05-2545-cr

To Be Argued By:
KEVIN J. O'CONNOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-2545-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

NOEL DAVILA,

Defendant -Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

STEPHEN B. REYNOLDS
WILLIAM J. NARDINI
Assistant United States Attorneys

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over his challenge to his conviction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do 18 U.S.C. § 2332a, which makes it a crime to threaten the use of a weapon of mass destruction, and 18 U.S.C. § 876(c), which makes it a crime to send a threat through the United States mail, criminalize threats of future action only?

2. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence for a reasonable jury to conclude that the defendant's sending a letter containing foreign writing, references to Osama bin Laden, and a white powdery substance that was represented to be anthrax to the offices of his former state prosecutor was a "true threat?"

3. Does the language of 18 U.S.C. § 2332a, allowing the government to prove, "in the case of a threat," that the defendant's conduct, had it been an actual anthrax incident, "would have affected interstate or foreign commerce," require more than a showing of a probable, minimal effect on interstate commerce?

4. Does the defendant's argument, not raised below, that 18 U.S.C. § 876(c) applies only to natural persons, and that Count Two of the Indictment is defective, in that it charges the defendant with sending "to the Connecticut State's Attorney's Office in Bridgeport, an envelope containing a white powdery substance represented to be anthrax, and a letter, which together with the white powdery substance threatened to injure the person of another," establish plain error?

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Preliminary Statement

After hearing hours of consensual recordings, as well as the testimony of eighteen witnesses, including law enforcement officers, three cooperating witnesses, several expert witnesses, and four victims, a jury found the defendant, Noel Davila, guilty of threatening the use of a

weapon of mass destruction in violation of 18 U.S.C. § 2332a and delivery of a threat through the U.S. mail in violation of 18 U.S.C. § 876. Davila had sent a threatening and vindictive letter containing foreign writing, Quranic prayers, references to Osama bin Laden, and a white powdery substance that was represented to be anthrax to the "State Att." at the Superior Court in Bridgeport, Connecticut -- the office that previously convicted Davila in 1992 for the aggravated rape of a fifteen-year-old girl, and in 2001 for five counts of risk of injury to a minor for his having fired nine shots into a house in Bridgeport in which five children between the ages of three and nine were present.

Carefully avoiding any reference to these prior convictions, the evidence at trial showed that following certain proceedings with the Bridgeport State's Attorney's Office in 2000 and 2001, Davila filed a meritless grievance and federal lawsuit against the state prosecutor who handled those cases. Thereafter, in August 2002, Davila, while incarcerated, sent an envelope addressed to the "State Att." in Bridgeport, which contained a white powdery substance; a piece of paper with foreign handwriting and prayers; and another piece of paper bearing the words "ANTRAX A.K.A. Bin Laden" [sic].

The threat was received at the Bridgeport State's Attorney's Office on August 20, 2002, where it was opened by a secretary who saw the white powder drop out. The mailing resulted in a full HazMat response by the Connecticut State Police Emergency Services Unit and the Federal Bureau of Investigation, and also caused that section of the State's Attorney's Office to be closed for

approximately two and a half days while awaiting testing on the powder by the Connecticut BioResponse Laboratory, the final results of which ultimately proved negative. The mailing, however, sparked fear in members of the State's Attorney's Office, certain of whom testified at trial regarding their reactions and certain precautionary steps they took, including one witness who began taking Cipro, an antibiotic effective against anthrax.

On appeal, the defendant claims that, as a matter of law: (1) he did not threaten to use a weapon of mass destruction within the meaning of § 2332a, nor did he threaten to injure the person of another within the meaning of § 876; (2) no reasonable jury could have found his letter to be a true threat; and (3) his conviction may not stand in the absence of an actual effect on interstate commerce. In addition, the defendant claims, for the first time on appeal, that Count Two of the Indictment failed to allege a violation of § 876. This Court should reject each of these challenges and affirm the conviction.

Statement of the Case

This appeal follows a six-day jury trial before the United States District Court for the District of Connecticut (Hon. Ellen Bree Burns).

In September 2002, a federal grand jury returned a two-count indictment charging the defendant with threatening the use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a, and delivery of a threat through the U.S. mail in violation of 18 U.S.C. § 876. (JA

19-20).[1] The defendant pleaded not guilty and was tried before a jury from June 21-28, 2004.

At the close of the government's case, the defendant moved for a judgment of acquittal. (JA 21-22); (Tr. 6/25/04 102-30). The court reserved decision.

Following the jury's guilty verdict and its discharge, the defendant filed timely motions for a new trial and for judgment of acquittal. The court denied both motions in unpublished written rulings on March 23, 2005. (GA 1-83).

On May 11, 2005, the court, in light of the defendant's career offender status, sentenced him within the applicable Guidelines range to 360 months on Count One and 60 months on Count Two. The court ordered the sentences to run concurrently with each other and with the defendant's already-imposed state sentence, effectively adding an additional 17 years of incarceration. (Tr. 5/11/05 53). In so doing, the court noted: "We are facing [a] defendant who[se] criminal history is very, very violent, a person who has never made it on probation. Every time he has been violated. A person who while incarcerated has continued to create problems for the institution. I think he got 11 incidents of disobeying . . . . So one of the things that is most important for this Court then is protection of the public. This man has displayed a propensity for violence. He has displayed a disregard for the sensibilities

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[1] References to the Joint Appendix are designated as ("JA _____"); to the Government's Appendix as ("GA ____"); and to the trial transcript as ("Tr. _____").

and health of other persons. I have on occasion[] had to sentence defendants who seem to be totally indifferent to the rest of society, and Mr. Davila seems to be one of those persons." (Tr. 5/11/05 50-51).

Davila filed a timely notice of appeal on May 18, 2005, and is presently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

During the six-day trial in June 2004, the jury heard the following evidence: In August 2002, Davila and his cellmate, Christopher Blacker, were housed at the Cheshire Correctional Institution in Connecticut, where inmates Andre Mendoza, Anthony Michael Young, and Aristocles Barley were also incarcerated. (Tr. 6/24/04 132-42); Govt. Exhs. 10, 11.

On August 18, 2002, while Davila and Blacker were in their cell, other inmates, including Young and Mendoza, were permitted to be out of their cells for an hour-long recreation time, and stopped by from time to time to talk. (Tr. 6/22/04 193-95; 205; 6/24/04 87; 126-32). During this time, Young and Blacker observed Davila, on his hands and knees, and while wearing plastic bags on his hands, write "ANTRAX A.K.A. Bin Laden" on a piece of paper. (Tr. 6/22/04 95-98; 207-09); Govt. Exh. 1. The two also saw Mendoza slide two additional pieces of paper under the cell door to Davila, the first of which Blacker saw contained foreign writing on it and the second of which he saw was a list of inmates and their corresponding inmate numbers. (Tr. 6/22/04 205-06; 209-13; 222-23).

