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IN THE
SUPREME COURT OF THE UNITED
STATES OCTOBER TERM 2023

PETER FRATUS,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for A Writ of Certiorari
To the United States Court of Appeals
For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the Third Circuit did not properly weigh the probative value with the prejudicial effect when admitting the messages to *Kars4Kids* and Rep. Waters to assess the messages to Commissioner Outlaw?
- II. Whether the Court wrongly weighed factors of mistake, perception, and motivation, which were irrelevant and superfluous for the admission of the messages to *Kars4Kids* and Rep. Waters.

PARTIES TO THE PROCEEDING

The caption identifies all parties involved.

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PETITION FOR A WRIT OF CERTIORARI

Peter Fratus respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The Third Circuit's opinion affirming Petitioner's conviction and sentence is unpublished and appears at Appendix A. The opinion of the United States District Court appears at Appendix B and is unpublished.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on August 8, 2019. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and issued its unpublished opinion on March 8, 2023. Rehearing was denied April 4, 2023. A copy of the Order denying Rehearing appears at Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved are 18 U.S.C. § 875(c):

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

28 U.S.C.A., Rule 403:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

And the Federal Evidence Rule 404(b)(2) (Character Evidence; Other Crimes, Wrongs, or Acts):

Permitted Uses. [E]vidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

STATEMENT OF THE CASE

The lower court summarized the facts and procedural history as follows:

Peter Fratus [(the Petitioner)] was convicted of transmitting threats in interstate commerce, 18 U.S.C. § 875(c), after sending Philadelphia's police commissioner racist and threatening emails. He was sentenced to four years of imprisonment and three years of supervised release. [The Petitioner] appeal[ed] his conviction and sentence, challenging the admission of certain evidence, the sufficiency of the evidence underlying his conviction, and the District Court's application of the Sentencing Guidelines.

* * *

On the night of June 6, 2020, [the Petitioner], using a false name, sent two emails to Philadelphia Police Commissioner Danielle Outlaw. The first email said: "Calling the police now for an emergency. No answer. Dirty n****r! Find a n****r hang a n****r. Jews into the ovens!!" The second, sent one minute later, began with a subject line of "Find a n****r kill a n****r." It read: "Where does police chief live?" He sent these emails to the address police.comissioner@phila.Gov after searching online for the Philadelphia Police Department and visiting its website.

Just minutes later, [the Petitioner] called the Jewish charity *Kars4Kids*. He spoke to [a] presentative of the charity and said, "Find a Jew, Kill a Jew. I'll find out where that fucking day camp is and I'll find out where they are and I'll kill all those fucking kids, how about that?" [The Petitioner] called *Kars4Kids* three more times that night and the next day. He left voice mails threatening to "Find a Jew, Kill a Jew" and promising to put Jews "in[the]oven." [The Petitioner] said in one voicemail that he wanted to "blow up the Jewish heritage" and added in two more that he was "trying to find out where Jews live so I can kill them." As a result of his emails to the police commissioner, [the Petitioner] was arrested by the FBI at his Massachusetts home on June 16, 2020. A grand jury in the Eastern District of Pennsylvania charged [him] for sending those emails, indicting him for a single count of transmitting an interstate threat in violation of 18 U.S.C. §875(c).

[The Petitioner's] trial began shortly after his indictment. The Government sought to introduce against [him] "eight prior incidents in which [the Petitioner] threatened or

assaulted individuals in a racist, misogynistic, or antisemitic manner.” [The Petitioner] objected, and so the District Court heard argument on the issue and allowed the Government to introduce only two. First, the court allowed the government to introduce recordings of the previously described phone calls [the Petitioner] made to *Kars4Kids*. Second, the court admitted evidence of a voicemail that [the Petitioner] left for Congresswoman Maxine Waters two years earlier replete with racial slurs and references to lynching. The court gave [] limiting instructions regarding this evidence both when it was introduced and before the jury’s deliberations.

