 2d 952} In *United States v. Carmichael,* 326 F. Supp. 2d 1267, 1272 (M.D. Ala. 2004), the government sought a protective order prohibiting the defendant, charged with drug offenses, from operating a website containing -- beneath the word "wanted" in large red letters -- the names and likeness of agents and informants involved in the case, along with a request for information about them. The government alleged that the site constituted harassment of witnesses, contrary to 18 U.S.C. §§ 1512 & 1514, and sought an **{2009 U.S. Dist. LEXIS 47}**order limiting him to posting information in the case record. *Id.* at 1273. The government argued that the site encouraged retaliation against witnesses, discouraged witnesses from coming forward and hindered undercover officers. *Id.* at 1273-74. Two informants depicted on the site testified that they felt apprehensive, and agents testified that due to an "atmosphere of intimidation" other potential witnesses had declined to cooperate in the case. *Id.* at 1275.

The court acknowledged that § 1514 authorized it to issue the requested order but noted that the First Amendment limited its authority. *Id.* at 1279. It then considered the posted language and the context in which the defendant created the site. *Id.* at 1280-81. The court first noted that the defendant had posted no threats and in fact had disclaimed any intent to threaten. *Id.* at 1281. It then compared the defendant's statements to those in *United States v. Khorrami,* 895 F.2d 1186, 1189 (7th Cir.1990), which also involved a wanted poster. In *Khorrami,* the court of appeals affirmed the defendant's conviction for violating 18 U.S.C. § 876, which prohibits the mailing of threatening communications. Khorrami mailed to the Jewish National **{2009 U.S. Dist. LEXIS 48}**Fund ("JNF") a "poster-like paper that state[d] at its top 'Wanted for crimes against humanity and Palestinians for fifty years.'" *Id.* at 1189. The poster featured photographs of Israeli political figures, disfigured with

swastikas and epithets, and the statements "His blood need," "Must be killed," and "Execute now!" next to some of the photos. *Id.* In addition, Khorrami repeatedly called the JNF, leaving obscene and threatening telephone messages, and he mailed it a threatening letter. *Id.* at 1188-90. Applying an objective, reasonable person standard, the *Khorrami* court held that, in light of the defendant's other actions, "there was more than sufficient evidence to support the jury's conclusion that [the defendant's] 'wanted poster' constituted a 'true threat.'" *Id.* at 1193.

The *Carmichael* court noted that the posts under its consideration were not nearly as threatening as the wanted poster in *Khorrami.* The defendant's site did not refer to killing, execution or blood and contained no disfigured photographs or epithets. Nor did the defendant contact individuals **{638 F. Supp. 2d 953}** featured on his site. *Id.* at 1281-82. The court acknowledged that the term "informant," which the defendant used, had a negative **{2009 U.S. Dist. LEXIS 49}**connotation, but stated that:

> The First Amendment, however, does not prohibit name-calling. The First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks" as well as language that is "vituperative, abusive, and inexact." *Watts,* 394 U.S. at 708. Further, the First Amendment protects such speech even when it is designed to embarrass or otherwise coerce another into action. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 910, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). Thus, "threats of vilification or social ostracism" are protected by the First Amendment and outside the reach of § 1512. *Id.* It is only when speech crosses the line separating insults from "true threats" that it loses its First Amendment protection.*Id.* at 1282. Similarly, in the present case, while clearly identifying Juror A, defendant's posts contain no threat. And, defendant's derogatory comments about Juror A's sexual orientation and attitude towards race are protected.

The *Carmichael* court proceeded to consider context, first contrasting the case before it with *PPCW.* Unlike in *PPCW,* the defendant in *Carmichael* did not create his website after a string of murders and violence linked to similar publications. *Id.* at 1284. The court **{2009 U.S. Dist. LEXIS 50}**also considered the broader context of violence against informants in drug cases, stating: "Viewed in light of the general history of informants being killed in drug conspiracy cases and the evidence of a drug-conspiracy and other criminal activity in this case, looks more like a threat. Indeed it may be that it is only this context that gives the site a threatening meaning." *Id.* at 1285.

