IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	
	)	No. 08 CR 851
WILLIAM WHITE	)	
	)	
	)	Judge Adelman

MOTION TO DISMISS SUPERSEDING INDICTMENT AS VIOLATIVE OF THE FIRST AMENDMENT

NOW COMES, Defendant, WILLIAM WHITE, by and through counsel, NISHAY K. SANAN, and respectfully moves this Honorable Court, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B) and the First Amendment of the United States Constitution to dismiss the Superseding Indictment, and in support states as follows:

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Background and Procedural History

In the only Count of the superseding indictment, William White is charged with violating 18 U.S.C. § 373. Specifically, White is alleged to have posted to the website "Overthrow.com," an entry entitled "The Juror Who Convicted Matt Hale," which listed the name, address, and phone numbers of Juror A from the 2004 trial of Matthew Hale. The post was placed online on September 11th, 2008 and updated the following day, September 12, 2008, to include the line "Note that [University A] blocked much of [Juror A's] information after we linked to [his/her] photograph." On October 17, 2008, a criminal complaint, supported by the affidavit of Agent Maureen Mazzolla of the Federal Bureau of Investigation, was filed in the United Stated District Court for the Northern District of Illinois alleging that White solicited or otherwise attempted to persuade another person commit a felony involving the use, attempted use, or threatened use of force against Juror A. This underlying felony offense was influencing or injuring a juror, in violation of 18 U.S.C. 1503. On October 21, 2008, a grand jury returned an indictment of White for the same violation. The government's indictment lists a number of prior postings in an attempt to use the surrounding circumstances[1] of those postings to describe the conduct in the

[1] Although the government's indictment lists numerous other online postings and refers to them as "surrounding circumstances," the Senate Report accompanying 18 U.S.C. 373 includes a non-exhaustive list of example surrounding circumstances, and White's prior postings are not of the nature of the surrounding circumstances that the Senate Report intended. This list is confined to:

> (i) the fact that the defendant offered or promised payment or some other benefit to the person solicited if he would commit the offense;
> (ii) the fact that the defendant threatened harm or some other detriment to the person solicited if he would not commit the offense;
> (iii) the fact that the 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;
> (iv) the fact that the defendant believed or was aware that the person solicited had previously committed similar offenses;
> (v) the fact that the defendant acquired weapons, tools or information 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.
> S.Rep. No. 307, 97th Cong., 1st Sess. 183 (1982)

charged posting as a solicitation or endeavor to persuade another person to injure Juror A[2], in violation of 18 U.S.C. 373.

ANALYSIS

The superseding indictment must be dismissed because it alleges only a defective count and therefore dismissal is proper under Federal Rule of Criminal Procedure 12(b)(b)(B). Specifically, the indictment is violative of the First Amendment of the United States Constitution, which provides that "Congress shall make no law…abridging the freedom of speech." The indictment is based solely around the fully protected attention grabbing headlines and political hyperbole used by White and is therefore tantamount to an abridgement of his freedom of speech. The indictment is defective as it attempts to criminalize White's protected speech.

First Amendment protection for unpopular and potentially offensive speech is not a new concept, and has been dealt with at length in various courts. The Supreme Court has always held high regard for, and granted expansive protection to, free speech rights. For instance, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), a petitioner gave a speech criticizing the conduct of a crowd of protesters and vigorously criticizing various political and racial groups that he felt were acting against the nation's welfare. *Id.* at 3. He was arrested for violating a Chicago city ordinance by creating a breach of the peace. *Id.* The Supreme Court ultimately reversed his conviction and spoke at length about free speech under the First Amendment. In pertinent part, the Court stated 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.

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[2] In violation of 18 U.S.C. § 1503.

> It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Id* at 4.

The Court then went on to use the clear and present danger test[3] to uphold the speech, and stated explicitly that "[t]here is no room under our Constitution for a more restrictive view [of the right to free speech]. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id*. The danger of limiting free speech is at issue in the instant case, as the government seeks to proscribe White's expression of his views through his website. However, the Supreme Court has made it abundantly clear that the freedom of speech must be read and applied expansively, especially when it has "profound unsettling effects."

Upon this backdrop of substantial freedom and protection granted to the freedom of speech, the government is nonetheless prosecuting White for merely posting information about a Juror, whose vote in the Hale case was criticized by many on the internet, in court filings within the Hale case and that White clearly disagrees with. The government's indictment and entire case runs the risk of standardizing ideas, by proscribing protected speech, on the grounds that it is offensive to some. The posting of Juror A's information, which **White took from several other websites and was even posted by Juror A himself** (emphasis added), has clearly stirred people to anger and struck at prejudices and preconceptions, but, as the *Terminiello* Court noted, this is when the freedom of speech is best serving it's high purpose. The government's indictment simply cannot get around the requirements of the First Amendment; it violates the very purpose of free speech, as defined by the Supreme Court.