During the same recreation period, Davila called Young back over to his cell. (Tr. 6/22/04 99-100). Young saw Davila with a bottle of powder in his hands, which were still covered by the plastic bags. *Id.* Davila asked Young to get him an envelope. *Id*. Young went to another cell and asked Barley for one of his pre-stamped envelopes from the prison commissary, telling him it was for Davila. (Tr. 6/22/04 100-03; Tr. 6/24/04 77-78; 83-88). Barley complied, and Young returned with the envelope to Davila. *Id*.; *see also* (Tr. 6/22/04 215-16; Tr. 6/24/04 77-78; 83-88).

Davila then addressed the envelope, using block lettering, as follows: "STATE ATT. SUPERIOR COURT 1061 MAIN ST. BRIDGEPORT CT. 06410." (Tr. 6/22/04 220- 28); Govt. Exh. 1. To avoid inspection, Davila also wrote "LEGAL MAIL" on the envelope and, for the return address, Davila selected an inmate name and number from the list provided to him by Mendoza. *Id*.

Davila then took the piece of paper containing the words "ANTRAX A.K.A. Bin Laden," folded the piece of paper in half and then folded the sides of the paper, creating a makeshift envelope. (Tr. 6/22/04 217-18); Govt. Exh. 1c. Davila poured white powder inside, then placed both the piece of paper with the foreign writing and prayers, and the makeshift envelope containing the powder and the words "ANTRAX A.K.A. Bin Laden," into the envelope provided by Barley. (Tr. 6/22/04 99-100; 218-19; 228). Davila then took a piece of toilet paper, wet it with water from the sink in his cell, and used it to wet the glue on the back of the envelope. (Tr. 6/22/04 228-29).

Davila then called out again for Young. (Tr. 6/22/04 103-07; 230). Davila slid the envelope, which was wrapped in toilet paper, to Young under the cell door and asked Young to mail it for him. *Id*. Young dropped the envelope in the outgoing mail slot in the cell block, shortly before the end of the recreation period. *Id*.

On August 20, 2002, the threat was received at the Bridgeport State's Attorney's Office, where it was opened by a secretary who saw the white powder drop out. (Tr. 6/21/04 29-30; 90-99). Specifically, victim Ruthann Haug testified that, upon opening the envelope at her desk, she saw the piece of paper with the foreign writing on it and became leery. (Tr. 6/21/04 96-98). Accordingly, she used a letter opener to take that piece of paper out. *Id*. Upon seeing the contents of that piece of paper, she became more leery and proceeded to use the letter opener to inspect the remaining contents. *Id*. Upon removing the second item from the envelope, Ms. Haug saw the words "ANTRAX A.K.A. Bin Laden" written on a piece of paper that was folded in half and along the sides. (Tr. 6/21/04 97-98); Govt. Exh. 1c. She also noticed a white powdery substance and, turning to her colleagues Annette Stufan and Michelle Martino, exclaimed, in substance, "There's powder in here!" (Tr. 6/21/04 29-30; 52-56; 61-62; 98-99). The three then immediately left the front office area and informed Supervisory Assistant State's Attorney John Smriga of the threat. (Tr. 6/21/04 31; 99-100; Tr. 6/25/04 142-44; 152-54). Smriga, along with Inspector Bill Hughes of the State's Attorney's Office, proceeded to the front office area to examine the letter. *Id.* Smriga kept a safe distance at the doorway while Hughes inspected the letter. *Id.* Upon picking up the letter, the white powder

spilled out onto Haug's desk. *Id*. Smriga then contacted the Connecticut State Police. *Id*.

The threat resulted in a full HazMat response by the Connecticut State Police Emergency Services Unit and the Federal Bureau of Investigation. (Tr. 6/21/04 136-38). In that regard, the jury heard the testimony of Haug, Stufan and Martino regarding the ensuing HazMat response and their reactions to the threat, including their reactions to seeing personnel from the State Police Emergency Services Unit respond in "Level C" protective gear. (Tr. 6/21/04 35-38; 62-69; 102-06). Martino testified that the mailing "made me somewhat fearful, very nervous." (Tr. 6/21/04 56). Haug testified that she started to wash her hands and stated that she "was very concerned that this was serious." (Tr. 6/21/04 101; 103). Smriga testified that he took it "very seriously" and that in his 17 years at the Bridgeport State's Attorney's Office, he had never come across a letter containing a white powder, which he described as "quite unusual." (Tr. 6/25/04 152-54).

The jury also heard the testimony of Connecticut State Troopers Tige Wade and Charlie Shaw of the Emergency Services Unit, regarding among other things, their HazMat response, their setting up "hot, warm and cool zones;" and the Level C protective gear worn by Shaw, who went into the State's Attorney's Office, collected the mailing, sprayed down the desk and sealed off the immediate area. (Tr. 6/21/04 133-84; 186-221).

The jury also heard testimony from Haug, Martino and Stufan regarding precautionary measures they took. (Tr. 6/21/04 35-37; 62-69; 102-06). Haug had to remove and

bag her clothes and, upon arriving home, washed the clothes into which she had changed. (Tr. 6/21/04 102-03). Haug also wiped down the inside of her car with alcohol and called her brother in the fire department for further advice. (Tr. 6/21/04 103-04). Haug did not leave her house while awaiting the test results over the next couple days, for fear that she might infect others. (Tr. 6/21/04 104-05).

Similarly, upon Martino's arrival at home, she took a shower and washed her clothes. (Tr. 6/21/04 66-67). That evening, Martino told her children what had happened that day, and became fearful during that discussion about possibly infecting her children. *Id*. Martino did not return to work for a couple days as well. (Tr. 6/21/04 67-69). Annette Stufan testified that upon leaving the office, she went home and immediately called her doctor. (Tr. 6/21/04 35-37). Based on what she told him, she received a prescription from her doctor for Cipro, an antibiotic effective against anthrax. *Id.* Stufan went immediately to a pharmacy, and began taking Cipro right away. *Id.*

The incident caused the front office of the State's Attorney's Office to be closed for approximately two and a half days while awaiting testing on the powder by the Connecticut BioResponse Laboratory. (Tr. 6/21/04 67-69). Fortunately, the powder ultimately proved negative for any pathogens. (Tr. 6/21/04 223-50).

During the ensuing investigation, Davila's cellmate Blacker voluntarily came forward, discreetly notifying prison authorities that he had information regarding the anthrax threat and the person responsible. (Tr. 6/22/04 16-

18). Blacker thereafter engaged in two consensually recorded discussions with Davila in their cell on August 26 and 30, 2002. (Tr. 6/22/04 16-34); *see also* Govt. Exhs. 5a-5d.

