No. __-_____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY DOUGLAS ELONIS,
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 WRIT OF CERTIORARI

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QUESTION PRESENTED

In affirming the trial court's decision denying Petitioner's post-trial motion to vacate his cyberstalking conviction, the Circuit Court neglected to address the government's failure to prove that Petitioner had the requisite intent to harass or intimidate the victims or that through his conduct he caused, attempted to cause, or would be reasonably expected to have caused substantial emotional distress to the victims. Moreover, in as much as the recipients of Petitioner's missives knew Petitioner and his penchant for hyperbole and knew that he had never before acted upon his hyperbolic words, none of his missives constituted a true threat.

The question is:

Whether the Third Circuit's decision affirming Petitioner's conviction is erroneous because the evidence in the record was insufficient to establish that he had the specific "intent to cause, attempt to cause or would be reasonably expected to cause substantial emotional duress" as required by the Cyberstalking Statute, 28 U.S.C. § 2261A(A)(2)(B), or that the Petitioner made a "true threat" as that term has been interpreted by this Court under the First Amendment of the Constitution.

LIST OF ALL PARTIES

The Petitioner is Anthony Douglas Elonis and the Respondent is the United States of America, as set forth in the caption of the case on the cover page.

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

Anthony Douglas Elonis respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding the district court's denial of his postconviction motion to vacate his conviction and for a new trial.

OPINIONS BELOW

A copy of the Third Circuit's May 15, 2024 non-precedential opinion is attached as in the Appendix A.

The United States District Court for the Eastern District of Pennsylvania (Smith, J.) did not write any pertinent opinion. Rather, the district orally announced its decision denying Petitioner's postconviction motion from the bench, prior to the imposition of sentence. The relevant part of the sentencing transcript is excerpted as Appendix B.

JURISDICTION

On May 15, 2024, the United States Court of Appeals for the Third Circuit filed its non-precedential opinion affirming petitioner's conviction. As a result, pursuant to this Court's Rule 13.1, this Petition for Certiorari is timely filed within 90 days of May 15, 2024, that is, not later than August 13, 2024. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES and RULE(S) INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Title 21, United States Code, provides, in pertinent part:

§ 18 USC §2261A(2)(B).

Whoever—

(2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that...

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A),

shall be punished as provided in section 2261(b) or section 2261B, as the case may be.

Federal Rule of Criminal Procedure 29(c)(1).

(c) AFTER JURY VERDICT OR DISCHARGE.

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.

STATEMENT OF THE CASE

In 2011, Petitioner was convicted by a jury for making a series of social media posts threatening to kill his ex-wife, harm law-enforcement agents, and commit a school shooting. A jury convicted him of transmitting "communications containing . . . threat[s] to injure the person of another" in violation of 18 U.S.C. § 875(c). *See United States v. Elonis*, 841 F.3d 589, 592–95 (3d Cir. 2016). The District Court sentenced Elonis to 44 months imprisonment followed by three years of supervised release, and Elonis served his prison term.

On July 21, 2021, Petitioner was indicted in the instant matter with three counts of cyberstalking, each count naming a different victim. As to Count One, the charges encompass the period on or about January 5, 2020 through December 2020. As to Count Two, the charges encompass the period on or about June 2018, to July 21, 2021. As to Count Three, the charges encompass the period on or about January 1, 2018 to July 21, 2021. Regarding each of the victims, the Indictment charged Petitioner with numerous separate instances of knowingly and intentionally utilizing electronic communication services and facilities of interstate commerce to harass and intimidate, via conduct that would cause, attempt to cause, and be reasonably expected to cause substantial emotional distress. (C.A. Appx 25-54)[1] Regarding Victim 1 (the prosecutor who handled his 2011 case), beginning in April through September 2013, while serving the sentence on the 2011 conviction, Petitioner mailed two letters to Victim #1.[2] The first stated: "I am rapidly approaching the date of my release. Accordingly, I would like to begin researching the ordinances of the municipality in which you reside. I simply do not wish to run afoul of any of them when I set fire to a cross in your yard...I just thought you would appreciate my newfound respect for the law." Signed "With Love, Your BFF Anthony Douglas Elonis." (C.A. Appx 26-27, 701-703) The second letter stated: "You may have won the battle, but you'll never stop me from wearing my Adam Lanza t-shirt in public." The

[1] "C.A. Appx" designates the Appendix to the appellate record in the Third Circuit Court of Appeals. Citations to "C.A. Appx," therefore, are to the Circuit Court's record.

letter noted that Petitioner was scheduled to be released from prison on February 14, 2014. Petitioner went dormant for about six years. (C.A. Appx 712, 797)

On January 5, 2020, Victim #1 received an e-mail from Petitioner stating: "HI. I hope these dick pics finds [sic] you well. Please accept them in lieu of a burning cross." (Attached to the email were pornographic pictures of Petitioner's genitalia.) Twelve minutes later, Victim #1 received another email with the same photographs. (C.A. Appx 27-28, 713, 715-718) Later, on the same day, Petitioner posted a "tweet" via his Twitter account @anthonyelonis which stated: "It's one thing to joke about sending your dick pics to the prosecutor that tried your case. It's another thing entirely to actually do it. And, yeah, I did." (C.A. Appx 28, 720-722) Five days later, on January 30, 2020, Petitioner sent another email to Victim #1 which included a picture of the "Joker" from the Batman series holding a picture of Adam Lanza.(C.A. Appx 29, 723-725)

The text stated: "HELL HATH NO FURY LIKE A CRAZY MAN IN A KINDERGARTEN CLASS, and, THE ONLY QUESTION IS . . . WHICH ONE?... Do you ever feel guilty about all the pain we've caused?" The email also included a paragraph citing an Illinois law defining the term "threatens," and stated, "I'm excited about this new development to the stalking law in Illinois. There's going to be a fresh batch of souls for us to collect." The email was signed., "Your BFF, Anthony Elonis." (C.A. Appx 29, 723-725)) The remainder of the email referred to language used by Petitioner that was part of the case relating to his 2011 conviction. (C.A. Appx 30-31, 728) `One email message sent, under the heading "Guilt," contained a picture of Sandy Hook elementary school with the following words: "I TOOK PAYMENT IN

BLOOD..." The email also contained an admission that Petitioner had posted messages boasting that any attempt to prosecute him would end in failure and, in turn, would generate a compensatory payment to him." (C.A. Appx 58-59, 741-742). An email to the prosecutor stated that in essence that the three victims would look to his various media postings to "protect themselves." (C.A. Appx 33, 744-745). Included in the e-mail was a Facebook posting of November 30, 2010, which read as follows:

> I was jus' waitin for y'all to handcuff me and pat me down--Touch the detonator in my pocket and we're all Goin' [BOOM!] Are all the pieces comin' together? Shit, I'm just a crazy sociopath that gets off playin you stupid fucks like a fiddle And if y'all didn't hear, I'm gonna be famous cause I'm just an aspiring rapper who likes the attention who happens to be under investigation for terrorism cause y'all think I'm ready to turn the Valley into Fallujah. But I ain't gonna tell you which bridge is gonna fall into which river or road-And if you really believe this shit, I'll have some bridge rubble to sell you tomorrow [BOOM !] [BOOM] [BOOM] 'You shouldn't have touched the detonator (first name of Victim #1). You believed these were threats. Now I get to sell my bridge rubble.