This indictment fails two crucial free speech tests laid out by the Supreme Court; the *Brandenburg* test, relating to advocacy; and the *Watts* test, relating to threatening statements.

[3] As discussed below, the clear and present danger test is no longer used.

Furthermore, the speech is not proscribable under any public nuisance jurisprudence. As the government cannot overcome the implications of these tests on White's freedom of speech, White cannot be found guilty of any crime based on the posting of Juror A's information. Consequently, the indictment should be dismissed, because it cannot state a criminal offense by White. It alleges merely that White made protected statements, yet attempts to improperly criminalize them in violation of the First Amendment.

***Brandenburg* Test**

The Supreme Court held in *Dennis v. United States* that "where an offense is specified by a statute in nonspeech or nonpress terms, a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime…" *Id.*, 341 U.S. 494, 505 (1951). The statute at issue in the present indictment, 18 U.S.C. §373, states in applicable 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 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) 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."

This statute is expressed in nonspeech and nonpress terms, and therefore, for the indictment to contain valid probable cause, it must be predicated on an assumption that a conviction is possible because the speech at issue created a clear and present danger. The clear and present danger test stems from *Schenck v. United States*, 249 U.S. 47 (1919) and is formulated as "whether the words are used in such circumstances and are of such a nature as to create a clear

and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id*. at 52. However, the *Schenck* case, along with the clear and present danger test, appear to have been overruled, *de facto*, as the Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), formulated an imminent lawless action test. While not explicitly overruled, *Schenck* has not been used in First Amendment jurisprudence since the ruling in *Brandenburg*.

In *Brandenburg*, a unanimous Supreme Court determined that there exists a "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." *Id*., 395 U.S. 444, 447 (1969). Subsequent to *Brandenburg*, this imminent lawless action test is used, as opposed to the clear and present danger test. The imminent lawless action test is a more structured and defined version of the clear and present danger test.

Turning to the indictment at bar, it cannot even be remotely argued that White's actions in this case rise to the level of producing imminent lawless action or are likely to incite or produce such action. The government has alleged merely that White caused to be displayed Juror A's name, address and phone numbers, and the statement that Juror A "played a key role in convicting Matt Hale." Further, the indictment alleges that White referred to him as a "gay anti-racist" who lives with his "gay black lover." Nothing in this language amounts to anything near a statement designed to produce imminent lawless action[4]. On the contrary, it is merely a posting of information relating to a juror in a criminal case, whose decision White disagrees with. The government has shown neither imminence nor likelihood, yet proceeds on an indictment of White in violation of his freedom of speech.

[4] For purposes of this Motion, Defendant chooses to not fully address the government's contention that the solicitation can be inferred from prior actions, and instead focuses on the fully protected speech that lies at the core of this indictment.

The *Brandenburg* Test evolved out of a case involving a rally of the Ku Klux Klan. At this rally, members were videotaped gathered around a cross, which was later burned, making derogatory statements about African-Americans and Jews. *Id*. at 445-6. While there were various threatening comments made by the members of the group, including "Bury the niggers" and "Nigger will have to fight for every inch he gets from now on," the prosecution was based around the petitioner's speech, which, at it's most inflammatory, said "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id*. at 446. A second videotaped speech was also used as evidence. In the second tape, the petitioner stated "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." *Id*. The Supreme Court's *Brandenburg* decision overruled the prior case of *Whitney v. California*, 274 U.S. 357 (1927), (which stood for the proposition that advocating violence to bring about political and economic change involves such danger to the security of a state that it may be outlawed) noting that *Whitney* had been thoroughly discredited by later decisions, such as *Dennis v. United States*, 341 U.S. 494 (1951). Brandenburg was being punished for mere advocacy of violence, not distinguished advocacy designed to incite imminent lawless action. *Brandenburg* at 448. This punishment fell within the condemnation of the First Amendment. *Id*. at 449.