In portions of the recordings which were played at trial, the jury heard Davila, in his own words, discussing the anthrax threat he made and the steps he took to avoid detection. Govt. Exh 5c, 5d. For example, while discussing the possibility of law enforcement testing the powder used in the mailing, Davila indicated that they would not be able to trace the powder back to him:

BLACKER: They can't do nothing with that, though. Can they?
DAVILA: It's the same ingredients, same shit, it's all made in the fuckin' factory, same company.
BLACKER: They probably make fuckin' a truck load of it at once.
DAVILA: Yeah! Come on, man . . . [U.I.] . . . Chlorine . . . [U.I.] . . . that's it. Same ingredients, same shit.
DAVILA: They, they . . . they all the same anyway.
BLACKER: It's all chemicals.
DAVILA: It's not like -- how you gonna know this is from here? How you gonna distinguish it's from here?

Govt. Exh. 5d (Consensual Recording dated August 30, 2002, 11:42:43 – 11:44:02).

Similarly, the jury heard Davila discuss the efforts he made to avoid detection. Govt. Exhs. 5c, 5d. For

example, Davila admitted on the recordings how he wet the glue on the back flap of the envelope to prevent leaving any DNA:

BLACKER: What did you wipe the, the, um, stuff with . . . the . . .
DAVILA: What?
BLACKER: Yeah, but the, the glue -- you put the whole envelope under there? How did the glue get wet?
DAVILA: What glue?
BLACKER: On the envelope?
DAVILA: Water. I put water a little bit like this . . . . Water is water you know. You know?
BLACKER: Yeah, it's not saliva.
DAVILA: No! Be honest with you I'm serious.
BLACKER: Yeah -- I didn't even think of that.
DAVILA: I did.
BLACKER: I know, I saw . . .
DAVILA: I did. [Laughing].
. . . .
BLACKER: Yeah, they're gonna try DNA . . . .
DAVILA: DNA from what?
BLACKER: I don't know. No -- they'll, they'll, they'll do the, um . . .
DAVILA: Do what?
BLACKER: The glue, you know? So . . . .
DAVILA: Psshhh . . . [U.I.] . . .
BLACKER: You know?
DAVILA: They can't do nothing like that, cellie.
BLACKER: I mean, they'll, they'll, they'll . . .
DAVILA: Hey! [Water running]. You, gonna test that?! Test it! It's all the same shit.

Govt. Exh. 5d (Consensual Recording dated August 30, 2002, 12:17:42 - 12:21:17). Davila also admitted rubbing his fingers across the envelope and avoiding pressing his fingers down directly on the mailing so he wouldn't leave a fingerprint for identification:

BLACKER: You didn't put your finger on it, did you?
DAVILA: It doesn't matter. I went like that.
BLACKER: Yeah, but wouldn't your print go on it?
DAVILA: No.
BLACKER: No, because it's only oil.
DAVILA: But if you're rubbin', what you goin' -- what you goin' to get is . . . it's not perfect, you understand what I'm saying? That's when you go like this, and take it like this, you go like this, you see? . . . and press . . . then everything's there. But when you go like that, that's not a . . . that's not a, a, a, a, a . . . a perfect, what you ma call it? I, I, I, identification. You know what I'm saying? [U.I.] . . . It's like -- you commit a, you commit a murder, right? . . .
BLACKER: Right.
DAVILA: And you have your prints like this -- different. Only -- it's like that. Ain't no prints in there. You know, you like, going like that.
BLACKER: You're rubbing it.
DAVILA: You're rubbing it. So everything is rubbed up.
BLACKER: Straight. The envelope too, right?
DAVILA: Everything. I touched it. Even the paper.
BLACKER: The what?

DAVILA: [U.I.] . . . The Muslim . . . [U.I.] . . .
BLACKER: Oh the prayers.
DAVILA: Everything.

Govt. Exh. 5d (Consensual Recording dated August 30, 2002, 12:17:42 - 12:21:17).

The jury also heard compelling motive evidence about how upset Davila was at the state prosecutor who had handled his state matters:

DAVILA: The whole case, the whole case was bogus. He just want a fuckin' conviction. He wanna nail me. He wanted me to do time.
BLACKER: The prosecutor?
DAVILA: Yeah! You know what I'm saying?
BLACKER: He was the big man down, he's the big man down there?
DAVILA: Who? The prosecutor? He was the one that was running Bridgeport.
BLACKER: He's running Bridgeport.
DAVILA: Yeah!
BLACKER: Well, he got a fuckin' day off the other day. Fuck him.
DAVILA: You know what? I'll tell you what, man. I'm mad. I'm -- see I don't say nothin, but I'm real pissed, though. If I were to do this shit, I don't give a fuck, I'll do my time. Fuck it. I'll do my time . . . [U.I.] . . . and say fuck it. You know what I'm saying?

Govt. Exh. 5c (Consensual Recording dated August 26, 2002, 15:40:58 - 15:41:40).

The jury also heard from Assistant State's Attorney Stephen Sedensky, who was the prosecutor who handled Davila's 1992, 2000 and 2001 cases. (Tr. 6/22/04 122-24). Sedensky testified generally about his having had Davila's cases, and that during the most recent matter, he had engaged in a vigorous cross-examination of Davila, after which Davila filed a grievance and brought a federal lawsuit against him, both of which were dismissed as meritless. (Tr. 6/22/04 122-26; 135-36). In the papers relating to those matters, Davila referred to Sedensky as having a "personal vendetta" and "malice" against him. (Tr. 6/22/04 129).

The jury also heard testimony from Ricardo Quental, Lead Manager of Distribution Operations for the Wallingford, Connecticut Postal Processing Facility regarding the impact that Davila's mailing would have had on interstate commerce had the defendant used anthrax as threatened. Quental testified that mail, like Davila's letter, which originates from the 063, 064 and 065 zip codes is processed and canceled at the Wallingford Postal Processing Facility; that incoming mail (including commercial mail) from around the world is processed at the Wallingford facility as well; and that those two types of mail commingle for a time. (Tr. 6/24/04 31; 34-40; 57-58). On an average day, the Wallingford facility processes four hundred thousand pieces of mail. (Tr. 6/24/04 34-48; 49).

Quental also testified that if Davila's letter had tested positive for actual anthrax, a significant portion of the Wallingford facility would have been shut down, causing

a delay in the processing of interstate commercial mail already in the pipeline; and causing a diversion of commercial mail to other processing facilities outside Connecticut. (Tr. 6/24/04 46-52, 56-57). The basis for this testimony was an actual anthrax incident that had resulted in the death of a Connecticut resident in the fall of 2001. Investigation had determined that contaminated mail received by the decedent had been processed at the Wallingford processing facility. (Tr. 6/24/04 43-52). After spores were detected at the facility, the entire facility was decontaminated and a portion was shut down for a number of weeks. *Id*.