(C.A. Appx 33-35,746-747)

Regarding Victim #2, Petitioner and she dated for about three years, 2015 to 2018, and had a child together. In support of the charges against Petitioner contained in Count Two, the Government presented evidence that Petitioner made numerous harassing communications to Victim #2. According to her testimony, Petitioner repeatedly sent her numerous communications, including text messages, numerous telephone calls and voicemails. She further testified that on several occasions Petitioner approached her at her place of employment and her home. (C.A. Appx 893-901, 906-909). In August 2019, Victim #2 was granted a Temporary Protection from Abuse Order from the Court of Common Pleas of Northampton County, Pennsylvania. (C.A. Appx 901, 909-913) On August 16, 2019, the same court granted her a Final

Protection from Abuse Order [PFA]. (C.A. Appx 917) Notwithstanding the PFA, Petitioner continued to contact her using prohibited means. (C.A. Appx 40-41, 920)

According to the Government's case, in or about September of 2019, Petitioner sent Victim #2 a text message stating: "I don't know if the news will definitely drop this week but you three need to prepare yourselves for the reality that Adam Lanza was inspired by my writing and that the Obama Administration lied to the American people about it. I don't know what that means for me, you, our children, or the country but you need to be made aware." (C.A. Appx 920-923) The following month, Petitioner posted a tweet stating: "A little update to U.S. history: The last Protection from Abuse order issued by the Commonwealth of Pennsylvania against me resulted in the deaths of 20 children at Sandy Hook Elementary School in Newtown, Connecticut."(C.A. Appx 928) Sometime in October of 2019, Petitioner posted a tweet that included an image of Victim #2 performing a sexual act. (C.A. Appx 42, 937-938)

Roughly a year later, in October of 2020, Petitioner posted another tweet containing images of Victim #2 and of another ex-girlfriend stating: "The Three Amigos using their victimhood to get the state to engage in acts of violence against men. Well, ladies two can play at that game. And I don't like to lose." (C.A. Appx 944-946) Four months later, on February 11, 2021, Petitioner issued another tweet stating: "Do these women[3] have any idea the collective harm they've caused to the United States of America?" (C.A. Appx 949) On March 29, 2021, Petitioner posted

[3] The tweet named Petitioner's ex-wife [Victim #3], Victim #2, and another ex-girlfriend [not named in the Ind.] .(C.A. Appx 43)

another tweet containing an image of himself and Victim #2 stating: "My trophy black ass ex-girlfriend with the CIA daddy. Let's talk about her." (C.A. Appx 950-951)

On March 30, 2021, Petitioner posted two separate tweets, the first stated: "Jolene is a song I heard in federal prison. It evoked images of the fascist hammer and [ ]. I named my black daughter [ ].... Her mother's second date with me was sipping bacon coffee at Bacon Fest. You know where I'm going with this. Revenge is unknown absent me." The second contained images of Petitioner, Victim #2 and Adolf Hitler. It stated: "I don't support the ideology. I support the right to support the ideology. It's the Constitution. You know we were the case study, right?" (C.A. Appx 957-959) On March 31, 2021, Petitioner posted a tweet again containing an image of himself and Victim #2 stating: "She informed me of my true societal influence, boys. I had to waterboard her." (C.A. Appx 951-952) On April 6, 2021, Petitioner reposted a tweet from August 9, 2020, depicting an image of a pregnant Victim #2 stating: "It's an erotic act." (C.A. Appx 956-957)

In support of the charges against Petitioner contained in Count Three, the evidence showed that the Petitioner visited Victim #3's (his ex-wife, also a victim in the Petitioner's 2011 conviction for violating 18 U.S.C. § 875(c)) home and made numerous unwanted communications to her. (C.A. Appx 995-997) On September 16, 2020, Petitioner posted a tweet with a screenshot of "The Book of Granny" mentioning Victim #3 stating: "It was after your testimony at trial that I decided to grow a Hitler mustache to wear at sentencing in an effort to make contact with a troubled artist and seal the deal that would become known as Sandy Hook." (C.A. Appx 1001-1002) Petitioner posted an additional tweet on the same day stating: "I had to say all that.

There's no trespass I wouldn't forgive, even unrequited. I still love you, [First name of Victim #3]." (C.A. Appx 1003) On October 22, 2020, Petitioner posted another tweet stating: "In her [hymn] of a hundred names from the MundamalaTantra, [First Name of Victim #3] is called 'she who likes blood, she who is smeared with blood,' and 'she who enjoys blood sacrifice, Wikipedia.' (C.A. Appx 1003-1004)

The Petitioner also left the Victim #3 voicemails on October 25, November 1 and 3, and December 6, 2020. The Petitioner touched upon a range of topics, including stating Victim #3: " I know you read my shit, I know [name of Petitioner's other ex-girlfriend] reads my shit...;" (C.A. Appx 1058-1060) "... "Why you're doin this..." ... I'm not lyin when I say I have data on top of data . . . I could release it all... I want you to apologize for what you did to me ...." (C.A. Appx 1054,1058); "I'm sorry for all the awful things I said on there, specifically the stuff about you, and, um, it's gone, it's deleted..." (C.A. Appx 1061); and "I deleted my Twitter, um, basically indefensible, I'm sorry for all the awful things I said on there, specifically the stuff about you, and, um, it's gone, it's deleted." (C.A. Appx 1061)

On November 3, 2020, Petitioner posted a tweet stating: "I don't think you understand how damaging your fear has been to the safety and security of the people of the United States of America, [First Name and Middle Name of Victim #3]. 1 love you. Probably always will. It's my cross." (C.A. Appx 1008) On November 4, 2020, Petitioner posted another tweet stating: "I was fascinated by the Oklahoma City bombing. I read the entire Newsweek article in my sex therapist's waiting room at the age of 12. I fell in love with terror [First name of Victim #3] in the summer of

2001. I'm not going to lie. Terrorism has always made my dick hard." (C.A. Appx 1010-1011)

At trial, Petitioner testified on his own behalf. He admitted to sending the communications but denied any intent to harass or intimidate anyone. He denied attempting to cause substantial emotional distress, or that his conduct actually caused substantial emotional distress, or would be reasonably expected to cause substantial emotional distress. (C.A. Appx 1266-1280, 1284-1286, 1289-1290, 1292-1302)

After deliberation, the jury convicted petitioner of all counts in the indictment on August 5, 2022.