Application of *Brandenburg* in *United States v. Williams*

As the Supreme Court recently stated, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. *United States v. Williams*, 128 S.Ct. 1830, 1842 (2008). However, the government has done nothing more than re-brand White's speech (which is, again, merely a posting of information about Juror A) as

"solicitation" when at the very most could be construed as abstract advocacy. In *Williams*, the petitioner was charged with one count of pandering child pornography under 18 U.S.C. § 2252(a)(3)(B) which, among other things, makes it a felony to solicit child pornography. The petitioner posted a message stating "Dad of toddler has 'good' pics of her an me for swap of your toddler pics, or live cam." *Id*. at 1838. He also told a law-enforcement agent[5] that he had pictures of men molesting his 4-year old daughter. *Id*. The Court noted that the statute at bar did not require the actual existence of child pornography, but banned the collateral speech that introduces such material into the child-pornography distribution. *Id*. The Court further noted that the statute used operative verbs, notably mentioning "solicits," and that these can be reasonably read to have a transactional connotation. *Id*. at 1839. The Court defined soliciting as, a step taken in the course of an actual or proposed transfer of a product, typically, but not exclusively in a commercial market. *Id*. The Court ultimately held that the Act did not prohibit the advocacy of child pornography and therefore was valid under *Brandenburg*. *Id*. at 1842. Further, the Court held "that offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment." *Id*.

Following the reasoning of *Williams*, and its treatment of the *Brandenburg* test, White's indictment is voilative of the First Amendment. The government cannot predicate a valid indictment based on a flawed interpretation of solicitation, when what they are actually prosecuting is protected speech. In contrast to the speech in *Williams*, where the petitioner expressly offered to swap "toddler pics," the speech at bar here is, again, merely a posting of information about Juror A. Even assuming that the government can support a finding that White intended that Juror A be injured, there is no possibility that they can support a finding that there was a proposal to engage in illegal activity. As a result, the government is prosecuting what can

[5] The law enforcement agent in *Williams* was online under the undercover moniker "Lisa n Miami."

only possibly be called "abstract advocacy of illegality." This does not rise to a level of First Amendment exclusion. As a result this indictment cannot be reconciled with constitutional jurisprudence and must be dismissed.

Furthermore, although the government attempts to portray the speech of White, in his posting, as a "solicitation," the actual speech that he engaged in is literally nothing more than publicizing already available information about Juror A. The government has alleged absolutely nothing explicit in White's post about how this supposed solicitation would occur. Instead, they wish to make the specious claim that "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 an element the use, attempted use, or threatened use of force against the person of Juror A" and proceeds to list prior writings by White that are supposedly show solicitation. Not only is this connection tenuous and logically flawed, but the government's view of what constitutes "solicitation" amounts to nothing more than a chilling effect on free speech. Following the government's contentions to their legal conclusion, otherwise valid and legal speech can be recast as a solicitation if statements made in the speaker's past can be construed to infer intent to solicit. This is in violation of the First Amendment; the proper focus is not on words written in the past, but on the speech the government's is proceeding on.

The speech at issue passes the earliest understanding of the *Brandenburg* test as it does not amount to advocacy directed at inciting or producing imminent lawless action and likely to incite or produce such action. The speech at bar does not even approach the speech that was unanimously held to be protected in *Brandenburg*. While the petitioner in *Brandenburg* hinted at possible "revengeance" that would be taken by his group, clearly advocating the possibility of

violence, White's speech is merely a posting of information. There is no advocacy, there is no incitement, and there is no chance at producing imminent lawless action. From a practical standpoint, White has done nothing more than posted information regarding Juror A. There is no hint of any violent to be taken towards him, there is no hint of advocacy, and there is certainly no hint of any solicitation. The posting lists his name, birthday, address and several phone numbers; nothing more. His speech, while unpopular, is nonetheless protected. The government's attempt to criminalize an unpopular point of view, simply because it is in the minority. The government should have "no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S 377, 392 (1992). The Government is clearly going after White because of the incendiary nature of his speech, with little regard for his First Amendment rights. However, the First Amendment is premised on the value of unfettered speech. *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972).

Application of *Brandenburg* in *Hess v. Indiana*

The Supreme Court further clarified its views on the imminence requirement of the *Brandenburg* test in Hess *v. Indiana*, 414 U.S. 105 (1973). In *Hess*, a defendant stood convicted of an Indiana disorderly conduct statute for saying "We'll take the fucking street later" or "We'll take the fucking street again," in the presence of a sheriff, during a demonstration against the Vietnam War. The Indiana Supreme Court had placed it's reliance on the trial court's finding that the statement "was intended to incite further lawless action on the part of the crowd in the vicinity of the appellant and was likely to produce such action." *Id.* at 108 *citing*, *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973). However, the U.S. Supreme Court interpreted the statement as "[a]t best, counsel for present moderation; at worst it amounted to nothing more than advocacy

of illegal action at some indefinite future time." *414 U.S.* at 108. This was not sufficient to punish the speech. *Id.* The statement could not be seen to be advocating any action in the normal sense. *Id.* at 108-9. Further, there was no evidence or rational inference that that the words were intended to produce, and likely to produce, imminent disorder, they could not be punished on the ground that they had a tendency to lead to violence. *Id.* at 109.