The jury also heard expert testimony from Brian Donnelly from the Federal Bureau of Investigation, who testified regarding weapons of mass destruction such as anthrax, and the effect an actual anthrax incident would have on interstate commerce. (Tr. 6/25/04 56-100). Had Davila's mailing been determined to have contained actual anthrax, a national strategic stockpile of antibiotics, located outside Connecticut, would have been shipped interstate on trucks for distribution in Connecticut. (Tr. 6/25/04 68-71). Agent Donnelly testified that the national strategic stockpile is manufactured by, and purchased from, private pharmaceutical companies located throughout the United States. *Id*.

SUMMARY OF ARGUMENT

I. The defendant "threatened to use" a weapon of mass destruction within the meaning of 18 U.S.C. § 2332a and "threat[ened] to injure" another within the meaning of 18 U.S.C. § 876(c) because his sending a letter containing

foreign writing, prayers, references to Osama bin Laden, and a white powdery substance that was represented to be anthrax, expressed the requisite intent to inflict injury at once or in the future.

II. The defendant's claim that the mailing could not reasonably have been perceived as a "true threat" involves a question of fact for the jury which, on appeal, is a challenge to the sufficiency of the evidence. Viewing the evidence in the light most favorable to the prosecution, the evidence easily sufficed for the jury to conclude that an ordinary, reasonable recipient of the defendant's mailing -- sent less than a year after the anthrax mailings that caused a number of deaths in the United States in late 2001, including a death in Connecticut -- would have interpreted it as a threat of injury.

III. Where, as here, a statute contains, as an explicit jurisdictional element, a showing of an effect on interstate commerce, a subtle or potential effect on commerce will suffice, and the effect need not be direct or substantial. The evidence at trial, including the testimony regarding the impact on commercial mail and the dispatching of trucks carrying antibiotics from a national stockpile out of state into Connecticut easily sufficed to meet this burden.

IV. Under Fed. R. Crim. P. 12, the defendant waived any claim that the language of Count Two of the Indictment was insufficient, because he did not raise such a claim prior to trial, and in fact has only raised it for the first time on appeal. Even if the Court were to reach the merits of the claim, the language of the indictment must be liberally construed, and it implicitly alleged that the letter

was addressed to a person. Moreover, that the mailing bore the title of an official, rather than the name of a specific individual, does not preclude liability under 18 U.S.C. § 876. In addition, even if the indictment is narrowly read as addressed to the Connecticut State's Attorney's Office, 18 U.S.C. § 876 is properly applied to legal, as well as natural, persons. In any event, the defendant's claim with respect to Count Two does not amount to plain error, i.e., that it affected the outcome of the trial and seriously affected the fairness, integrity or public reputation of judicial proceedings.

ARGUMENT

I. TO "THREATEN TO USE" A WEAPON OF MASS DESTRUCTION OR TO "THREATEN TO INJURE" THE PERSON OF ANOTHER CONTEMPLATES EXPRESSION OF AN INTENT TO INFLICT INJURY AT ONCE OR IN THE FUTURE.

A. Relevant Facts

The evidence pertinent to consideration of this issue is set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The defendant claims that he did not "threaten to use" a weapon of mass destruction within the meaning of 18 U.S.C. § 2332a, nor did he "threat[en] to injure" another within the meaning of 18 U.S.C. § 876, on the ground that these terms permit criminal liability only upon a threat of some future action. Because the defendant's argument is one of statutory interpretation, the Court applies a *de novo* standard of review. *See United States v. Rowe*, 414 F.3d 271, 276 (2d Cir. 2005); *Field v. United States*, 381 F.3d 109, 111 (2d Cir. 2004).

C. Discussion

The defendant argues that, as a matter of law, he did not threaten to use a weapon of mass destruction within the meaning of 18 U.S.C. § 2332a, nor did he threaten to injure another within the meaning of 18 U.S.C. § 876,

because his mailing was a singular event that was completed when the letter was opened, and both statutory phrases require evidence of an intent to do something in the future.

As it existed in August of 2002, 18 U.S.C. § 2332a provided, in pertinent part:

> A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction . . .
>
> (2) against any person within the United States, and the results of such use affect interstate commerce or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce . . .
>
> shall be [guilty of a crime].

18 U.S.C. § 2332a.[2] Similarly, 18 U.S.C. § 876(c) provides, in pertinent part:

> Whoever knowingly [deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication with or without a name or designating mark subscribed thereto, addressed to

---

[2] Unless otherwise indicated, all references to § 2332a are to that statute as it existed in August 2002.

> any other person and containing . . . any threat to injure the person of the addressee or of another, shall be [guilty of a crime].

18 U.S.C. § 876(c).

The defendant argues that both the statutory phrases "threaten to use" and "threat to injure" make it a criminal act only to threaten to do some act in the future. Because the defendant's mailing here was a singular event that was complete upon receipt and contained no express language suggesting separate future harm, the defendant contends that there was no evidence to suggest such future conduct. In that regard, the defendant urges this Court to adopt the reasoning of the only reported opinion to have so held, *United States v. Taylor*, No. 02CR73 (RPP), 2003 WL 22073040 (S.D.N.Y. Sept. 5, 2003).

In *Taylor*, the district court granted a Rule 29 motion in favor of a co-conspirator of Taylor in a severed trial, finding that a disgruntled store employee of ABC Carpet who had left a note stating that anthrax was already in the store did not "threaten to use" a weapon of mass destruction under 18 U.S.C. § 2332a. In an oral ruling from the bench at the close of the government's case, the district court reasoned that there was no evidence to indicate in any way that the defendants were going to spread anthrax and, because the note simply indicated that anthrax was already in the store and was "already disseminated," such conduct did not fall under the threat provisions of 18 U.S.C. § 2332a. *Id.* at *2. The court stated "I don't think a jury, a reasonable jury could find

that this document was a threat to do an act that would be harmful at once or in the future." *Id*.

The government then moved for a pretrial ruling on the sufficiency of a stipulated record in Taylor's case, asking that the Indictment not be dismissed pursuant to Rule 29 of the Federal Rules of Criminal Procedure. In the written opinion that followed, the district court reasoned that to establish a "threat to use" a weapon of mass destruction within the meaning of 18 U.S.C. § 2332a, the threat must convey an "imminent prospect of execution," and "communicate the idea that the writer of the threat will engage in some future conduct." *Id*. at *6. Relying on the Supreme Court's definition of "use" in 18 U.S.C. § 924(c) as meaning "active employment," *see Bailey v. United States*, 516 U.S. 137, 143 (1995), the district court concluded that:

> The word "threatens," taken in conjunction with the words "to use," require active employment of something in the future. Because the Note state[d] . . . that the anthrax has already been placed in ABC Carpet, and because there is no evidence that Defendant was threatening to "actively employ" the anthrax, there is no evidence that Defendant "threatened to use" a weapon of mass destruction.