On January 19, 2023, consistent with the trial court's extension of the time to file post-verdict motions, the Defendant filed a post-verdict motion for Judgment for Acquittal and in the Alternative for a New Trial, pursuant to Fed. R. Crim. P. 29. (C.A. Appx 252-278) On March 23, 2023, Defendant appeared before the trial court for sentencing. Prior to imposition of sentence, the trial judge denied Defendant's post-verdict motions. (C.A. Appx 352, 1562-1564) In pertinent part, the trial court stated:

> The interesting thing about this is the facts that were alleged in the indictment were almost uniformly agreed to by Mr. Elonis. So, the issue in this case as far as the facts and what happened were not really contested. What was really contested, I believe in Mr. Elonis' mind, was whether he had the constitutional right under the First Amendment to make these communications. And by that I mean did he have the intent to intimidate -- well, to make me very concise about it - did he have the intent to put his victims in fear of bodily harm or death.
>
> ****

> I'm not going to go through all the evidence that was presented at trial. What I will say is that Mr. Elonis has failed to meet his burden in this case. The Government presented sufficient evidence that a reasonable juror could find that he sent the messages with the intent to create a fear of harm in the three victims. That is a fear of bodily injury or death.
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> ****
>
> Therefore, I am going to deny his motion for judgement of acquittal.... And I incorporate the rulings that I've previously made throughout the course of these proceedings, but [sic] with pretrial and during trial.

(14a-16a)

Immediately thereafter, Defendant was sentenced to an aggregate term of 151 months of incarceration with a three-year period of supervision upon release. (C.A. Appx 1615-1617)

A timely Appeal was filed with the Third Circuit Court of Appeals. On May 15, 2024, the Third Circuit issued a non-precedential opinion affirming Petitioner's conviction. Appendix A.

Petitioner files the instant Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Circuit Court's decision affirming Petitioner's cyberstalking convictions is erroneous as the court neglected to address the government's failure to prove that Petitioner had the requisite intent to harass or intimidate the victims or that through his conduct he caused, attempted to cause, or would be reasonably expected to have caused substantial emotional distress to the victims. Moreover, none of his missives constituted a true threat and his convictions, therefore, constitute a violation of his right of free expression under the First Amendment of the United States Constitution.

Count 1 of the Indictment charged Petitioner with Cyberstalking pursuant to 18 USC §2261A(2)(B). The statute proscribes the following behavior:

> Whoever –
>
> (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person, uses the mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce, or any other facility of interstate or foreign commerce to engage in a course of conduct that–
>
> B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person described in clause (i), (ii), or (iii) of paragraph (1)(A), shall be punished as provided in section 2261(b) or section 2261B, as the case may be.

(Emphasis added.)

To prove that Petitioner violated the cyberstalking statute, the Government was required to prove three elements beyond a reasonable doubt: 1) Petitioner used a facility of interstate commerce; 2) to engage in a course of conduct that places a person in reasonable fear of death or serious bodily injury or causes substantial emotional distress, either to that person or to a partner or immediate family member;

and 3) with the intent to kill, injure, harass, intimidate or place under surveillance with intent to kill, injure, harass or intimidate that person.

Petitioner never denied sending or posting any of the written or electronic missives alleged by the Government. Consequently, element number one was never in contention. However, as to the remaining two elements, Petitioner denied that he intended to place any of the recipients in fear of death or serious bodily injury or cause them substantial emotional distress. He further denied that the communications had the capacity to cause substantial emotional distress or, that in fact, the missives caused its recipients substantial emotional distress. Petitioner respectfully submits that the Government failed to present sufficient evidence to support the jury's verdict, and that the Third Circuit's holding concerning Petitioner's intent and the actual effect the missives had upon the recipients is incorrect. *See United States v. Gonzalez*, 905 F.3d 165, 179-182 (3d Cir. 2018).

According to the Circuit Court's decision, the Government "met its burden on both elements." (4a) As to the first, the Circuit Court held that there was "ample evidence from which a rational juror could conclude that Elonis aimed to 'put [his] victim[s] in fear of death or bodily injury' or 'distress [his] victim[s] by threatening, intimidating, or the like.'" (4a-5a) (*Citing United States v. Yung*, 37 F.4th 70, 80 (3d Cir. 2022)). Petitioner disagrees.

To prevail on a sufficiency of the evidence challenge, Petitioner is required to show that no rational juror could have found the elements of the offense beyond a reasonable doubt. *See United States v. Cothran*, 286 F.3d 173, 175 (3d Cir. 2002). In

Yung, *supra*, the Third Circuit limited the types of "intimidation" and "harassment" that will trigger the criminal sanctions of 2261A. The *Yung* Court determined that the intent element must be narrowly construed, otherwise the ordinary construction of intimidate and harass can "describe nonviolent, nonthreatening speech" and that criminalizing such speech would "collide with the First Amendment." *Id.* at 76-78. The Third Circuit held that to "intimidate" someone, a Petitioner "must put the victim in fear of death or bodily injury" and that to "harass" a Petitioner must "distress the victim by threatening, intimidating, or the like." *Id.* at 80. Thus, criminally punishable speech is limited to true threats or speech integral to criminal conduct. *Ibid.*

The Supreme Court's true threat jurisprudence originated in *Watts v. United States*, 394 U.S. 705 (1969). There, the Petitioner was charged with making a "threat" to harm the president of the United States in violation of 18 U.S.C. § 871 (a). In reversing the denial of the Petitioner's motion for judgment of acquittal, the Court instructed that a statute that "makes criminal a form of pure speech must be interpreted with the commands of the First Amendment clearly in mind." *Id.*at 707. Thus, the Court held that a threat statute may criminalize only "a true threat, which "must be distinguished from ... constitutionally protected speech," *Id.* at 708, (*Citing United States v. Stock*, 728 F.3d 287, 293 (3d. Cir 2013)). "Based on our own statutory interpretation and this persuasive authority, we hold that the term 'threat' in § 875(c) refers to the expression of an intent to inflict injury in the present or future." *Stock* at 297. It is not unprecedented for a court to conclude that a communication does not legally qualify as a threat or a true threat. Indeed, in *Watts*, the Court held as a

matter of law that the petitioner's statement was merely "political hyperbole" that did not fit within the definition of the phrase "true threat. " 394 U.S. at 708.

In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court stated that a "true threat" is one "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." *Id.* at 359.