There is no rational inference to be drawn from the posting of Juror A's information that there was any advocacy and certainly no intention to produce, or even likely to produce, imminent disorder. The posting contains literally no advocacy of any kind. There is no call to action, no inflammatory statement such as "We'll take the fucking street again" anywhere in the statement. There is no intention or likelihood in the listing of information that the speech would lead to any imminent disorder. The government alleges that White posted Juror A's information on September 11th, 2008 and updated the posting on September 12, 2008, and characterizes it as a solicitation. However, undercutting the government's contentions, and weighing in favor of the protected nature of this speech, is the lack of imminent lawless action, as required to support a conviction under the First Amendment freedom of speech. The government has shown no lawless action of any kind in the five weeks from when the posting was put online until October 17, 2008, when the government filed their criminal complaint.

It is unconscionable to allow the government to characterize speech as they please, in order to escape the protections of the First Amendment. Consequently, lacking any showing of imminent lawless action, the government's indictment cannot stand. The government's indictment has not alleged any actual incident of anyone "corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influenc[ing], intimidat[ing], or imped[ing] any grand or petit juror, or officer in or of any court of the United States." 18 U.S.C.

1503[6]. While the government has alleged merely a solicitation, the lack of an underlying offense, as well as the lack of any lawless action, weighs heavily in favor White's speech being protected speech via the *Brandenburg* test. In the five weeks from when White posted the information of Juror A, to when he was arrested on the criminal complaint and the Overthrow.com servers shut down, no "lawless action" happened towards Juror A. He merely received text messages from unknown sources. Even taking into account the government's tenuously connected "surrounding circumstances," as alleged in the indictment, there is still no indication of imminent lawless action. Assuming that the government's allegations of prior circumstances can be read to infer advocacy, there is no such advocacy that is directed to inciting or producing imminent lawless action, that is also likely to incite or produce such action, as required in the *Brandenburg* test. The speech immediately fails the second prong of the test as there is no plausible way to state that the speech was likely to produce imminent lawless action. Lacking lawless action for five weeks, it requires a tortuous interpretation of the clear-cut facts of this case to claim that the speech is likely to produce imminent lawless action.

Application of *Brandenburg* in *NACCP v. Claiborne Hardware*

Dealing more specifically with the posting of the personal information of individuals, the Court took the up the issue in *NAACP v. Claiborne Hardware Co*, 458 U.S. 886 (1982). In *NAACP*, civil rights organizers in Claiborne County, Mississippi launched a boycott of white owned businesses[7] in order to secure compliance with a list of demands for equality and racial justice. The white merchants damaged as a result of the boycotts sued the participants and the organizations for damages sustained. As a specific part of the boycott, nonparticipants were urged to join through public address and personal solicitation. *Id.* at 909. The names of boycott

[6] 18 U.S.C. 1503 is the underlying offense that White is alleged to have solicited.
[7] Though decided in 1982, the facts at bar took place in 1966.

violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. The petitioners in the case admitted that the purpose of this was to "persuade others to join the boycott through social pressure and the 'threat' of social ostracism. *Id*. at 909-10. As the Court explicitly stated, "speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." *Id*. at 910. The speech at issue involved constitutionally protected activity. *Id*. at 911. While speech can be proscribed in some narrowly defined instances, the Court noted that "expression on public issues 'has always rested on the highest run of the hierarchy of First Amendment values.'" *Id*. at 913, *citing Carey v. Brown*, 447 U.S. 455, 467 (1980).

Further, as this was a civil case, Charles Evers individually, as the field secretary of the NAACP was sued and found liable in the original trial. *Id*. at 886. Evers was connected to the boycott by giving a speech stating that boycott violators would be "disciplined" by their own people and warned that the violators "better not be caught on these streets shopping in [the] stores until [the] demands [were] met." *Id*. at 926, 938. Every also told the crowd that "uncle toms" who broke the boycott would have "have their necks broken." *Id*. at 900. The Court held that Evers could not be liable for his threats of vilification or social ostracism as his speech was constitutionally protected. *Id*. at 926. The Court's concern was that imposing liability would be an imposition on highly charged political rhetoric lying at the core of the First Amendment. *Id*. at 926-7. The Court relied on *Brandenburg* in finding that, although many of the comments in Evers' speech might have contemplated discipline in social ostracism and more severely that they may have their necks broken, "the mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." *Id*. at 927. The language of the speeches did not transcend the bounds of protected speech laid out in *Brandenburg*, through the

imminent action test. *Id*. at 928. The Court went so far as to state that if the "language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." *Id*. However, the Court found that there was no violence in the weeks and months after the speech given. *Id*. "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*. *quoting New York Times Co*. *v*. *Sullivan*, 376 U.S. 254, 270 (1963).