Id. at *8.

The defendant's reliance on *Taylor* is misplaced, because: (1) principles of statutory interpretation do not support a conclusion that the terms "threaten to use" or

"threat to injure" involve only the prospect of future harm; (2) the weight of authority confirms that a threat includes conduct that would be harmful either at once or in the future; and (3) in any event, the defendant's actions in this case involved threats of both immediate and future harm.

1. Statutory Interpretation Supports Both Present and Future Harm.

Statutory interpretation begins with the language of the statute itself. *See*, *e.g.*, *United States v. Lucien*, 347 F.3d 45, 51 (2d Cir. 2003). This Court, however, has not construed the meaning of the terms "threaten" or "use" under 18 U.S.C. § 2332a and the statute itself does not define them. In the absence of a specific statutory definition, words are to be interpreted pursuant to their "ordinary, contemporary and common meaning." *Harris v. Sullivan*, 968 F.2d 263, 265 (2d Cir. 1992) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Beginning with the plain meaning of the statute, § 2332a(a)(2) criminalizes behavior when a person "without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction." There is no temporal limitation in the language of the statute indicating that the term "threatens" contemplates only future action. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (concluding that term "employee" in antiretaliation provision of Title VII covered former as well as current employees, in part because term contained no "temporal qualifier").

In addition to its plain meaning, the statutory structure of 18 U.S.C. § 2332a supports the notion that the term "threaten to use" includes both present and prospective harm. In determining the scope of statutory language, "[t]he meaning of statutory language, plain or not, depends on context," *Bailey v. United States*, 516 U.S. 137, 145 (1995), and "absurd results are to be avoided." *United States v. Turkette*, 452 U.S. 576, 580 (1981). If a particular reading of the language of a statute leads to absurd results, "and thus impute[s] to Congress an irrational purpose, [such an interpretation] should be spurned." *Adams-Mitchell Co. v. Cambridge Distributing Co.*, 189 F.2d 913, 923 (2d Cir. 1951).

Under the reading of the statute urged by the defendant, Congress would have intended to prohibit a person from threatening to use a weapon of mass destruction only if such threats were prospective in nature. As aptly noted by the district court, "[u]nder this interpretation, had Mr. Davila simply mailed a note, and nothing more, saying something to the effect of 'I will be mailing anthrax to your offices tomorrow,' his actions would fall under the scope of this statute, while his mailing of an envelope containing a white powdery substance, a piece of paper with the words 'ANTRAX A.K.A. Bin Laden,' written on it and another piece of paper with 'foreign handwriting' and prayers written on it would not . . . . Such a result would . . . be absurd." (GA 25-26).

The defendant argues at some length that the enactment of the Stop Terrorist and Military Hoaxes Act of 2004 and the corresponding amendment of § 2332a "clearly reflects

Congressional recognition and awareness that the then-existing statutes addressing threats to use weapons of mass destruction, i.e., 18 U.S.C. §§ 876 and 2332a, did not reach anthrax hoax mailings of the type involved here," which he claims do not imply future conduct. Appellant's Brief at 20. In that regard, the defendant relies heavily, but selectively, upon the legislative history surrounding the consideration and enactment of bills in 2003 and 2004. *Id.* at 18-20. That legislative history, however, not only expressly stated that the 2004 amendments to § 2332a and the enactment of separate hoax provisions were in response to decisions like *Taylor*, but also expressly confirmed that the operative version of § 2332a did, in fact, prohibit, threatening the use of a weapon of mass destruction:

> [S]ome courts have found that certain terrorism hoaxes are false reports that cannot be prosecuted as threats. On January 17, 2003, for instance, a court dismissed an anthrax hoax case because the court found that the statute under which the defendant was charged did not fit. *That statute prohibited threats of use of weapons of mass destruction*. These hoaxes threaten the public's safety and health, further diminish the already overburdened resources of law enforcement and emergency responders, distract our military, and harm the nation's morale and economy.

H.R. Conf. Rep. 104-518 at *4 ("Background and Need For Legislation") (emphasis added). The new law, by contrast (reproduced at JA 67), significantly expands criminal prohibitions to any conduct designed to convey

"false or misleading information," regardless of whether that information is threatening in nature. Indeed, as the defendant himself recognizes, the perceived "gap" in existing law that Congress was seeking to close related to "a hoax related to biological, chemical, or nuclear dangers *where there is no specific threat.*" (JA 56; Appellant's Br. at 19). In the present case, Davila's mailing was unmistakably specific and threatening, and went far beyond simply providing false information: it essentially claimed to contain anthrax within its inner envelope.

In any event, it is well established that it is inappropriate to look to the actions or statements of a subsequent Congress in order to discern either the intent of, or the meaning of statutory language from, an earlier Congress. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress."); *United States v. Williams*, 23 F.3d 629, 634 (2d Cir. 1994); *see also Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency*, 399 F.3d 486, 508 (2d Cir. 1995).

Moreover, nothing in the legislative history from the applicable version of 18 U.S.C. § 2332a suggests that criminal liability for threats to use a weapon of mass destruction was narrowly limited to threats of future conduct only. *See* (GA26-29). As originally enacted in 1994, § 2332a(a) provided that "[a] person who uses, or attempts or conspires to use, a weapon of mass destruction . . . against any person within the United States . . . shall be imprisoned." *See also* Pub. L. 103-322, Title VI, § 60023(a). In 1995, both houses of Congress began

considering amendments to § 2332a to "provide[] for criminal prosecution for threats of use of weapons of mass destruction." H. R. Rep. 104-383, 104th Cong. (1995).[3] *See also* 141 Cong. Rec. S2502, S2525 (daily ed. Jan. 30, 1995) (describing amendments to § 2332a as "add[ing] coverage for threats to the weapons of mass destruction statute").[4] Section 2332a was amended by Public Law 104-132, the Antiterrorism and Effective Death Penalty Act of 1996, by inserting "threatens," before "attempts or conspires to use, a weapon of mass destruction." H.R. Rep. 104-383. The final House Conference Report on the amendments stated: "This section *criminalizes a threat to*

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[3] "Sec. 107. . . . This section amends Section 2332a of Title 18, United States Code. It provides for criminal prosecution for threats of use of weapons of mass destruction. . . . New Subsection (b) of section 2332a will authorize a penalty of death for the use, attempted use, threatened use, or conspiracy use [sic] of such a weapon by a U.S. national outside the United States that results in the death to any other person beside the offender." H.R. Rep. 104-383, 104th Cong. (1995).