> Nevertheless, it is important to recall that the inquiry here is whether a reasonable person would view Carmichael's website as a serious expression of an intention to inflict bodily harm, not whether the site calls to mind other cases in which harm has come to government informants, not whether it would be reasonable to think that Carmichael would threaten an informant, and not whether Carmichael himself is somehow threatening. Context can help explain the website's meaning, but it is the website that is the focus of the court's inquiry. Although the broad social context makes the case closer, the background facts described above are too general to make the Carmichael case site a "true threat."*Id.* at 1285 (internal citations and quote marks omitted).

Most relevant to the present **{2009 U.S. Dist. LEXIS 51}**case, the *Carmichael* court also considered whether, even if the site did not contain a threat, it encouraged others to harm those depicted. *Id.* at 1286.

> The problem with this argument is that [it] implicates the Supreme Court's stringent "incitement" doctrine. *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). *Brandenburg* stands for the proposition that, as a general rule, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation." *Id.; see also NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 927,

102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment"). To fall outside the First Amendment's protection, advocacy of violence must be "directed to inciting or producing imminent lawless action and **{638 F. Supp. 2d 954}** [be] likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447. There is no evidence that Carmichael's site meets the imminency requirement of *Brandenburg.* Indeed, in *Planned Parenthood,* Judge Kozinski in dissent noted that there was so little chance of proving that the posters and website in that case met the imminency requirement **{2009 U.S. Dist. LEXIS 52}**in *Brandenburg* that the plaintiffs did not even raise the argument. 290 F.3d at 1092 n.5 (Kozinski, J., dissenting). Thus, the court cannot proscribe Carmichael's site as constitutionally unprotected advocacy of violence.*Id.* at 1287. The court also found the case analogous to *Claiborne Hardware:*

> Like Evers, Carmichael has used language with a threatening connotation, and, as with Evers, there is no evidence that he has authorized, ratified, or directly threatened acts of violence. If Evers's literal threat -- "If we catch any of you going in any of them racist stores, we're going to break your damn necks," -- was not outside the First Amendment's protection, it is hard to see how Carmichael's use of language with at most only non-specific threatening connotations could be unprotected.*Id.* at 1288 (internal citations and quote marks omitted).

The *Carmichael* court acknowledged that the case involved the internet, and that some commentators had suggested that the internet's unique features made information posted on- line more threatening. *Id.* at 1288 (citing articles). The court nevertheless found the site protected:

> First, notwithstanding the commentary cited above, the Supreme Court has **{2009 U.S. Dist. LEXIS 53}**held that speech on the internet is subject to no greater or lesser constitutional protection than speech in more traditional media. *Reno,* 521 U.S. at 870. Second, the general rule in the case law is that speech that is broadcast to a broad audience is less likely to be a "true threat," not more. *United States v. Bellrichard,* 994 F.2d 1318, 1321 (8th Cir.1993) ("correspondence . . . delivered to a person at home or at work is somewhat more likely to be taken by the recipient as a threat than is an oral statement made at a public gathering"); *Planned Parenthood,* 290 F.3d at 1099 (Kozinski, J., dissenting) ("[S]tatements communicated directly to the target are much more likely to be true threats than those . . . communicated as part of a public protest."). Thus, to the extent that the government's concern is that Carmichael's website will be seen by a lot of people, that fact makes the site look less like a "true threat," not more.*Id.* at 1288-89.

Finally, the court considered that while the defendant had a First Amendment interest in publicizing his trial and criticizing the prosecution, his posts of the names and photographs of witnesses might not constitute political advocacy or involve **{2009 U.S. Dist. LEXIS 54}**a matter of social importance. *Id.* at 1290. Nevertheless, the court concluded that because speech is presumptively protected by the First Amendment and because the government had failed to demonstrate that the defendant's speech fell within an excepted category, the site was protected. *Id.* I reach the same result here. The posting of personal information about an individual involved in a judicial proceeding, even under circumstances that are intimidating or unsettling, cannot, absent a true threat or an incitement to imminent lawless action, be criminalized consistent with the First Amendment.