Additionally, in *United States v. Landham*, 251 F.3d 1072 (6th Cir. 2001), the Second Circuit reversed the district court's denial of the petitioner's motion to dismiss, concluding that "[the indictment] failed, as a matter of law, to allege a violation of § 875(c) since the alleged communication did not contain "a true threat." *Id.* at 1082-83. *See also Elonis v. United States*, 575 U.S. 723 (2015). In Elonis, the Court was tasked with interpreting the federal crime of transmitting in interstate commerce "any communication containing any threat ... to injure the person of another." 575 U.S. at 732. (*quoting* 18 U.S.C. § 875(c)). The Court reversed Petitioner's convictions, holding that conviction under the federal statute would require a showing that Petitioner intended to issue threats or knew that his communications would be viewed as threats. *See Elonis* at 739.

In the present matter, as to Petitioner's intent, the Third Circuit rejected Petitioner's assertion that his communications were "jocular," "mere annoyances," "nothing more than hyperbole," and "harmless expressions of a frustrated individual." (4a-5a) The Circuit Court did so without citing to any specific evidence. It merely stated as a matter of fiat: "the record belies that description." *Id.* Absent specific

evidence, the Court concluded that "there was sufficient evidence to convict Elonis for his threats, and because an independent examination of the record reveals no "forbidden intrusion on the field of free expression." (5a) *Citing In re Kendall*, 712 F.3d 814, 828 (3d Cir. 2013) (quotation marks omitted).

In reaching this conclusion, the Circuit Court accorded "substantial deference to the jury's finding of guilt," but it failed to "temper" that "deference" "where, as here, the First Amendment is implicated." *In re Kendall*, 712 F.3d 814, 828 (3d Cir. 2013). More to the point, by not citing to any specific evidence from the record, the Court plainly failed to "make an independent examination of the whole record in order to [ensure] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.*

There were three victims alleged in the instant indictment. Victim #1 was the Assistant United States Attorney that previously prosecuted Petitioner in 2011 for violations of 18 U.S.C. § 875(c) (communicating threats in interstate commerce), involving communications – some of which took the form of rap lyrics – that he made via Facebook, Victims #2 and #3 were Petitioner's ex-girlfriend and former wife, respectively. Thus, each of them was well aware that Petitioner's missives were empty ravings. As in both the previous case and the present case, over a course of years, Petitioner never carried out any of his so-called threats. Consequently, the Circuit Court's reliance upon the jury's verdict concerning Petitioner's intent constitutes a failure on the part of the Circuit Court to "make an independent examination of the whole record." Furthermore, by giving credence to the jury's

verdict without any evidentiary support that Petitioner *intended* to issue threats or *knew* that his communications would be viewed as threats, the Circuit Court failed to ensure that "the judgment does not constitute a forbidden intrusion on the field of free expression." *In re Kendall*, 712 F.3d at 828 (emphasis added); *Elonis,* 575 U.S. 723. In contrast to the Circuit Court's findings as to the intent element, when addressing whether the Petitioner's electronic missives did in fact cause the victims to experience substantial emotional distress, the Court concluded that: "the record makes clear that Elonis's communications gave rise to the victims' substantial emotional distress to all three victims. 18 U.S.C. § 2261A(2)(B)." (5a) In making that finding, unlike its finding concerning Petitioner's objective intent, the court did cite to the specific trial testimony of the victims. In that regard, the Third Circuit noted each of the victim's testified that Petitioner's messages left them feeling "threatened," "panicked," "afraid," and "terrified. See, e.g., App. 733, 936, 1039." *Id.* Based thereon, the Circuit Court held that "ample evidence" existed "from which a rational juror could conclude that Elonis "cause[d] . . . substantial emotional distress" to all three victims. 18 U.S.C. § 2261A(2)(B). (5a) While Petitioner disagrees with the Court's finding that the recipients did in fact fear him, the Circuit Court at least attempts to support its finding by highlighting the specific testimony of the victims. Yet it failed to do the same when addressing Petitioner's specific intent.

As stated at the outset, in order to convict Petitioner, the Government was required to prove both Petitioner's "intent" in sending the missives and that the missives had the actual effect of placing the recipients in fear of death or serious

bodily injury or cause them substantial emotional distress. Proof of both elements is required to survive a motion to dismiss or for denying a judgment of acquittal notwithstanding the verdict. In the present matter, the Government failed to present sufficient evidence for a rational jury to conclude beyond a reasonable doubt that Petitioner intended to convey a true threat to any of the named victims or knew that his missives would be viewed as a true threat to kill, injure, or cause substantial emotional distress to any of the named victims. When considering all the communications sent within the dates alleged in the Indictment, even those containing parts of messages from the previous case, Petitioner's communications with the recipients do not rise to the level of a true threat and his convictions amount to a violation of his right of free expression as guaranteed by the First Amendment.

For example, while the 2013 letter Petitioner sent to Victim #1 from his place of confinement there contains the phrase "set fire to a cross in your yard," the phrase must be viewed in full context. To wit: "I am rapidly approaching the date of my release. Accordingly, I would like to begin researching the ordinances of the municipality in which you reside. I simply do not want to run afoul of any of them when I set fire to a cross in your yard." (C.A. Appx 701-702) When viewed as such, the missive fails to rise to the level of a true threat. Indeed, the Government presented no evidence that, once released from prison Petitioner burned or even attempted to burn a cross on Victim #1's lawn, or any of the other alleged victims' residences for that matter. In fact, on cross-examination Victim #1 admitted that investigators determined that Petitioner's letter did not represent a viable threat. (C.A. Appx 857-859) Moreover, Petitioner testified that the missive was merely

intended to be a jocular reference to the briefs filed as part of the direct appeal of his previous conviction to which Victim #1 was a party. (C.A. Appx 1304-1305)

The Government presented no evidence that Petitioner communicated even a single true threat. A 'true threat' must "communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual...." *Virginia v. Black*, supra at 359. On the contrary, when viewed in a light most favorable to the Government, none of the communications sent by Petitioner during the period alleged in the Indictment conveyed or could reasonably have been construed to convey a true threat. Additionally, the Government's evidence failed to establish conduct that could be construed as harassment and/or intimidation or that could be reasonably expected to cause substantial emotional distress. In reality, at worst, all of Petitioner's missives and postings were mere annoyances and none rose to the level of a "true threat." Indeed, Victim #1 did not act expeditiously and never contacted local authorities regarding the alleged threats, nor did she hear from Petitioner in any form for the next six years. (C.A. Appx 788-791, 798, 1221-1222, 1231-1234) Likewise, Victims #2 and #3 did not initiate complaints for any of the missives issued within the dates alleged in the Indictment. (C.A. Appx 963-964, 969, 1071-1072, 1129-1130, 1221-1222, 1233-1234)

In a post-conviction motion filed pursuant to Fed. R. Crim. P. 29, Petitioner moved for judgment of acquittal on all Counts. The motion addressed the insufficiency of evidence as to all Counts charged in the indictment. Petitioner argued that even when considered in the light most favorable to the government, there was

insufficient evidence that the missives constituted a true threat and that he had the specific intent to make a true threat, which are both required elements for the charges.