[4] "Section 602. This section would add coverage for threats to the weapons of mass destruction statute (18 U.S.C. § 2332a). The offense of using a weapon of mass destruction (or attempting or conspiring to use such a weapon) was created by section 60023 of the Violent Crime Control and Law Enforcement Act of 1994 . . . [h]owever, no threat offense was included. A threat to use such a weapon is a foreseeable tactic . . . Accordingly, it seems clearly appropriate to make threatening to use a weapon of mass destruction a federal offense." 141 Cong. Rec. S2502, S2525 (daily ed. Jan. 30, 1995). *See also* 141 Cong. Rec. S6202 (daily ed. May 5, 1995).

use a weapon of mass destruction, extends the prohibition to the use of such weapons by U.S. nationals overseas, and clarifies that any chemical weapon is included in the definition of weapon of mass destruction or destructive device." H.R. Conf. Rep. 104-518, *reprinted in* 1996 U.S.C.C.A.N. 944, 956 (emphasis added). As persuasively reasoned by the district court:

> Since "[t]he conference report is generally the most reliable evidence in legislative history of congressional intent because it represents the final statement of the terms agreed to by both houses," *Auburn Housing Auth. v. Martinez*, 277 F.3d 138, 147 (2d Cir. 2002), and the final House Conference Report clearly indicate[d] that Congress sought to prohibit threats to use a weapon of mass destruction, . . . Congress intended to criminalize threats to use weapons of mass destruction in section 2332a. *See also* 142 Cong. Rec. H2247, H2263 (daily ed. Mar. 14, 1996) (statement of Rep. Jackson-Lee) ("[The] bill also extends the law regarding weapons of mass destruction to include threatened use of weapons of mass destruction, as well as cases involving a U.S. national outside of the United States."). Indeed, as introduced during Senate statements on the Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, the proposed amendment of section 2332a read: "Sec. 723. Threatening to Use a Weapon of Mass Destruction. Section 2332a(a) of Title 18, United States Code, is amended by inserting 'or threatens' before 'or attempts or conspires to use,

> a weapon of mass destruction.'" 141 Cong. Rec. S 53, S75, S90 (daily ed. Jan. 4, 1995). Although this was not the final language adopted, it is further evidence that Congress intended to criminalize threats to use a weapon of mass destruction.

(GA 28-29).

More importantly, nothing in the statutory language or in the legislative history of the operative version of 18 U.S.C. § 2332a requires that such threats to use weapons of mass destruction be threats of future conduct. As evidenced by the legislative history, Congress was concerned that the statute as written in 1994 failed to proscribe threats to use such weapons and there is no indication that Congress's concern focused only upon threats of future action. (GA 29).

2. The Weight of Authority Holds That a Threat May Entail Either Present or Future Harm.

Although this Court has not had occasion to squarely address whether the terms "threaten to use" in 18 U.S.C. § 2332a and "threat to injure" in 18 U.S.C. § 876 refer only to threats of future harm, Second Circuit precedent defining the term "threat," as well as case law outside the Circuit directly addressing those terms, support the position that the statutes proscribe threats that would be harmful either at once or in the future.

First, Second Circuit cases considering threats to injure others in violation of 18 U.S.C. §§ 875 and 876 have consistently maintained that the threats proscribed by such statutes include threats that are "immediate" or "imminent." For example, in *United States v. Sovie*, 122 F.3d 122 (2d Cir. 1997), the Court, in determining whether the defendant's threatening phone calls to his former girlfriend were true threats to injure within the meaning of 18 U.S.C. § 875(c), defined a "true threat" as one that "on its face and in the circumstances in which it is made is so unequivocal, unconditional, *immediate* and specific as to the person threatened, as to convey a gravity of purpose and *imminent* prospect of execution." *Id.* at 125 (citing *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)) (emphasis added). The Court went on to confirm that the government need not prove that the defendant "had a specific intent or a present ability to carry out his threat, but only that he intended to communicate a threat of injury through means reasonably adapted to that purpose." *Id.* (citing *Kelner*, 534 F.2d at 1023).

Similarly, in *United States v. Malik*, 16 F.3d 45, 51 (2d Cir. 1994), the Court considered whether the defendant's mailing certain arguably ambiguous letters to a United States District Judge for the Southern District of New York and to a panel of judges of this Court, which the recipients regarded as threatening, were threats to injure within the meaning of 18 U.S.C. § 876(c). The defendant argued "that the letters did not contain threats within the meaning of the statute." *Id*. at 49. In rejecting the claim, the Court included in its definition of threats to injure the terms immediate and imminent, again suggesting that

"threats to injure" are not limited only to threats of prospective harm:

> "So long as the threat on its face is so unequivocal, unconditional, *immediate* and specific as to the person threatened, as to convey a gravity of purpose and *imminent* prospect of execution," a statute punishing a threat may be applied constitutionally.

Id. at 51 (quoting *Kelner*, 534 F.3d at 1027) (emphasis added). The Court also warned that "rigid adherence to the literal meaning of a communication . . . would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of *impending injury by an implied menace* as by a literal threat." *Id*. at 50 (emphasis added); *see also Kelner*, 534 F.3d at 1027 (threats include "unequivocal, unconditional and specific expressions of intention *immediately to inflict injury*") (emphasis added).

Moreover, every reported decision that has directly considered the terms "threaten to use" in 18 U.S.C. § 2332a and "threat to injure" in 18 U.S.C. § 876 has declined to follow *Taylor* and has rejected the argument that those terms refer only to threats of future harm. In *United States v. Reynolds*, 381 F.3d 404 (5th Cir. 2004), the Fifth Circuit expressly rejected the defendant's argument "that the term 'threaten to use' in 18 U.S.C. § 2332a suggests that only threats of future use of a weapon of mass destruction are prohibited by the statute." *Id*. at 406. In *Reynolds*, the defendant was involved in an ongoing dispute with his mortgage company over

delinquent payments. Reynolds called the mortgage company to access an automated account system but was instead transferred to a customer service representative due to his delinquency. Upon being connected, Reynolds yelled into the phone, "I just dumped anthrax in your air conditioner." *Id*. at 405. Reynolds was subsequently convicted under § 2332a.

On appeal, Reynolds "argue[d] that because his statement indicated a past act, i.e., that he had already dumped anthrax in the air conditioner, it [could] not be construed as a threat under" 18 U.S.C. § 2332a. *Id*. at 406. In rejecting his claim, the Fifth Circuit looked both to "ordinary, contemporary, [and] common meaning[s]" found in certain dictionaries, as well as its definition of "threats to injure" in prior cases under 18 U.S.C. § 875(c). *Id*. The Court "found no credible support for a definition of 'threat' that requires reference to a future act," and concluded "that the proper definition of 'threaten' in § 2332a is that adopted by this court in [a prior case under § 875(c)]: a communication that has a reasonable tendency to create apprehension that [the] originator of the communication will act as represented." *Id*. (citing *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997)).