At his trial, [the Petitioner] did not deny that he sent the email she was charged with sending. His principal defense was that his threats were the result of his longstanding “problem with alcohol consumption.” [The Petitioner] testified that he was not aware of the commissioner’s race (she is Black) and did not intend to threaten her. The jury [] convicted him. The District Court denied [the Petitioner’s] post-trial motions for acquittal and for a new trial and proceeded to sentencing. [The Petitioner] faced a statutory maximum of five years. The court calculated an advisory range for [the Petitioner’s] sentence under the Sentencing Guidelines of 41 to 51 months. Ultimately, the court considered the relevant factors under 18 U.S.C. § 3553 and imposed a sentence of 48 months [of] imprisonment and three years [of] supervised release.

See United States v. Fratus, 2023 WL 2710270 (March 30, 2023 opinion) (internal citations omitted).

On March 30, 2023, the Third Circuit affirmed the Petitioner’s judgment of sentence. The Petitioner timely moved for a rehearing. On May 1, 2023, the rehearing petition was denied. This petition for a writ of *certiorari* follows.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT DID NOT PROPERLY WEIGH THE PROBATIVE VALUE WITH THE PREJUDICIAL EFFECT WHEN ADMITTING THE MESSAGES TO *KARS4KIDS* AND REP. WATERS TO ASSESS THE MESSAGES TO COMMISSIONER OUTLAW.

Courts have long held that the crucial deliberation for whether a message is a threat is how a “reasonable recipient” would interpret the message. *See United States v. White*, 810 F.3d 212 (6th Cir. 2021) (*citing Elonis v. United States*, 575 U.S. 723 (2015) (finding that to convict a defendant under 18 U.S.C. § 875, the prosecution must show that “an ordinary, reasonable recipient who is familiar with the context in which the statement is made would interpret it as a serious expression of an intent to do harm.”)).

In its fact-finding role, the jury essentially stands in the place of the “reasonable recipient.” As such, a jury must weigh the words and the context in which the words were used to determine how a “reasonable recipient” would interpret the messages as a serious expression of an intent to do harm. But just as the actual recipient (here, Commissioner Outlaw) would not have access to statements made to third parties (i.e., *Kars4Kids* and Rep. Waters) when viewing the Petitioner’s messages, a “reasonable recipient” would also not have access to messages sent to third parties. Thus, the trial court unlawfully reduced the government’s burden by allowing the jury to weigh irrelevant, cumulative, and prejudicial messages to *Kars4Kids* and Rep. Waters to assess the messages to Commissioner Outlaw. *See White and Elonis, supra.*

The Third Circuit assented the trial court’s error. The Third Circuit’s findings not only showed a misreading of the Appellant’s argument on appeal, but also showed

that the Court overlooked a material consideration in its decision—that under the “reasonable recipient” standard, the prejudicial effect of the messages to *Kars4Kids* and Rep. Waters far outweighed any probative value. *See* 28 U.S.C.A., Rule 403.

To wit: on appeal, the Court found that the messages to *Kars4Kids* and Rep. Waters were admissible because they showed that the Petitioner “intended his emails to be threatening.” While the senders’ intent for a threatening message is relevant, the need to prove intent is diminutive under the “reasonable recipient” standard. Under the “reasonable recipient” standard, the jury could find the messages to Commissioner Outlaw as threatening by the mere words and context of the messages alone. Because a jury may find the emails threatening without extraneous information, the need to show that the Petitioner intended his emails to be threatening was minor compared to the overwhelming prejudicial effect of the messages sent to *Kars4Kids* and Rep. Waters. Simply, these messages had extraordinary prejudicial significance with low probative value, but neither the trial court nor the Third Circuit properly weighed these considerations. *Id.*

The Court’s reasoning for admitting the messages was also viciously circular. Even if the messages to *Kars4Kids* and Rep. Waters could show the Petitioner’s threatening intent when he sent the messages to Commissioner Outlaw, the only way to assess whether the messages to *Kars4Kids* and Rep. Waters were threatening was to view these messages as a “reasonable recipient.”

In short, to assess whether one message was sent with threatening intent, the jury must assess whether another message was sent with threatening intent. This

analysis is circular, without ending. Indeed, this is not a case where the second and third shots from a gun help establish the intent of the first. Here, two, three, or forty messages with similar content would not matter as the same analysis would still apply to each message. To employ the idiom, this additional analysis for intent merely “kicks the can down the road.” Meanwhile, as the can skids and bobs aimlessly with the admission of each extraneous message, the Petitioner is unduly prejudiced.