Rule 29(a) provides that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the Petitioner's motion 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 ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must `review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilty beyond a reasonable doubt based on the available evidence.'" *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005) (citations omitted). *See also, United States v. Kayode*, 254 F.3d 204, 212 (D.C. Cir. 2001) ("When ruling on a motion for judgment of acquittal, the Court considers "the evidence in the light most favorable to the government and determine[es] whether, so read, it is sufficient to permit a rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt") (citation omitted).

On the same day as sentencing, but prior to imposing sentence, the trial court ruled on Petitioner's post-verdict motion. The following, in pertinent part, is the court's ruling on the merits of the Rule 29 motion:

> The interesting thing about this is the facts that were alleged in the indictment were almost uniformly agreed to by Mr. Elonis. So, the issue in this case as far as the facts and what happened were not really contested. What was really contested, I believe in Mr. Elonis' mind, was whether he had the constitutional right under the First Amendment to make these communications. And by

> that I mean did he have the intent to intimidate -- well, to make me very concise about it - did he have the intent to put his victims in fear of bodily harm or death.
>
> ****
>
> I'm not going to go through all the evidence that was presented at trial. What I will say is that Mr. Elonis has failed to meet his burden in this case. The Government presented sufficient evidence that a reasonable juror could find that he sent the messages with the intent to create a fear of harm in the three victims. That is a fear of bodily injury or death.
>
> ****
>
> Therefore, I am going to deny his motion for judgement of acquittal.... And I incorporate the rulings that I've previously made throughout the course of these proceedings, but [sic] with pretrial and during trial.

(14a-16a)

The trial court and the Circuit Court clearly erred in their rulings. As the trial judge stated, Petitioner "almost uniformly" acknowledged that he sent or posted the messages outlined in the Government's case against him. (C.A. Appx 1562) Petitioner presented two defenses to the charges: 1) that none of the messages sent or posted rose to the level of a true threat because when he sent or posted the messages, he had no intent to create in the recipients a fear of bodily harm or death; and 2) that his messages did not in fact create in any of the three recipients a reasonable fear of death or bodily injury or cause them substantial emotional distress. Yet, the Circuit Court's ruling upholding the denial of Petitioner's Rule 29 motion neglected to address the necessary elements of the charged offenses.

Had the Circuit Court addressed this element of the offense, it would have been constrained to reverse the denial of Petitioner's motion because the evidence

presented by the Government was not sufficient to enter such a ruling. At best, the Government proved that Petitioner sent some of the messages to each of the recipients. Yet, according to the testimony of all three recipients, they took no action or steps that would have addressed their alleged fears post-haste. Victim #1 acknowledged that local authorities were best positioned to take immediate action on her behalf. (C.A. Appx 788-794) Yet, as previously noted, she never contacted those local authorities regarding any of the alleged threats contained in the Indictment. (C.A. Appx 788-794, 1221-1222, 1230-1231, 1233-1234) As for alleged Victims #2 and #3, neither contacted any of the authorities, either local or federal, nor did either initiate any complaints for any of the alleged threats listed in the Indictment. (C.A. Appx 963-964, 769, 1071-1072, 1128-1129, 1221-1222, 1233-1234) Failure to have concern sufficient to take any action to notify the authorities about Elonis' missives is inconsistent with the belief that these missives were actually even seen as "true threats." This inaction belies both the notion that Petitioner had the intent to threaten the victims and that the recipients of these messages actually felt threatened. *See Perez v. Florida*, 580 U.S. 1187 (2017) (Sotomayor, J., concurring) ("Statutes criminalizing threatening speech . . . 'must be interpreted with the commands of the First Amendment clearly in mind' in order to distinguish true threats from constitutionally protected speech." (quoting *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam))).

Recently, the United States Supreme Court issued its decision in *Counterman v. Colorado*, 600 U.S. 66 (2023). In *Counterman*, the Court was tasked to determine whether the Colorado statute as written required a jury finding that

Counterman had the specific intent necessary when issuing electronic messages. Petitioner submits that the *Counterman* case is distinguishable both on the facts and the law. As to the former, "Counterman sent hundreds of Facebook messages to C. W., a local singer and musician. The two had never met, and C. W. never responded. In fact, she repeatedly blocked Counterman. But each time, he created a new Facebook account and resumed his contacts. Some of his messages were utterly prosaic ...." *Id.* at 70. "Others suggested that Counterman might be surveilling [C.W.]...." *Ibid.* "And most critically, a number expressed anger at C. W. and envisaged harm befalling her...." *Ibid.* "The messages put C. W. in fear and upended her daily existence. She believed that Counterman was "'threat[ening her] life,'" "'was very fearful that he was following'" her, and was "'afraid [she] would get hurt.'" *Ibid.* As a consequence, she experienced "'trouble sleeping'" and mental anguish from severe anxiety. C.W. stopped walking alone, became reclusive, and canceled performances, resulting in financial strain. *Counterman,* 600 U.S. at 70 (citations omitted).

In the present matter, Petitioner's missives, limited to the temporal period charged in the indictment, were not nearly as numerous as in *Counterman*, nor did the alleged victims refrain from socializing or suffer financially as a result of the unwanted communications from Petitioner. Moreover, unlike the parties in *Counterman*, each of the three alleged victims knew Petitioner well enough to know that his missives were nothing more than hyperbole, that he would not act upon his words, and that his words were harmless expressions of a frustrated individual.

Thus, on the facts alone, *Counterman* is utterly distinguishable from the present matter.

The legal distinction between the two cases could not be starker.

First, in *Counterman,* the Court was interpreting a Colorado State statute which proscribed "knowingly" sending threats to another, either directly or indirectly. Secondly, violation of the statute did not require that the author intended his conduct to be threatening, only that the recipient reasonably interpreted it to be threatening. The majority in *Counterman* held that in order to not chill the guarantee of free speech under the First Amendment, Colorado must prove that Petitioners charged with violating its statute must have had an objective mens rea. This Court further concluded that, like similar lines of cases interpreting the First Amendment, proof of a reckless mens rea would suffice. In that regard the Court stated:

> The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries. A speaker may be unsure about the side of a line on which his speech falls. Or he may worry that the legal system will err, and count speech that is permissible as instead not. Or he may simply be concerned about the expense of becoming entangled in the legal system. The result is "self-censorship" of speech that could not be proscribed a "cautious and restrictive exercise" of First Amendment freedoms. And an important tool to prevent that outcome—to stop people from steering "wide[ ] of the unlawful zone"—is to condition liability on the State's showing of a culpable mental state.