The politically charged rhetoric at issue in *NAACP v*. *Claiborne* is undoubtedly more severe than Defendant White's posting. As opposed to stating that anyone's neck would be broken or that anyone would be disciplined, White's posting contains no rhetoric advocating any type of violence. Furthermore, as noted above, no violent actions occurred as a result of White's posting. The government can point merely to text messages sent to Juror A, as opposed to violence, which weighs heavily in favor of White. Again, "speech does not lose its protected character, however, simply because it may embarrass others…" *Id*. at 910. Similar to the *NAACP* case, there was no violence in the five weeks from when the speech was posted, to when the website was shut down and the criminal complaint filed. The posting incited no lawless action and must be regarded as protected speech. The speech does not potentially pass the *Brandenburg* test, the actual response to the speech explicitly shows that it has passed the test.

Finally, the *NAACP* Court held that, although the petitioners specifically read the names of violators of the boycott and went so far as to publish the names in a local newspaper. This is nothing more than what White did in this case. He posted information about a juror whose vote he disagreed with, as the petitioners in *NAACP* posted information about individuals whose actions with regard to the boycott they disagreed with. Just as the publishing in *NAACP* was

found to be constitutionally protected speech, White's posting is constitutionally protected speech. Lacking any imminent action or actual violence, it is against the principles of the constitution to allow this indictment to stand.

Watts Test

White's speech also meets the Supreme Court's second major test for when speech is protected, the *Watts* test. In *Watts v. United States*, 394 U.S. 705 (1969), the Supreme Court took up the issue of threatening statements, specifically threatening statements towards the President. The petitioner was convicted of "knowingly and willfully…[making] any threat to take the life of or to inflict bodily harm upon the President of the United States…" *Id.* at 705. Specifically, the petitioner stated that if he was ever drafted that he would not go and that if he was ever made to carry a rifle, the first man he wanted to get in his sights was Lyndon Johnson. *Id.* at 706. Petitioner argued that there was no evidence that he made a threat against the life of the president, and that the statement was made during a political debate and was therefore protected under the First Amendment. He argued that it was a "very crude offensive method of stating a political opposition to the President. *Id.* at 706-7. The Court reasoned that the "willfulness" requirement of the statute implied that a defendant must have indented to carry out the threat. *Id.* They did not believe that the political hyperbole of the defendant fit into the statutory term. *Id.* at 708. The language that Congress chose must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open…" *Id. quoting New York Times Co. v. Sullivan*, 376 U.S. at 270. The government must prove a true threat; political hyperbole does not constitute a true threat. *Id.* at 708.

Furthering the interest of debate on public issues being "uninhibited, robust and wide open," the statute that White is charged under must be interpreted against that backdrop. The statute at bar, 18 U.S.C. 373, specifically makes intent a requirement of a violation. The government is unable to point to any intent on the part of White to solicit a felony. White clearly disagrees with the conviction of Matthew Hale and, as part of this undoubtedly political debate, posted information about Juror A. The *Watts* Court took the threatening statement against the president in context and regarded the explicitly conditional nature of the statement into consideration when stating that the was "a kind of very crude offensive method of stating a political opposition…" *Id*. at 708. White's speech does not even rise to the level of a conditional threat. It is merely a statement of information. There is nothing in the speech regarding a solicitation, nothing threatening about the speech, indeed nothing that would even place White's speech in any sort of comparison with the petitioner's speech in *Watts*. A direct statement that, if drafted and made to carry a rifle, the petitioner in *Watts* would want to get the sitting President in his sights, is more dangerous, threatening and offensive than anything in White's posting. However, the Court found the First Amendment to be too important to even allow suppression of this sort of speech. White's statement cannot be called a true threat, it is mere political hyperbole. Voicing his discontent with the Juror he felt was responsible for Hale's conviction, White posted his personal information. The government's "threat[8]" is based on a solicitation of another person to influence a juror. A conditional threat was not considered a true threat in *Watts*. Even assuming that the government is correct in their allegation that White intended for someone to harm Juror A, this threat would be conditioned on someone reading his posting, inferring something unwritten in the language of the post, and therefore harming Juror A. This does not amount to a true threat,

[8] The government would be misplaced to argue that White's statement, as a solicitation, does not equate to a threat as this would underscore the supposed intent of White to solicit a crime. To consider it less than a threat would call their entire indictment into question.

but merely an extremely tentative, conditional threat. The *Watts* Court seems to protect speech of this nature.

The Seventh Circuit has taken up the issue of "true threats," most notably in *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986) and *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990). *Hoffman* involved a statutory interpretation of 18 U.S.C. 871(a), prohibiting threats against the President. The Court followed the Ninth Circuit's formulation of a "true threat" in that the government must demonstrate that the defendant made a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President." *Id.* at 707 *quoting Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969).