For these reasons, the Third Circuit did not properly weigh the probative value with the prejudicial effect when admitting the messages to *Kars4Kids* and Rep. Waters to assess the threatening intent of the messages sent to Commissioner Outlaw.

II. THE COURT WRONGLY WEIGHED FACTORS OF MISTAKE, PERCEPTION, AND MOTIVATION, WHICH WERE IRRELEVANT AND SUPERFLUOUS FOR THE ADMISSION OF THE MESSAGES TO *KARS4KIDS* AND REP. WATERS.

In addition to the above, the Court also wrongly weighed factors of mistake, perception, and motivation, which were irrelevant and superfluous for the admission of the messages to *Kars4Kids* and Rep. Waters. In its opinion, the Court wrongly found that the Petitioner’s other messages were admissible and strong evidence that he was motivated to “make racist threats . . . knew they would be perceived as threats, and did not send them by mistake . . . even if there were a ‘large risk of unfair prejudice.’” These considerations were misplaced.

First, the Court wrongly found that the messages to *Kars4Kids* and Rep. Waters “were strong evidence that [the Petitioner] was motivated to make racist threats.” Indeed, motivation is not an element of the crime, and the statute does not require the threats to be racially motivated. *See* 18 U.S.C. § 875. Thus, the prejudicial effect of

the messages sent to *Kars4Kids* and Rep. Waters far outweighed the jury's need to consider the nonessential evidence of motive.

The Court next errored by finding that the messages to *Kars4Kids* and Rep. Waters were admissible to show that the Petitioner "knew the [messages] would be perceived as threats." This finding was unsupported. The Petitioner had no idea if his messages to *Kars4Kids* or Rep. Waters were even heard. Without a reply, how would the Petitioner's know how his messages were perceived? Moreover, the need for a jury to learned how the Petitioner's messages were perceived is rebutted by the "reasonable recipient" standard, as the jury could find the Petitioner guilty regardless of whether he knew how his messages were perceived.

Lastly, the Court errored by finding that the messages to *Kars4Kids* and Rep. Waters were admissible to show that the Petitioner "did not send them by mistake." This is a misreading of the law. Under Federal Rules of Evidence, Rule 404(b)(2) evidence may be admissible to show "absence of mistake" or "lack of accident." Whether the emails were a mistake would apply to the *sending* of the email. *See, e.g., United States v. Huels*, 31 F.3d 476 (7th Cir. 1994) (holding that testimony about having previously grown marijuana in the same location was admissible to show the absence of mistake or accident, where the defendant claimed he wandered into the same marijuana garden by chance while hunting for deer.).

In other words, emails to third-parties would be relevant to rebut the Petitioner's claim that he did not know how to use a computer, entered the wrong email address, or intended the messages for a friend. But none of these claims were in play

here. Even if these claims were relevant, the messages to *Kars4Kids* and Rep. Waters were by phone, not by email.

That said, the two emails to Commissioner Outlaw already refuted any possible mistake claim. The Petitioner sent *two* emails, not one, with similar content, to the Commissioner. In one email, he asked “Where does the police chief live?” These facts alone were more than sufficient to show that the emails were not sent by mistake. Thus, the messages to *Kars4Kids* and Rep. Waters were either immaterial or cumulative to rebut any mistake claim.

For these reasons, this Court should overturn the Third-Circuit’s ruling, vitiated the District Court’s ruling, excluded the messages to *Kars4Kids* or Rep. Waters, and awarded the Petitioner a new trial.

III. THE LEGAL QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

This case presents a question of exceptional importance because not only does it affect virtually every federal criminal case for threatening statements under 18 U.S.C. § 875, but it also affects the way in which other acts may be permitted in prosecuting those cases.

IV. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS QUESTION.

This case is also ideal for addressing the above issues, as the District Court and the Third Circuit both failed to spot or remedy the issues. Essentially, this Court resolving this matter in the Petitioner’s favor would judicially clarify two equivocations by two courts.

CONCLUSION

Because the legal question presented is exceptionally important, the Court should grant this petition for writ of certiorari and reverse the decision of the Third Circuit Court of Appeals.

Dated: July 26, 2023

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