The Fifth Circuit returned to the question in *United States v. Guevara*, 408 F.3d 252 (5th Cir. 2005), and confirmed its holding in *Reynolds* that § 2332a "ha[s] no future action requirement." *Id.* at 257. In *Guevara*, the defendant wrote and mailed a letter to United States District Judge Mary Lou Robinson of the Northern District of Texas in August 2002. An employee at the court's mail depository retrieved the letter and, recognizing that it was

from an inmate, opened the envelope, which contained a white powdery substance that got onto the employee's fingers. *Id*. at 255. The letter stated:

> Mary Lou Robinson,
>
> I am sick and tired of your games[.] All [A]mericans will die as well as you. You have been now been [sic] exposure [sic] to anthrax.
>
> Mohammed Abdullah.

Id. The substance in the envelope turned out to be harmless hair gel and powdered cleanser. *Id*. The threat effectively closed the federal building and a full HazMat response ensued. *Id*. Guevara was convicted by a jury of threatening to use a weapon of mass destruction in violation of § 2332a and mailing a threatening communication in violation of § 876(c).

On appeal, Guevara argued that "to secure a conviction under § 2332a, the government must establish both that he made a 'threat' and that it encompassed the 'use' of a weapon of mass destruction." *Id*. at 256. Although the Court stated that, in the absence of preclusive authority, Guevara's arguments might "make closer the issue of whether 'to threaten to use' requires an expression of intent to act in the future," *id*., the Fifth Circuit nevertheless found Guevara's claims unavailing in light of *Reynolds*, and confirmed its view that "§ 2332a's language does not require reference to a future act." *Id*. at 257. Significantly, the Court went on to caution against

"read[ing] too much into the 'to use' language" of 18 U.S.C. § 2332a:

> Guevara makes much of the fact that the statute says "to use," and he reads the "to use" language as requiring future action. Aside from the fact that *Reynolds* forecloses this interpretation, we remain skeptical of any earnest attempt to read too much into the "to use" language . . . . Guevara would distribute the phrase "to use" upstream in [18 U.S.C. § 2332a(a)(2)], applying it to the word "threaten," to get to the requirement that Guevara "threaten to use." Such distributive mechanics, however, would also require that "to use" be distributed upstream to the word "uses," a grammatical construction that leaves something to be desired. That construction, however, is probably superior to the alternative, which is to decline to distribute "to use" upstream. This alternative construction would leave the statute an unintelligible law punishing any "person who, without lawful authority . . . threatens . . . a weapon of mass destruction." We are faced with the unenticing choice, on the basis of the "to use" language, between a construction that reads "uses . . . to use" and a construction that leaves the statute without a direct object. We therefore decline to refocus intensely on the "to use" language . . . .

Id. at 257 n.4. The court therefore confirmed its holding interpreting § 2332a "to have no future action requirement." *Id*.

Similarly, in *United States v. Zavrel*, 384 F.3d 130 (3d Cir. 2004), the Third Circuit rejected a claim that the term "threat to injure" in 18 U.S.C. § 876(c) requires proof of a prospective threat. In *Zavrel*, the defendant had mailed seventeen envelopes containing a white powdery substance (cornstarch) that she intended to resemble anthrax, to local officials, the President of the United States, and certain school and hospital workers. The mailings contained no written message whatsoever. On appeal of her convictions under § 876(c), Zavrel argued, relying on *Taylor*, "that she did not threaten the addressees of the letters, as required under the statute, because any harm caused by the mailings would have been immediate, and, she assert[ed], the statute only envisions prospective threats." *Id*. at 133; *see also id*. at 135 ("Zavrel argues that the phrase 'threat to injure' in § 876 contemplates a prospective, not immediate, threat.").

Relying upon this Court's decision in *Malik*, the Third Circuit concluded that the phrase "threat to injure" contemplates *both* immediate and future harm, and approved a jury instruction by the district court that defined a threat as "a serious statement or communication which expresses an intention to inflict injury *at once or in the future* . . . ." *Id*. at 136; *see also Sand*, Instruction 31-13 (a threat is "a serious statement expressing an intention to inflict injury *at once* or in the future."). The Court reasoned:

> We believe that Zavrel's actions accord with the *Malik* definition: a recipient of one of Zavrel's envelopes would fear imminent harm and perhaps death upon seeing the white powder. The

> envelopes with white powder were non-verbal messages of the sender's intent to harm the recipients.

Zavrel, 384 F.3d at 136. In the Third Circuit's view, "[a] reasonable person opening an envelope containing a white powdery substance, during the height of the anthrax crisis in this country, would doubtless fear immediate and future injury." *Id*.

The Third Circuit went on to hold that even if it accepted Zavrel's claim that § 876(c) was limited to threats of future harm, Zavrel's mailing of envelopes with a white powder -- even without any accompanying written communication -- met that definition as well:

> Even if we adopted Zavrel's assertion that the threats in the mailings must be prospective, we believe that Zavrel's mailings *did* contain threats of future harm. No doubt persons who were first exposed to Zavrel's mailings at the Nanticoke post office were immediately dismayed when they discovered Zavrel's letters. It would be natural for any person in such a circumstance to be fearful of future harm. Donlyn's actions exemplify this. She testified that after she came in contact with the white powder at the post office she went to the hospital out of fear that exposure to the powder might cause her health problems.
>
> Mailing cornstarch, or real anthrax for that matter, may be analogized to mailing a bomb (real or fake) or . . . a dead animal. The fact that some

> of the contents of these mailings may be immediately harmful does not alter the fact that the sender in each case intends to communicate prospective harm as well. Additionally, opening an envelope containing a white powder, in the circumstances described, could not only create an apprehension of immediate fear and future harm, but also communicates to the intended victim the sender's hostility and the idea that the sender has access to a deadly agent that he or she can use again in the future.

Id. at 136-37. The Third Circuit therefore held that "threat to injure" includes both immediate and future harm, and that the jury in Zavrel's case properly concluded that Zavrel's mailings were threats to injure within the meaning of 18 U.S.C. § 876(c). *Id.* at 137; *see also United States v. Lewis*, 220 F. Supp.2d 548 (S.D. W. Va. 2002) (mailing that included an unidentified white powder, a cigarette butt, and a note stating "If I were you, I'd change my attitude" and "It is on" constituted a "threat" under § 876).

3. Davila's Mailing Contained Threats of Both Immediate and Future Harm.

In any event, Davila's conduct falls within either reading of the terms "threaten to use" in § 2332a and "threat to injure" in § 876(c) because those who were exposed to Davila's mailing feared immediate harm as well as future injury.