In *Sheehan v. Gregoire,* 272 F. Supp. 2d 1135, 1139 (W.D. Wash. 2003), the court considered a statute providing:

> **{638 F. Supp. 2d 955}** A person or organization shall not, with the intent to harm or intimidate, sell, trade, give, publish, distribute, or otherwise release the residential address, residential telephone number, birthdate, or social security number of any law enforcement-related,

corrections officer-related, or court-related employee or volunteer, or someone with a similar name, and categorize them as such, without the express written permission of the employee or volunteer unless specifically exempted by **{2009 U.S. Dist. LEXIS 55}**law or court order.The plaintiff in *Sheehan* operated a website, , which criticized police officers. In response to the statute quoted above, he removed personal identifying information about law enforcement officers, corrections officers and court employees and volunteers from his site, and then challenged the statute under the First Amendment. *Id.*

The defendants first defended the statute as proscribing threats. The court rejected the argument:

> [O]n its face, the statute does not purport to regulate true threats or any other proscribable mode of speech, but pure constitutionally-protected speech. Defendants cite no authority for the proposition that truthful lawfully-obtained, publicly-available personal identifying information constitutes a mode of constitutionally proscribable speech. Rather, disclosing and publishing information obtained elsewhere is precisely the kind of speech that the First Amendment protects. *Bartnicki v. Vopper,* 532 U.S. 514, 527, 121 S. Ct. 1753, 149 L. Ed. 2d 787.*Id.* at 1141-42 (footnote omitted). The defendants cited no historical or anecdotal evidence indicating that the disclosure of personal identifying information had a long and pernicious history as a signal of impending **{2009 U.S. Dist. LEXIS 56}**violence, like the cross burning at issue in *Virginia v. Black,* which might enable the court to regard it as a true threat. The court rejected the notion that revealing names, addresses and phone numbers, coupled with a subjective intent to intimidate, could transform pure speech into a true threat. *Id.* at 1143.

The defendants next argued that the statute only banned speech lacking public significance and served the important state interests of preventing harassment and retaliation. *Id.* at 1144. Citing *Florida Star,* the court rejected this argument, finding that the plaintiff's website, a vehicle of mass communication, was analytically indistinguishable from a newspaper, and that it communicated truthful, lawfully-obtained, publicly-available personal identifying information with respect to a matter of public significance -- police accountability. *Id.* at 1145. The court noted that *Florida Star* also involved a concern with physical safety, that of crime victims who could be targeted for retaliation if their names become known to their assailants. *Id.* at 1145 (citing 491 U.S. at 537). The Justices nevertheless held that "punishing the press for its dissemination of information which is **{2009 U.S. Dist. LEXIS 57}**already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act." *Florida Star,* 491 U.S. at 535. Finally, the court noted that, under the statute, for-profit commercial entities remained perfectly free to sell, trade, give, or release personal identifying information to third-parties who intend to harm or intimidate individuals purportedly protected by the statute, making the statute significantly under-inclusive. *Sheehan,* 272 F. Supp. 2d at 1145.

The court thus determined that the statute prohibited constitutionally protected speech based on content, and that its "with the intent to harm or intimidate" provision did not alleviate the constitutional problem. **{638 F. Supp. 2d 956}** The court rejected the defendants' contention that the statute could be analyzed as a time, place and manner regulation aimed at the "secondary effects" of the speech, i.e. the potential harm to and intimidation of those covered by the law.

> [L]isteners' reactions to speech or the motive impact of speech on its audience is not a secondary effect. As plaintiff notes, defendants' rationale would allow the secondary effects doctrine to completely swallow the First Amendment. It **{2009 U.S. Dist. LEXIS 58}**would grant the government a dangerous tool to proscribe any speech based solely on the government's speculation as to what harms might result from its utterance.*Id.* at 1146 (internal citations omitted).