In *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990), the government extended the test of *Hoffman* to threats not involving a President. *Khorrami* involved a defendant who repeatedly called the toll-free number to the headquarters of the Jewish National Fund. *Id.* at 1188. During these calls he made statements such as "death to all Jews," "Jews are scum," and "Fuck all Jews." He also made statements such as "long live" Palestine and Hitler among others. *Id.* The organization also received a poster-like paper with pictures of various Israeli officials and executives of the Jewish National Fund. There were swastikas and epithets drawn over the pictures and next to several of the names the words "Execute now!", "His blood need" and "Must be killed." *Id.* at 1189. There was also an accompanying statement saying "Long live Sarhan Sarhan[9]." (sic). *Id.* The organization also received another envelope addressed to "Zionist and Outlawed Fund." *Id.* In the envelope was a copy of the Jewish National Fund Mission's Calendar, defaced with swastikas and various statements similar to what was made the

[9] This was a reference to Sirhan Sirhan, the assassin of Robert F. Kennedy.

phone calls. Specifically, the calendar stated "Death" to the "occupiers of beloved Palestine," "Congress," "Ronald Reagan," "Shamir," and "to the Fucking JNF." *Id*. There were also statements saying "Long live": "the beloved Iranians," "the beloved PLO," and "his holiness Khomeinee, the only leader of the free world."

The *Khorrami* court then reasoned that statutes banning threats make criminal a form of pure speech and therefore, they must be interpreted with the commands of the First Amendment clearly in mind. *Id*. at 1192 *citing Watts* at 707. The Court extended the test of *Hoffman* to require that establishing a "true threat" requires a demonstration that the defendant made a statement "in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [another individual]."[10] *Id*. at 1192. As in *Hoffman*, the court emphasized the importance of the context of the statement in order to determine whether a true that is made or merely political hyperbole. *Id*. at 1194 *citing Hoffman*, 806 F.2d at 707. The court then examined the facts of the case to make a determination that there was more than sufficient evidence to support a conclusion that the "wanted" poster constituted a true threat. *Id*. at 1193. Specifically, the Court found that the wanted poster was sent during a "six-month campaign of profane, vulgar and vicious telephone calls" to the Jewish National Fund. *Id*. All of the correspondence came from him and he included threats against the Fund officers. This transcended mere political hyperbole. *Id*.

Applying the *Khorrami* test to the facts at bar, there is no statement made in a context or under circumstances that could cause a reasonable person to foresee that it would be interpreted

[10] The Supreme Court has used a similar definition, defining threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence ot a particular individual or grout of individual." *Virginia v. Black*, 538 U.S. 343, 359 (2003), *citing Watts*, 394 U.S. at 708 *and R.A.V*. 505 U.S. at 388.

by those to whom the maker communicates as a serious expression of an intention to inflict harm on another. An interpretation of the present situation to support that finding is out of tune with the facts. No harm ever came to Juror A, nor is there any indication that anyone ever intended to harm him. It is unreasonable for anyone to interpret that the statement was a serious expression of an intention, as it does not mesh with the facts of this case. The government cannot show that this statement constitutes a true threat; it is mere political hyperbole, fully protected. Unlike *Khorrami*, there was no defacing of the picture, there was no "wanted poster"; there were no statements such as "execute now" or "death to" or "his blood need." As repeatedly mentioned, there was absolutely no threat made towards Juror A. The government is seeking to prosecute pure speech and political hyperbole and as a result this indictment must be dismissed.

Application of *Watts* to Posting Personal Information

The Ninth Circuit held in *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) that certain postings of personal information can be proscribable as "true threats." In *Planned Parenthood*, the American Coalition of Life Activists, Advocates of Life Ministries and numerous individuals were involved in the creation and circulation of posters portraying various abortion doctors' names, accompanied with the words "GUILTY" and "OF CRIMES AGAINST HUMANITY." *Id.* at 1062. Some of the posters included full names and home addresses of the physicians. *Id.* at 1064-5. These posters were circulated in the wake of a series of "WANTED" and "unwanted" posters identifying other abortion doctors, before the doctors were murdered. *Id.* In these circumstances, the court determined that the posters were a true threat because they connoted something that they did not literally say. Specifically, the posters carried a message of "You're Wanted or You're Guilty; You'll be shot or killed." *Id.* at 1085. The speech failed the *Watts* test applied by the court, as it could have been interpreted as a

"serious expression of intent to harm or assault." *Id*. at 1074. As a result, the speech fell outside of the protection of the First Amendment.