Counterman, 600 U.S. at 75. (citations omitted)

However, unlike the Colorado statute, the federal statute Petitioner was convicted of violating expressly requires that the Government prove that the

Petitioner acted with "the intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person..." 18 USC §2261A(2)(B). (emphasis added) Given that the Colorado law proscribes "knowing" conduct, the statement and ultimate holding in *Counterman* that "recklessness offers the right path forward" is understandable, as it allows for the prosecution of Petitioners who have consciously accepted a substantial risk of inflicting serious harm." *Counterman*, 600 U.S. at 79. (emphasis added) The on-line version of the Cambridge Dictionary defines "consciously" as "in a way that involves noticing that a particular thing exists or is present." While the same dictionary defines "intent" as being "determined to do or achieve something."

Petitioner respectfully submits that the ruling in *Counterman* is inapplicable to its federal counterpart because the latter expressly proscribes intentional conduct and the former proscribes the lesser standard of knowing conduct. Until the Supreme Court rules on what level of culpability Congress intended when it expressly utilized the words "with intent," the *Counterman* decision will remain inapplicable to prosecutions brought under 18 USC §2261A(2)(B).

In conclusion, notwithstanding the *Counterman* decision, because the Government failed to carry its burden of proving both the "with intent" element of the offenses charged and that Petitioner's missives constituted a true threat, this Court should grant Petitioner's Petition for *Certiorari* so that the trial and Circuit Court's rulings may be rectified by reversing Petitioner's convictions or, in the alternative, remanding the matter so that the trial court can address the issue on the record.

CONCLUSION

For the foregoing reasons, Petitioner Anthony Douglas Elonis prays that this Court grant his petition for a Writ of Certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his conviction.

Respectfully submitted,

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August 6, 2024

APPENDIX

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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1643

UNITED STATES OF AMERICA

v.

ANTHONY DOUGLAS ELONIS,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 5-21-cr-00281-001)
District Judge: Honorable Edward G. Smith

Submitted Under Third Circuit L.A.R. 34.1(a)
on May 2, 2024

Before: KRAUSE, CHUNG, and AMBRO, *Circuit Judges*

(Filed: May 15, 2024)

OPINION*

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* This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

KRAUSE, *Circuit Judge*.

Anthony Elonis appeals his 2022 conviction for three counts of cyberstalking in violation of 18 U.S.C. § 2261A(2)(B). Finding none of his arguments persuasive, we will affirm.

I. BACKGROUND

In 2011, after Elonis made a series of social media posts threatening to kill his ex-wife, harm law-enforcement agents, and commit a school shooting, a jury convicted him of transmitting "communications containing . . . threat[s] to injure the person of another" in violation of 18 U.S.C. § 875(c). *See United States v. Elonis*, 841 F.3d 589, 592–95 (3d Cir. 2016). The District Court sentenced Elonis to 44 months' imprisonment followed by three years of supervised release, and Elonis served his prison term.[1] But the threats were just getting started. Shortly before his sentence ended, Elonis sent two letters to the prosecutor in his 2011 case: one indicating that he would burn a cross on the prosecutor's lawn, and the other referencing the Sandy Hook massacre and including his projected release date with a smiley face. Following these letters, Elonis sent the prosecutor emails containing sexually explicit and gruesome images, violent language, and references to Sandy Hook, Hitler, and Charles Manson. Elonis also made a number of threatening

[1] Elonis appealed his conviction to this Court, and we rejected his argument that § 875(c) requires a subjective intent to threaten. *United States v. Elonis*, 730 F.3d 321, 327–32 (3d Cir. 2013), *rev'd*, 575 U.S. 723 (2015). The Supreme Court reversed, finding subjective intent necessary, *Elonis*, 575 U.S. at 740, 742, and on remand we concluded that Elonis would have been convicted even under a subjective-intent standard, *Elonis*, 841 F.3d at 598. We thus found any error harmless and upheld Elonis's conviction. *Id.* at 601.

Twitter posts directed toward the prosecutor.[2] Many of Elonis's emails and posts contained references to his 2011 conviction.

The prosecutor was not Elonis's only target. Elonis also sent crude messages to his ex-wife—the same ex-wife he had previously threatened to kill—and a recent ex-girlfriend. These messages, which Elonis sent over text and posted on Twitter, again referenced Sandy Hook, violence, and his prior conviction. In 2021, a grand jury charged Elonis with one count of cyberstalking for each victim. *See* 18 U.S.C. § 2261A(2)(B) (criminalizing the use, with the "intent to kill, injure, harass, [or] intimidate," of "any interactive computer service . . . or any other facility of interstate or foreign commerce to engage in a course of conduct that . . . causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to a person").

At trial, over repeated objections from Elonis, the District Court allowed the Government to introduce evidence of (1) Elonis's 2011 conviction, (2) the communications giving rise to that conviction, and (3) protection-from-abuse orders obtained by Elonis's ex-wife and ex-girlfriend. The jury found Elonis guilty on all three counts, and the District Court declined to set aside the verdict. Elonis now brings this timely appeal.

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[2] The prosecutor, as well as Elonis's other victims, read or otherwise viewed Elonis's Twitter posts.

II. DISCUSSION[3]

On appeal, Elonis contends that (1) the evidence was insufficient to support the jury's verdict, (2) the District Court improperly admitted past-acts evidence under Federal Rules of Evidence 403 and 404(b), and (3) the District Court erroneously denied his motion for a new trial. No contention withstands scrutiny.

A. Sufficiency of the Evidence

Elonis first argues that the Government failed to prove, beyond a reasonable doubt, that (1) he intended to harass or intimidate his victims, and (2) his victims suffered substantial emotional distress. *See United States v. Gonzalez*, 905 F.3d 165, 180 (3d Cir. 2018). The Government, however, met its burden on both elements.