> Defendants assert a compelling state interest in protecting law enforcement-related, corrections officer-related, and court-related employees from harm and intimidation. . . . Any third party wishing to actually harm or intimidate these individuals may freely acquire the personal identifying information from myriad public and private sources, including for-profit commercial entities, without entering the scope of the statute. Yet, defendants argue, "Even the fact that an individual may gather the same information and use that information to harm someone does not detract from the state's compelling interest behind prohibiting the publication or distribution of such information with the intent to harm or intimidate." Thought-policing is not a compelling state interest recognized by the First Amendment.*Id.* at 1147 (internal citations and footnotes omitted).

The court concluded:

> As the foregoing makes clear, the First and Fourteenth Amendments preclude the State of Washington from proscribing **{2009 U.S. Dist. LEXIS 59}**pure speech based solely on the speaker's subjective intent. Likewise, there is cause for concern when the legislature enacts a statute proscribing a type of political speech in a concerted effort to silence particular speakers. Defendants' position is troubling. Defendants boldly assert the broad right to outlaw any speech -- whether it be anti-Semitic, anti-choice, radical religious, or critical of police -- so long as a jury of one's peers concludes that the speaker subjectively intends to intimidate others with that speech. This brash stance strikes at the core of the First Amendment and does not comport with constitutional requirements. "[P]utting [certain individuals] in harm's way by singling them out for the attention of unrelated but violent third parties is [conduct] protected by the First Amendment." *Planned Parenthood,* 290 F.3d at 1063. . . .
>
> This Court does not intend to minimize the real fear of harm and intimidation that law enforcement-related, corrections officer-related, and court-related employees, and their families, may experience. [J]udges and court employees are common targets of threats and harassment. However, we live in a democratic society founded on fundamental **{2009 U.S. Dist. LEXIS 60}**constitutional principles. In this society, we do not quash fear by increasing government power, proscribing those constitutional principles, and silencing those speakers of whom the majority disapproves. Rather, as Justice Harlan eloquently explained, the First Amendment demands that we confront those speakers with superior ideas:
>
> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each **{638 F. Supp. 2d 957}** of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air **{2009 U.S. Dist. LEXIS 61}**may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.*Id.* at 1150 (quoting *Cohen,* 403 U.S. at 24-25).

Finally, in *City of Kirkland v. Sheehan,* No. 01-2-09513-7, 2001 WL 1751590, at *1 (Wash. Super. Ct. May 10, 2001), the defendants also operated a website critical of law enforcement personnel, which contained political argument and disclosed the names, addresses, birth dates, telephone numbers,

Social Security numbers ("SSNs") and other personal information about law enforcement personnel and their relatives. The defendants offered to remove the information pertaining to police officers in any jurisdiction that would "admit" that police officers are public officials, agree to accept service for officers, and created a "civilian review board" having a certain composition. The court found this "willingness to trade back plaintiffs' privacy for certain policy changes could be argued to bear some resemblance to blackmail." *Id.* at *5.

Nevertheless, **{2009 U.S. Dist. LEXIS 62}**the court found the site (aside from its publication of SSNs) protected: 17

> Upon the facts presented to date in this case, reprehensible though some may find defendants' proposed bargain to be (trading privacy for policy changes), it is clear that defendants' utterances are indeed political speech. In *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 929, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Supreme Court ruled that publicly reading the names of persons who disregarded a boycott and threatening that they would be "disciplined" and saying "we're gonna break your damn neck" could be viewed as intending to create a fear of violence but was not sufficient to grant relief because the speaker had not thereby "authorized, ratified or directly threatened" acts of violence.
>
> In **{2009 U.S. Dist. LEXIS 63}**this case, as in numerous others, in the absence of a credible specific threat of harm, the publication of lawfully obtained addresses and telephone numbers, while certainly unwelcome to those who had desired a greater degree of anonymity, is traditionally viewed as having the ability to promote political speech. Publication may arguably expose wrongdoers and/or facilitate peaceful picketing of homes or worksites and render other communication possible.**{638 F. Supp. 2d 958}** *Id.* at *6. I reach the same result here. The government does not allege that defendant unlawfully obtained the information about Juror A, and an intimidating context alone does not remove the protection of the First Amendment.