Subsequently, the issue of posting personal identification information in a less incendiary manner, was taken up in *Sheehan v. Gregiore*, 272 F. Supp. 2d. 1135 (W.D. Wash. 2003). In *Sheehan*, a plaintiff, operating the website "justicefiles.org," had removed the residential addresses, phone numbers, birthdates and social security numbers of law enforcement officers or volunteers, corrections officers or volunteers, and court employees or volunteers, in response to a statute prohibiting such posting. *Id* at 1139. The plaintiff sued the State of Washington arguing that the statute was an unconstitutional proscription of speech. *Id*.

The defendants argued that the "release of personal identifying information regarding individuals, together with the intent to harm or intimidate, constitutes a threat." *Id*. at 1141. The court found this to be fundamentally incorrect as a matter of law, and instead followed the *Watts* test, as applied in *Planned Parenthood*. *Id*. at 1141. Distinguishing the situation from *Planned Parenthood*, the court noted that the statute did not regulate anything dealing with "threats" but rather the "mere release of personal identifying information." *Id*. at 1142. The statute did not purport to regulate true threats or any other proscribable mode of speech, but pure constitutionally-protected speech. *Id*. Furthermore, the court explicitly stated that "disclosing and publishing information obtained elsewhere is precisely the kind of speech that the First Amendment protects. *Id*. *citing Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001). As a result, the plaintiff was entitled to summary judgment on the claim that the statute was violative of the First Amendment. The court noted that it did "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," but that "we live in a democratic society

founded on fundamental constitutional principles" and as a result "we do not quash fear by increasing government power, proscribing those constitutional principles, and silencing those speakers of whom the majority disapproves." *Id*. at 1150.

Unlike the *Planned Parenthood* case, where the words "GUILTY" and "OF CRIMES AGAINST HUMANITY" were found on the posters and they had been circulated in the wake of violent murders stemming from similar posters, White's posting involves the "mere release of personal identifying information," similar to the speech in *Sheehan*. White has done nothing more than release information that he obtained elsewhere on the Internet, which is "precisely the kind of speech that the First Amendment protects." *Sheehan* at 1142. The government is seeking to criminalize speech that is neutral and non-threatening; pure constitutionally-protected speech. The indictment seeks to silence speech that the government disapproves of. A threat cannot be constituted by release of personal identifying information. *Id*. at 1141. Lacking something more threatening or dangerous than just a release of information, White's posting is clearly protected speech and this indictment must be dismissed.

Other courts have dealt with the issue of posting personal information on the Internet as well. In *United States v. Carmichael*, 326 F.Supp.2d 1267 (M.D. Ala. 2004), the court examined whether or not a court can order that a website displaying information about informants and government agents be taken down. A defendant charged with marijuana possession with the intent to distribute and money laundering started a website (www.carmichaelcase.com) and began to request information on the agents and informants in his case. *Id*. 1271-2. Specifically, he put the words "Wanted" and "Information on these Informants and Agents" on the website, above a listing of the names of eight individuals as well as pictures of three of them. *Id*. A reproduction of the website was also published as an advertisement in the local newspaper. *Id*.

at 1272-3. The government sought to restrict the defendant from posting the personal information about the agents and informants, while the defendant argued that his speech was protected. *Id*. at 1273, 1279.

Noting that there is no explicit threat on the site and that the site disclaims any intent to threaten[11], the court found the statements to be a way of gathering information. *Id*. at 1281. Distinguishing the website from the "wanted poster" of *Khorrami*, the court reasoned that the website is not nearly as threatening as the *Khorrami* case. *Id*. There was no mention of killing, execution, blood, no epithets used and no evidence that the defendant had sent threatening letters. *Id*. at 1281-2. The First Amendment protects speech that is "designed to embarrass or otherwise coerce another into action." *Id*. at 1282, *citing NAACP v. Claiborne*, 548 U.S. at 910. Standing alone, the website did not cross the line to become a true threat. *Id*. at 1282.

The court next looked at the context of the website, drawing a contrast between the circumstance in *Planned Parenthood*, where the posters were circulated during a time where murders had occurred based on similar posters, and the defendant's website, which was not put up in the context of a string of murders. *Id*. at 1284. "The crucial circumstance for the court in *Planned Parenthood* was the pattern of posters followed by murders that pre-dated the defendants' publication of their posters." *Id*. Lacking any similar context, the speech was held to be protected and not a "true threat." *Id*. at 1285.