As to the first, although Elonis describes his communications as "jocular," "mere annoyances," "nothing more than hyperbole," and "harmless expressions of a frustrated individual," Opening Br. 28–29, 34, the record belies that description. Elonis's messages were repetitive, disturbing, and often threatened violence, and there is ample evidence

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[3] The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a challenge to sufficiency of the evidence, *United States v. Lacerda*, 958 F.3d 196, 225 (3d Cir. 2020), and although we traditionally accord "substantial deference to the jury's finding of guilt," *id.*, that deference is tempered where, as here, the First Amendment is implicated, *In re Kendall*, 712 F.3d 814, 828 (3d Cir. 2013). We thus "make an independent examination of the whole record in order to [ensure] that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (quotation marks omitted). "We review the district court's evidentiary rulings principally on an abuse of discretion standard," although we exercise plenary review "to the extent [those rulings] are based on a legal interpretation of the Federal Rules of Evidence." *United States v. Green*, 617 F.3d 233, 239 (3d Cir. 2010) (quotation marks omitted). "[W]hether evidence falls within the scope of Rule 404(b)" is a question of law. *Id.* (quotation marks omitted).

from which a rational juror could conclude that Elonis aimed to "put [his] victim[s] in fear of death or bodily injury" or "distress [his] victim[s] by threatening, intimidating, or the like." *United States v. Yung*, 37 F.4th 70, 80 (3d Cir. 2022).[4]

As to the second, the record makes clear that Elonis's communications gave rise to substantial emotional distress. At trial, the victims testified that Elonis's messages left them feeling "threatened," "panicked," "afraid," and "terrified." *See, e.g.*, App. 733, 936, 1039. And the victims described the safety measures they took, in response to the messages, to protect themselves from Elonis.[5] Again, there is ample evidence from which a rational juror could conclude that Elonis "cause[d] . . . substantial emotional distress" to all three victims. 18 U.S.C. § 2261A(2)(B).

Because there was sufficient evidence to convict Elonis for his threats, and because an independent examination of the record reveals no "forbidden intrusion on the field of free expression," *In re Kendall*, 712 F.3d 814, 828 (3d Cir. 2013) (quotation marks omitted), Elonis's first challenge fails.

B. Past-Acts Evidence

Elonis next "challenges the district court's admission of three categories of evidence: (1) his prior federal conviction; (2) the two protection-from-abuse orders; and

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[4] These narrow definitions of "intimidate" and "harass," respectively, balance First Amendment concerns with the fact that true threats are not protected speech. *See Yung*, 37 F.4th at 75, 77–81. The jury received instructions consistent with these definitions, and Elonis does not challenge *Yung* on appeal.

[5] These descriptions refute Elonis's assertion that, "according to the testimony of all three [victims], they took no action or steps that would have addressed their alleged fears post-haste." Opening Br. 32.

(3) language from his [prior] threats that he incorporated in his communications to the three victims in this case." Answering Br. 60. We perceive no error, however. And even if the District Court did err, any improper admission in this case was harmless.

1. Admission

Elonis challenges the District Court's evidentiary rulings on procedural and substantive grounds.

Procedurally, Elonis contends that the District Court erred when it failed to conduct a detailed, on-the-record substantive analysis for each piece of disputed evidence at trial. But our precedent requires no such analysis: As long as we are able to confirm that the District Court conducted some inquiry under the applicable rule or rules, the relevant procedural requirements are met. *United States v. Finley*, 726 F.3d 483, 491 (3d Cir. 2013); *cf. Virgin Islands v. Pinney*, 967 F.2d 912, 918 (3d Cir. 1992) (finding error when the trial court provided no explanation for its Rule 403 decision); *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992) (same). Here, although the District Court did not always undertake contemporaneous Rule 403 and Rule 404(b) inquiries, it is clear that the Court engaged in extensive Rule 403 and Rule 404(b) analysis. The Court held a "lengthy pretrial hearing" during which, with the benefit of "extensive briefing" from the parties, it "weighed the competing arguments, made the required findings," and entertained objections. Answering Br. 55 n.12, 59. And based on that hearing, the Court issued a blanket admissibility ruling for the three categories of evidence Elonis now

flags.[6] That the Court later declined to explain the denial of certain (renewed) objections does not negate its earlier ruling, and the record allows us to review both the Court's legal conclusions and its exercise of discretion. The Court, therefore, made no procedural error.

Substantively, Elonis contends that the Court erred when it chose to admit the disputed evidence. That evidence, in Elonis's view, was propensity evidence barred by Rule 404(b)(1), or else evidence for which the "probative value [was] substantially outweighed by a danger of . . . unfair prejudice" under Rule 403. We disagree. Because the disputed evidence "directly prove[d] the charged offense[s]," the Court properly characterized it as intrinsic and outside the scope of Rule 404(b).[7] *See United States v. Green*, 617 F.3d 233, 248–49 (3d Cir. 2010) (quotation marks omitted). And none of the Court's Rule 403 decisions were "arbitrary, fanciful, or clearly unreasonable," *id.* at 239 (quotation marks omitted), especially in light of the limiting instructions given to the jury at trial. Elonis's second challenge thus fails as well.

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[6] The Court made its ruling without prejudice to future objection, and it adjusted some of its initial decisions (with reasoned analysis) as the trial progressed.

[7] Even if the District Court erred in its characterization, it did not abuse its discretion in admitting the disputed evidence. *See United States v. Cruz*, 326 F.3d 392, 394 (3d Cir. 2003). Assuming the evidence was extrinsic, it was relevant to motive, intent, and/or context under Rule 404(b). *See* Fed. R. Evid. 404(b)(2); *Green*, 617 F.3d at 247; *United States v. Caldwell*, 760 F.3d 267, 277–78 (3d Cir. 2014). The Court also offered limiting instructions and, as noted below, did not rule arbitrarily in relation to Rule 403. *See Caldwell*, 760 F.3d at 277–78.

2. Harmlessness

Even if Elonis's substantive or procedural arguments had merit, they would not change our overall conclusion. That is because "[e]videntiary errors are subject to harmless error analysis," *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 121 (3d Cir. 1999), and here "there is a high probability that [any] . . . error did not contribute to the verdict," *United States v. Boyd*, 999 F.3d 171, 183 (3d Cir. 2021) (quotation marks omitted). Additional sanitizing or exclusion would still have left "clear and overwhelming evidence of [Elonis's] guilt," in other words, and a jury could have convicted Elonis even without the disputed past-acts evidence.[8] *Id.*

C. Motion for a New Trial

Elonis's final argument is that, "based on [a] combination of trial errors," he is entitled to a new trial under Federal Rule of Criminal Procedure 33(a). Opening Br. 54–55. But we have said that Rule 33 motions "are to be granted sparingly and only in exceptional cases," *Virgin Islands v. Derricks,* 810 F.2d 50, 55 (3d Cir. 1987), and this is far from an exceptional case. If anything, this is a routine case where the District Court appropriately ruled on evidentiary issues and reasonably exercised its discretion. Thus, Elonis's third argument also fails.

