IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

versus Case 6:13-cr-304-Orl-228GJK

WILLIAM A. WHITE
_____/

MOTION FOR JUDGMENTS OF ACQUITTAL –

WILLIAM A WHITE, through undersigned counsel and pursuant to Rule 29(a) because as a matter of law and even while viewing the evidence and inference in a light most favorable to the United States the evidence is legally insufficient to demonstrate guilt beyond a reasonable doubt, and more specifically states the following:

Viewing the evidence in a light most favorable to the United States with reference to Counts One through Six there has been no competent proof presented that MR. WHITE sent the communications. The evidence is wholly circumstantial and a conviction based on such inadequate proof that is otherwise consistent with innocence denies Due Process and violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Viewing the evidence in a light most favorable to the United States with reference to Counts One through Five, there is inadequate proof that MR. WHITE subjectively intended to threaten Walter Komanski, Lawson Lamar, Kelly Boaz or Thomas Lamar by communicating true threats using interstate and/or foreign commerce (hereafter "the

Internet.") Using the timeline advanced by the United States and assuming, *arguendo* and not conceding that MR. WHITE emailed the communications using the nslf-helterskelter@hotmail.com on May 19, 2012 (Count One) and May 20, 2012 (Counts Two through Five) the evidence shows that MR. WHITE at that time was isolated in Mexico. A complete search of his email and facebook accounts by the United States produced no evidence that he communicated with anyone to do anything in reference to the communications. Further, facially, the communications cannot reasonably be viewed as "true threats" given the context and the public dissemination of the communications to officials who under no circumstances would take the actions requested in the communications. The punishment of protected speech violates the First Amendment to the United States Constitution and such communications are protected by the First Amendment absent a subject intent to communicate a true threat. *Virginia v. Black*, 583 U.S. 343 (2003). *See*, *Elonis v. United States*, 134 S.Ct. 2819 (June 16, 2014) (the United States Supreme Court granted certiorari and directed the parties to brief and argue "Whether, as a matter of statutory interpretation, conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant's subjective intent to threaten.").

With reference to Count Six, Congress enacted 18 U.S.C. § 1028(a)(7) to prosecute the use of *false* identities. The fact that MR. WHITE is also charged with threatening people by using their correct names and addresses indicates the identities involved in this case are neither false nor fraudulent. A conviction for a violation of 18

U.S.C. § 1028 requires the use of false identification information. At a minimum, a conviction for violating 18 U.S.C. § 1028 requires the knowing use of identification information *falsely*. If the statute criminalizes the mere "use" of identifying information of another person during the commission of any crime, it becomes overly broad and casts a net so broad that it lacks a rational basis. A domestic violence suddenly becomes a federal offense when a wife, holding a knife, yells at her philandering husband when he returns drunk at 2:00 A.M, "I've had it with you, John Smith. I'm going to cut your heart out!"

More specifically, in *Flores-Figueroa v. United States*, 556 U.S. 646 (2009), the Supreme Court analyzed 18 U.S.C. 1028A(a)(1), a related statute that criminalizes "aggravated identity theft" with a mandatory consecutive 2-year imprisonment if "during and in relation to the commission of" enumerated felonies that specifically relate to fraud, the offender "knowingly...possesses, or uses, without lawful authority, a means of identification of another person." In *Flores-Figueroa*, a Mexican defendant provided his employer with counterfeit Social Security and alien registration cards containing his name but with identification numbers that belonged to other people. At trial, motion for acquittal was denied as to the 1028A charge where the trial judge found that the word "knowingly" does not modify "of another person." The Supreme Court reversed and held that § 1028A(a)(1) requires the Government prove defendant knew the identification numbers being fraudulently used belonged to another person and reversed the trial court on that count.