The court further found the speech to be protected under the *Brandenburg* test. *Id*. at 1287. Noting that the "incitement" doctrine is stringent, the court compared the speech to the speech in *NAACP v. Claiborne*. The literal threat in that case, "If we catch any of you going in any of them racist stores, we're going to break your damn necks," *Id*. at 902, was not outside of the protection of the First Amendment, and the court found it hard to see how the use of language

[11] White's website similarly disavows the breaking of the law in multiple posts.

with "at most only non-specific threatening connotations could be unprotected." *Carmichael*, 326 F. Supp. 2d at 1288. The court also mentioned that in *Planned Parenthood*, Judge Kozinski's dissent mentioned that there was so little chance of proving imminency under *Brandenburg* that the plaintiffs did not even raise an argument. *Id*. at 1287 *citing Planned Parenthood*, 290 F.3d at 1092 n. 5 (Kozinski, J., dissenting). The court quickly dispatched with the *Brandenburg* argument based on the defendant's speech.

Similar to the posting in *Carmichael*, White's posting does not rise to anything near the level of the *Khorrami* case, as discussed above. There are no threats, no violent language, or anything similar. The *Carmichael* court held that any speech made by the defendant was protected, as was any later posting of personal information. All White has done has taken the step of posting personal information. There is no threatening statement on the site, there is no explicit threat, and White has even stated, in the "surrounding circumstances," that illegal actions should not be taken. Posting the information of government agents and informants, who were set to be witnesses in a criminal trial does not rise to the level of a "true threat," and is therefore protected. Consequently, it is incomprehensible to criminalize the posting of information about a juror, which should be similarly protected. There is no context of jurors being murdered because of similar postings, there is no threatening statement. White's speech here is a mere posting of information. Therefore, any indictment of this speech amounts to nothing short of a constitutional violation.

Public Nuisance

The government can act in many situations to prohibit the intrusion of the home of unwelcome views and ideas, which cannot be totally banned from the public dialogue. *Cohen v. California*, 403 U.S. 15, 21 (1971). However, the government has not alleged that the privacy

interests of whoever read White's post were invaded or that White created a public nuisance. It is nonetheless clear that the speech does not amount to a public nuisance In *Cohen*, a defendant was observed in the Los Angeles County Courthouse wearing a jacket that said "Fuck the Draft." *Id*. at 16. The defendant did not engage in or threaten to engage in any act of violence or threaten violence nor did he make any loud or unusual noise. *Id*. at 17. One of the arguments before the Court was that this was a distasteful mode of expression, thrust upon unwilling or unsuspecting viewers, specifically in the presence of women and children. *Id*. at 21. The Court noted that people are often captives outside the home and therefore subject to objectionable speech. *Id*. at 21, *quoting Rowan v. United States Post Office Dept*, 397 U.S. 728 (1970). The Court then reasoned that persons confronted with the jacket were in a different posture then someone objected to loud sounds blaring outside their homes. The people in the Courthouse could have avoided the bombardment of the speech by simply averting their eyes. If the speech was otherwise entitled to protection, a conviction cannot be justified where unwilling listeners may have been briefly exposed to it. *Id*. at 21.

While some viewers of the post regarding the information of Juror A may have been briefly exposed to the speech in their home, this does not rise to the level of intrusion on the home. Logging on to the Internet necessitates exposure to the uncensored and often unwieldy views of other people in the world. While neither the Supreme Court nor the Seventh Circuit have directly taken on the issue of public nuisance in the realm of the Internet, cases similar have indicated that the proper approach is to avoid limitation of free speech with regard to the Internet.

In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Court struck down the Communications Decency Act, which prohibited the transmission of obscene or indecent or

patently offensive messages in a manner available to a person under 18 years of age. The Court first began with an analysis of the characteristics of the Internet and found, as the district court had, that unlike communications received by radio or television, it takes affirmative steps more deliberate than "merely turning a dial" and that it requires some sophistication and some ability to read and to retrieve material, as opposed to merely leaving the Internet unattended. *Id*. at 854. A website's title or description generally appears before the site itself[12] and therefore "the odds are slim" that someone would stumble across a site by accident. *Id*. at 854. The Court further noted that there is no qualification of First Amendment protection because of the nature of the Internet. *Id*. at 870.

Following the reasoning of both *Cohen* and *Reno*, it seems unlikely that someone would stumble across White's website accidentally. It requires affirmative steps and there are generally descriptions of websites before the site itself appears. Furthermore, as stated in *Cohen*, someone who was bombarded by White's speech and found it objectionable could avoid further intrusion by merely averting his or her eyes. An objectionable website cannot be characterized as a public nuisance in the same sense as someone standing outside of a person's home and blaring the objectionable speech within earshot of the sanctuary of their home.

[12] Specifically with regard to finding objectionable material via a search engine.

Conclusion

For the foregoing reasons, this Court must dismiss the indictment against Defendant William White as it seeks to criminalize his fully protected speech in violation of the First Amendment to the United States Constitution.

Respectfully submitted on this 28th day of May, 2009

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