IV. CONCLUSION

For **{2009 U.S. Dist. LEXIS 64}**the reasons set forth above, the allegations in the indictment are insufficient to state a violation of § 373. Defendant's posts about Juror A do not solicit violence; the alleged corroborating circumstances set forth in the indictment are insufficient to transform the posts regarding Juror A into a solicitation of violence and also fail to provide the strong corroboration necessary for a lawful prosecution under § 373 and the First Amendment. Finally, all of the relevant recent case law supports the conclusion that the indictment does not charge a punishable offense. The indictment must be dismissed. 18

THEREFORE, IT IS ORDERED {2009 U.S. Dist. LEXIS 66}that defendant's motion to dismiss is **GRANTED.**

Dated at Milwaukee, Wisconsin, this 21st day of July, 2009.

/s/ Lynn Adelman

LYNN ADELMAN

District Judge

Footnotes

1

Title 18 U.S.C. § 373 provides: "Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative **{2009 U.S. Dist. LEXIS 2}**of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned . . . ." The indictment in the present case alleges that defendant solicited another to violate 18 U.S.C. § 1503, which prohibits harming a juror on account of his jury service.
2

The government has charged defendant in the Western District of Virginia with interstate transmission of threatening communications, in violation of 18 U.S.C. § 875(c).
3

The parties agree that I am not bound by any previous rulings in the case.
4

As the present case illustrates, when the government prosecutes a person based on the content of his speech, the inquiry into the sufficiency of the indictment is often intertwined with the First Amendment analysis. *See Alkhabaz,* 104 F.3d at 1493 (affirming district court's dismissal of indictment on the ground that it failed to allege **{2009 U.S. Dist. LEXIS 16}**a violation of the statute, as construed by the court, rather than based on the First Amendment).
5

Also unprotected are so-called "fighting words," i.e. those which "by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). Because the speech at issue here was "not 'directed to the person of the hearer,'" *Cohen v. California,* 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 309, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)), this exception does not apply in the present case.
6

In *Hale,* the Seventh Circuit agreed with this statement of the elements of the offense. 448 F.3d at 982 ("In order to meet its burden of proof on the solicitation count, the government had to establish (1) with 'strongly corroborative circumstances' that Hale intended for Tony Evola to arrange the murder of Judge Lefkow; and (2) that Hale solicited, commanded, induced, or otherwise tried to persuade Evola to carry out the crime."). The *Hale* court likewise quoted with approval the examples of circumstances strongly corroborative of intent set forth in Senate Report 97-307. *Id.* at 983.
7

See also S. Rep. 98-225, P.L. 98-473 (Aug. 4, 1983) ("The Committee wishes to makes it clear that what is involved is legitimately proscribable criminal activity, not advocacy of ideas that is protected by the First Amendment right of free speech.").
8

Although I base this decision on the allegations contained in the indictment, the parties advise that no actual harm befell Juror A; he/she simply received text messages from unknown sources.
9

Defendant did not post information about Juror A *during* the Hale trial. Thus, I need not balance the fair administration of justice against the right to freedom of expression. *Cf. Turney v. Pugh,* 400 F.3d 1197 (9th Cir. 2005) (distinguishing *Wood* and like cases in a jury tampering prosecution).

10

The indictment alleges that defendant at times expressed satisfaction that others committed violent acts. However, the "approval of past violence by others cannot be made illegal consistent with the First Amendment." *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists* (hereafter PPCW), 290 F.3d 1058, 1091 n.3 (9th Cir. 2002) (Kozinski, J., dissenting) (citing *Hess v. Indiana,* 414 U.S. 105, 108-09, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973); *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969); *Edwards v. South Carolina,* 372 U.S. 229, 237-38, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963); *Noto v. United States,* 367 U.S. 290, 297-99, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961)).

11

The present case involves an alleged solicitation rather than a threat; however, the cases often analyze such disclosures under both the true threat and incitement doctrines.