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[8] Interestingly, Elonis himself seems to acknowledge this point. In his reply brief, he writes that "the Government's unobjected to, non-propensity related . . . evidence standing alone, arguendo, could have been more than sufficient to support the Government's theory" of motive and intent with respect to all three victims. Reply Br. 12–15. Although Elonis makes this argument in the context of Rule 403, and he later writes that "the Government's case [could] barely . . . survive a dismissal motion" without the past-acts evidence, *id.* at 20–21, the argument itself gestures toward a finding of harmlessness.

III. CONCLUSION

For the foregoing reasons, we will affirm the judgment of the District Court.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	)	21-cr-00281-1
Plaintiff,	)	Easton, PA
	)	March 23, 2023
vs.	)	2:06 PM
ANTHONY DOUGLAS ELONIS,	)	
Defendant.	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE EDWARD G. SMITH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROBERT J. O'HARA, ESQ.
UNITED STATES ATTORNEY'S OFFICE - EDPA
615 Chestnut Street
Suite 1250
Philadelphia, PA 19106

For the Defendant: EDSON A. BOSTIC, ESQ.
THE BOSTIC LAW FIRM
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Also present: JARED WITMIER, FBI
SHERRI STEPHAN, AUSA

ECR OPERATOR: JENNIFER FITZKO

Proceedings recorded by electronic sound recording.

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I N D E X

THE CLERK: All rise. United States District Court is now in session. The Honorable Edward G. Smith presiding.

THE COURT: You may be seated. Thank you.

The Court is called to order in the matter of the United States of America v. Anthony Douglas Elonis. This is criminal action number 21 TAC 281. Present in the courtroom is the defendant, Mr. Elonis.

Good afternoon, sir.

THE DEFENDANT: Good afternoon.

THE COURT: And he's being assisted by his counsel, Attorney Edson Bostic. Mr. Bostic --

MR. EDSON BOSTIC: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

And on behalf of the United States appears Assistant United States Attorney Robert O'Hara.

MR. ROBERT O'HARA: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

And Jared Witmier from the Federal Bureau of Investigation. Good afternoon.

MR. JARED WITMIER: Good afternoon, Your Honor.

THE COURT: Mr. Elonis, the Court convenes today for a sentencing hearing. You have previously been convicted by a jury of three counts of cyberstalking. Sir, are you prepared to proceed to sentencing?

THE DEFENDANT: Yes.

THE COURT: Very well. If you would please stand and raise your right hand to be sworn.

DEFENDANT, ANTHONY DOUGLAS ELONIS, SWORN

THE COURT: Thank you very much, sir. You may be seated.

And before we proceed to the formal sentencing proceeding, we do need to address the defendant's motion for judgment of acquittal or, in the alternative, for a new trial. I have received both the defendant's motion and memorandum of law, as well as the Government's response to the motion.

Mr. Bostic, would you like to be heard further with respect to your motion for judgment of acquittal or for a new trial?

MR. BOSTIC: Your Honor, we would rest on the submission. I think we wrote a lot about the issues, and we will not add to it at this point. Thank you.

THE COURT: Very well, sir.

Assistant United States Attorney O'Hara, would you like to be heard?

MR. O'HARA: I agree, Your Honor. We filed an extensive brief on both the Rule 29 and the Rule 33 standard. We've summarized -- tried to briefly summarize the evidence, and we believe that neither the motion for judgment of acquittal or the motion for a new trial has merit.

THE COURT: Very well.

MR. O'HARA: And we rest on the filings. Thank you.

THE COURT: Thank you.

And I do commend both counsel for addressing these issues, as they were addressed at trial. The issues with respect to the evidence that was going to come in under 404(b) was addressed extensively at trial and pretrial, as were the legal issues related to these particular charges. And what I mean by that is the relationship between what is a true threat versus what is constitutionally protected threat, and whether the evidence at trial was sufficient to meet that.

The interesting thing about this is the facts that were alleged in the indictment were almost uniformly agreed to by Mr. Elonis. So the issues in this case as far as the facts and what happened were not really contested. What was really contested, I believe in Mr. Elonis' mind, was whether he had the constitutional right under the First Amendment to make these communications. And by that I mean did he have the intent to intimidate -- well, to make me very concise about it -- did he have the intent to put his victims in fear of bodily harm or death.

So with respect to these motions, these are very much what we've already addressed throughout the trial. As both of you know, the Rule 21 motion requires that I review the record in light most favorable to the prosecution to determine whether any rational trier of fact could've found proof of guilt beyond

a reasonable doubt based on the available evidence. And again, this is a very highly deferential standard. The defendant is seeking relief under Rule 29 bears a very heavy burden.

With respect to motions for a new trial, the trial court has discretion as to whether to grant a new trial. But here again, unlike situations where I'm reviewing the sufficiency of the evidence, when a district court evaluates a Rule 33 motion it does not view the evidence favorably of the Government, but instead exercises its own judgment in assessing the Government's case. However, even if a district court believes that a jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that a miscarriage of justice has occurred -- that is, that an innocent person has been convicted. And such motions are not favored and should be granted sparingly and only in exceptional cases.

I'm not going to go through all the evidence that was presented at trial. What I will say is that Mr. Elonis has failed to meet his burden in this case. The Government presented sufficient evidence that a reasonable juror could find that he sent the messages with the intent to create a fear of harm in the three victims. That is a fear of bodily injury or death.

Further, the Court found that the prior bad acts and the order of Facebook posts were intrinsic evidence and should

be admissible. And to the degree any of the objectionable evidence was extrinsic, it went to motive and intent and should be admitted under Federal Rules of Evidence 403 and 404(b). Mr. Elonis has presented no evidence or case law that calls these decisions into question.

Therefore, I am going to deny his motion for judgment of acquittal and deny his motion for a new trial. And I incorporate the rulings that I've previously made throughout the course of these proceedings, but with pretrial and during trial.

Is the ruling of the Court clear?

MR. BOSTIC: From the defense perspective, yes, Your Honor.

MR. O'HARA: Yes, Your Honor.

THE COURT: Very well. Then moving on to the formal sentencing hearing, at the time, Mr. Elonis, that the jury verdict was accepted and entered, I noted the applicability of the Sentencing Reform Act, and I directed that a presentence report be prepared. That report has been prepared, and I have received it and I have read it.

I've also received the Government's memorandum of law regarding objections to the presentence investigation report. I've received the defendant's response to the Government's objections. I received the defendant's motion for variance and sentencing memorandum. I received as part of that the report

C E R T I F I C A T I O N

I, Carol Folk, court-approved transcriber, do hereby certify the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Carol Folk — April 3, 2023

Carol Folk — DATE

No.___ - _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTHONY DOUGLAS ELONIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Certiorari in the above-entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in Century Schoolbook 12 point for the text and 10 point for the footnotes, and that the Petition for Certiorari contains 6,863 words, excluding the part of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the forgoing is true and correct.

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