In analyzing the related "aggravated identity theft" statute in 18 U.S.C. 1028A, the Supreme Court in *Flores-Figueroa* also analyzed the statute involved in Mr. White's case, 18 U.S.C. § 1028. In so doing, the Court found:

> The relevant House Report refers...both to "identity theft" (use of an ID belonging to someone else) and to ***"identity fraud" (use of a false ID)***, often without distinguishing between the two. And, in equating fraud and theft, Congress might have meant the statute to cover both—at least where the fraud takes the form of using an ID that (without the offender's knowledge) belongs to someone else.

Flores-Figueroa, at 655 (2009)(internal citations omitted)(emphasis added). The Court went on:

> ***Congress separated the fraud crime from the theft crime in the statute itself. The title of one provision (not here at issue) is "Fraud and related activity in connection with identification documents, authentication features, and information." 18 U.S.C. § 1028.*** The title of another provision (the provision here at issue) uses the words "identity *theft*." § 1028A (emphasis added). Moreover, the examples of theft that Congress gives in the legislative history all involve instances where the offender would know that what he has taken identifies a different real person. H.R.Rep. No. 108–528, at 4–5, U.S.Code Cong. & Admin.News 2004, pp. 779, 780–81 (identifying as examples of "identity theft" " 'dumpster diving,' " "accessing information that was originally collected for an authorized purpose," "hack[ing] into computers," and "steal[ing] paperwork likely to contain personal information").

Id.; accord United States v. Spears, 729 F.3d 753, 757 (7th Cir. 2013)(*en banc*)("Section 1028(a)(7) deals with document fraud committed with intent to aid or abet any federal crime, or any state felony.").

Thus, it appears the statute at issue in this case, 18 U.S.C. § 1028(a)(7), is part of the statutory scheme that criminalizes "identity fraud" where "use of a false ID" is involved. Since the Government is required to prove a fraud in using identifying information that belongs to someone else, and because no fraud is involved in this case where the identifying information correctly relates to the proper people and addresses, the 18 U.S.C. §1028 charge is wholly inapposite. It is the *fraudulent* use of the information to commit a crime that is criminalized by 18 U.S.C. § 1028. This is emphasized in the header to the statute, which expressly states, "18 U.S.C. § 1028. **Fraud and *related activity* in connection with identification documents, authentication features, and information."** (Italics added for emphasis). It is the activity "related" to fraud that is criminalized by 18 U.S.C. §1028. Any activity that is criminalized in the remainder of the statute must pertain to activity related to fraud and not simply generic criminal activity where identifying information (name) is used that is in the public domain.

The use of this statue to criminalize the use of information within the public domain to commit any crime lacks a rational basis, infringes on the First Amendment right to freedom of speech, *chills* the exercise of free speech by potentially criminalizing and making it a federal felony to use a name or address that is already within the public domain lest someone's name be uttered in the context of committing a crime. This statute is constitutionally applied only in the context of the fraudulent use of identification documents, authentication features and information. It cannot be applied here in a constitutional way. Accordingly, a judgment of acquittal must be granted as to Count VI.

WHEREFORE, the defendant respectfully moves for judgments of acquittal as to Counts One through Six.

Respectfully submitted,

DONNA LEE ELM
FEDERAL DEFENDER

/s/ Larry B. Henderson
Larry B. Henderson
Assistant Federal Defender
Florida Bar Number 0353973
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone (407) 648-6338
Facsimile (407) 648-6095
E-Mail: larry_henderson@fd.org
Counsel for WILLIAM A. WHITE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY the foregoing was hand delivered to A.U.S.A. Vincent S. Chiu and on September 11, 2014, and otherwise electronically filed with the Clerk of Court with the CM/ECF system that will automatically send a notice of electronic filing to Assistant United States Attorney Vincent S. Chiu this 12th day of September, 2014.

/s/ Larry B. Henderson
Larry B. Henderson
Assistant Federal Defender
Florida Bar # 0353973
201 South Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone (407) 648-6338
Facsimile (407) 648-6095
E-Mail: larry_henderson@fd.org