12

In *PPCW,* Judge Kozinski characterized the *Claiborne Hardware* holding as follows: "In other words, even when public speech sounds menacing, even when it expressly calls for violence, it cannot form the basis of liability unless it **{2009 U.S. Dist. LEXIS 34}**amounts to incitement or directly threatens actual injury to particular individuals." 290 F.3d at 1095 (Kozinski, J., dissenting).

13

The majority later reiterated that the Nuremberg Files website, standing alone, was protected, "because the First Amendment does not preclude calling people demeaning or inflammatory names, or threatening social ostracism or vilification to advocate a political position." *Id.* at 1086.

14

The Seventh Circuit's opinion in *Hale* is consistent with this construction of § 373. First, Hale solicited a specific person, Tony Evola (who turned out to be an FBI informant), to murder Judge Lefkow. Prior to the solicitation, Hale had designated Evola as his "head of security" and leader of the "White **{2009 U.S. Dist. LEXIS 42}**Berets," the World Church's "'elite' fighting force." *Id.* at 976. Thus, Hale stood in a position of direct influence or authority over Evola, and despite the equivocation in some of Hale's statements Evola clearly understood Hale to be soliciting Judge Lefkow's murder. *Id.* at 983. Second, the government presented a detailed course of dealings between Hale and Evola leading up the solicitation, which corroborated defendant's intent that Evola commit the crime. *Id.* at 976-79, 983-84. The court did uphold the admission of Hale's statements praising the shooting rampage of Benjamin Smith, also a Hale follower, but only because those statements provided context for Hale's dealings with Evola. In other words, Hale's statements about Smith were relevant to the solicitation at issue, which also involved a follower. *Id.* at 985. Even so, the court of appeals considered admission of such statements "a close question." *Id.* at 986. The court did not endorse the wholesale introduction of previous threats or intemperate statements made by Hale relating to individuals unconnected to Evola as corroborative of Hale's intent. Although I need not address the issue in ruling on the instant motion to dismiss, **{2009 U.S. Dist. LEXIS 43}**I note that defendant has also filed a motion under Fed. R. Evid. 404(b) seeking to exclude virtually all of the evidence the government seeks to use as strong corroboration of his intent.

15

Professor Volokh suggests that speech communicated entirely to people who the speaker knows will use it for criminal purposes has virtually no First Amendment value and therefore may be banned without interfering with valuable uses of speech. Volokh, *supra,* at 1142-43. On the other hand, the case for restricting speech is much weaker when the speaker distributes material that has valuable as well as harmful uses and has no meaningful way of limiting his audience to benign users. *Id.* at

1176. When speech is communicated to the public at large, most listeners will focus on the social criticisms, rather than being moved to commit crimes. *Id.* n.194. Professor Volokh further notes that the law of aiding and abetting and crime facilitation developed in cases where the defendant knew that he was helping a particular person commit a crime. *Id.* n.147.
16

As Judge Berzon explained in her dissent in *PPCW:*

> Where there is no threat, explicit or implicit, that the speaker or someone under his or her control intends to harm someone, a statement inducing fear of physical harm must be either (1) a prediction or warning of injury, or (2) an inducement or encouragement of someone else to cause the injury. The former is, as Judge Kozinski suggests, clearly entitled to protection under the First Amendment as either informative or persuasive speech. The latter kind of statement may or may not be protected. Whether it is or not must be governed by the strict inducement standard of *Brandenburg* if the more than fifty years of contentious development of the protection of advocacy of illegal action is not to be for naught.*Id.* at 1106. Judge Berzon further explained that one can

justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes **{2009 U.S. Dist. LEXIS 46}**between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The speech itself, in that circumstance, does not create the injury, although it may make it more likely. The Supreme Court has essentially decided that free expression would be too greatly burdened by anticipatory squelching of advocacy which can work harm only indirectly if at all.*Id.* As stated, the indictment in the present case charges a solicitation not a threat.
17

Public dissemination of information like social security numbers and computer passwords "is unlikely to facilitate any political activity (unlike, say, publicly distributing abortion providers' or boycott violators' names, which may facilitate lawful shunning and social pressure, or even their addresses, which may facilitate lawful residential picketing and parading)." Volokh, *supra,* at 1146. Thus, dissemination of such information may be distinguished from the publication of names and addresses.
18

Professor Volokh argues that speech which potentially facilitates crime should be banned only (1) when the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment; (2) when the speech, even though broadly published, has virtually no noncriminal uses (e.g., it reveals social security numbers or computer passwords); and (3) when the speech facilitates extraordinarily serious harms, such as nuclear or biological attacks. Volokh, *supra,* at 1217. Because the speech at issue in the present case is clearly protected under existing **{2009 U.S. Dist. LEXIS 65}**First Amendment law, I need not adopt Professor's Volokh's categories. Nevertheless, his analysis of how crime facilitating speech may be prosecuted consistent with the Constitution is cogent. As he also helpfully explains, courts should avoid deciding these types of cases based on their own view as to whether there is a legitimate public interest in the information being disseminated, as such an inquiry will likely involve opining on whether the court agrees with the individual about whom the disclosure is made. Volokh, *supra,* at 1172 ("Restricting the speech on the ground that the names aren't matters of 'legitimate public concern' is thus restricting speech

based on a judgment about which side of this contested political debate is right--something judges generally ought not be doing."). Thus, the fact that I might regard as noble the struggle of Mississippi blacks for equal treatment, and defendant's views as reprehensible, is irrelevant to the constitutional analysis. Nevertheless, there is irony in the fact that defendant's right to spread a message of white supremacy has, in large part, been secured by the efforts of African-Americans to obtain civil rights.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 373. Solicitation to commit a crime of violence

(a) Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571 [18 USCS § 3571]) fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.

(b) It is an affirmative defense to a prosecution under this section that, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, the defendant prevented the commission of the crime solicited. A renunciation is not "voluntary and complete" if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective. If the defendant raises the affirmative defense at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(c) It is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because he lacked the state of mind required for its commission, because he was incompetent or irresponsible, or because he is immune from prosecution or is not subject to prosecution.

HISTORY:

Added Oct. 12, 1984, P. L. 98-473, Title II, Ch X, Part B, § 1003(a), 98 Stat. 2138; Nov. 10, 1986, P. L. 99-646, § 26, 100 Stat. 3597; Sept. 13, 1994, P. L. 103-322, Title XXXIII, § 330016(2)(A), 108 Stat. 2148.

§ 4001. Limitation on detention; control of prisons

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

(b) (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

HISTORY:

Act June 25, 1948, ch 645, § 1, 62 Stat. 847; Sept. 25, 1971, P. L. 92-128, § 1(a), (b), 85 Stat. 347.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is

awaiting such determination.

HISTORY:

Act June 25, 1948, ch 646, 62 Stat. 964; May 24, 1949, ch 139, § 112, 63 Stat. 105; Sept. 19, 1966, P. L. 89-590, 80 Stat. 811; Dec. 30, 2005, P. L. 109-148, Div A, Title X, § 1005(e)(1), 119 Stat. 2742; Jan. 6, 2006, P. L. 109-163, Div A, Title XIV, § 1405(e)(1), 119 Stat. 3477; Oct. 17, 2006, P. L. 109-366, § 7(a), 120 Stat. 2635; Jan. 28, 2008, P. L. 110-181, Div A, Title X, Subtitle F, § 1063(f), 122 Stat. 323.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from the final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) 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; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may

appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 [28 USCS § 2244] by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

HISTORY:

Act June 25, 1948, ch 646, 62 Stat. 967; May 24, 1949, ch 139, § 114, 63 Stat. 105; April 24, 1996, P. L. 104-132, Title I, § 105, 110 Stat. 1220; Jan. 7, 2008, P. L. 110-177, Title V, § 511, 121 Stat. 2545.

Cl 2. Habeas corpus.

The Privilege of the Writ of **Habeas** Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This clause is popularly known as the "Suspension Clause".