Each of the victims in the vicinity of the letter feared they had suffered immediate harm. Victim Ruthann Haug testified that, upon opening the envelope and seeing the piece of paper with the foreign writing on it, the makeshift envelope with the words "ANTRAX A.K.A. Bin Laden" written on it, and the white powdery substance therein, she turned to her colleagues and exclaimed, "There's powder in here!"; and the three then immediately left the front office area, after which the police were called. (Tr. 6/21/04 29-31; 52-56; 61-62; 98-100; 142-44; 152-54). Haug was clearly concerned that she had already been contaminated with anthrax. She washed her hands, removed and bagged her clothes, wiped down her car with alcohol, and remained closed in her house for two days while awaiting test results, fearful that she might infect others. (Tr. 6/21/04 101-05). Michelle Martino was similarly "nervous" and "fearful," (Tr. 6/21/04 56), washed her clothes and showered (Tr. 6/21/04 66-69), stayed home for a couple of days, and feared that might infect her children. *Id*. Annette Stufan likewise immediately contacted a doctor and began taking Cipro. (Tr. 6/21/04 35-37). On this record, it cannot be said that the recipients did not fear immediate injury.

Even if the Court were to adopt Davila's narrow reading of the statutes and conclude that the terms "threaten to use" and "threat to injure" require prospective threats, Davila's mailings *did* contain threats of future harm. First, Davila's actions, at the time they were undertaken, were threats of future harm. Davila filled the envelope with white powder and threatening writing and caused it to be mailed, knowing that once it arrived at its

destination, a day or more in the future, it would cause fear and harm.[5]

Second, the anthrax Davila purported to send would not have been disseminated until the opening of the envelope and the manipulation of its contents by the recipients. In that regard, Davila's conduct is much different from that of the defendant in *Taylor*. In *Taylor,* the store employee simply left in the store an unattended note -- that was unaccompanied by any powder, stating that anthrax had *already* been disseminated. Here, Davila sent a letter that contained foreign writing and prayers, and references to Osama bin Laden, which was accompanied by a white powder that was labeled as anthrax. From the time Davila prepared and caused the envelope to be mailed, through and including the time of its receipt, Davila's mailing contemplated and expressed a future dissemination of the contents when it was opened, rather than a communication indicating that anthrax had *already* been disseminated at the location.

Third, it bears repeating that the powder was enclosed in an *inner* envelope which, according to the expert testimony of Special Agent Donnelly, had it been actual

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[5] That the Court may conduct the analysis from the point at which Davila initiated the threat is supported by those cases holding that "[i]t does not matter whether the communication is actually delivered." *Zavrel*, 384 F.3d at 133 (letters containing white powdery substance discovered in public mailbox where they were deposited, before delivery to intended recipients) (citing *Seeber v. United States*, 329 F.2d 572, 573 (9th Cir. 1964)).

anthrax, would have been released upon the manipulation and opening of that inner envelope. (Tr. 6/25/04 64-66) (opening envelope would cause anthrax to be disseminated; removal of enclosures would cause further, additional dissemination). In that regard, the circumstances here are far from the note in *Taylor*, which simply stated that something had already occurred. Here, the note stated an intention to inflict injury "at once or in the future" -- namely, upon the opening or manipulation of the inner envelope the powder labeled as anthrax would be released.

Finally, as noted by the Third Circuit in *Zavrel*, "[i]t would be natural for any person in such a circumstance to be fearful of future harm. [The victims'] actions exemplify this." *Id*. at 137. As aptly noted by the *Zavrel* court, "[t]he fact that some of the contents of these mailings may be immediately harmful does not alter the fact that the sender in each case intends to communicate prospective harm as well . . . opening an envelope containing a white powder, in the circumstances described, could not only create an apprehension of immediate fear and future harm, but also communicates to the intended victim the sender's hostility . . . ." *Id.*; *see also Lewis*, 220 F. Supp.2d 548 (S.D. W. Va. 2002) ("In the context of the post-September 11 anthrax outbreaks, the mailing of any powdery substances through the postal system is clearly capable of being interpreted as a 'threatening' communication under sections 876 and 871.").

II. THE EVIDENCE WAS EASILY SUFFICIENT TO ESTABLISH THAT DAVILA'S MAILING WAS A "TRUE THREAT"

A. Relevant Facts

The evidence pertinent to consideration of this issue is set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The defendant contends that his conduct could not be construed as a "true threat" because he claims that the recipients of his threatening communication were aware, at the time of receipt, of facts which rendered it not credible. Although he characterizes this as a matter of law, this Court has repeatedly held that the question whether a mailing is a true threat is generally best left to a jury. *See*, *e.g.*, *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994) ("Whether a given writing constitutes a threat is an issue of fact for the trial jury."); *id*. at 51. In that regard, the defendant's claim that his mailing could not be construed as a "true threat," is a challenge to the sufficiency of the evidence on that issue.

A defendant claiming that a jury verdict is unsupported by sufficient evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses

is a matter for argument to the jury, not a ground for reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003); *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir.), *cert. denied*, 540 U.S. 889 (2003). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

C. Discussion

Viewed in the light most favorable to the government, the evidence was unequivocally sufficient for the jury to reasonably conclude that Davila's mailing was a "true threat."

As noted above, whether a communication constitutes a "true threat" is a factual determination to be made by the jury. *See Malik*, 16 F.3d at 49; *United States v. Carrier*, 672 F.2d 300, 306 (2d Cir. 1982). "The test is an objective one -- namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury." *Malik*, 16 F.3d at 49; *see also Sovie*, 122 F.3d at 125. The jury may consider "proof of the effect of the alleged threat upon the addressee, [which] is highly relevant." *Malik,* 16 F.3d at 49. Moreover, an absence of explicitly threatening language does not preclude the finding of a threat. *Id.*

Given the testimony presented in this case, there is no question but that employees of the State's Attorney's Office actually interpreted Davila's mailing as a serious threat. Ruthann Haug testified that she washed her hands twice; removed and bagged her clothes and, upon arriving home, even washed the clothes into which she had changed. Haug also testified that she wiped down the inside of her car with alcohol, and did not leave her house while awaiting the test results over the next couple days, for fear of infecting others. Michelle Martino showered upon her arrival at home, washed her clothes, and was fearful about infecting her children. Martino did not return to work for a couple days as well. Stufan immediately went home, called her doctor, obtained a prescription for Cipro, and began taking it right away. In the face of these actions, as well as the State of Connecticut's full-blown emergency response, there is simply no basis for the defendant's contention that the recipients did not actually believe this was a true threat.

Nor can it be said that their reaction was unreasonable. A communication cannot be separated from the circumstances in which it is sent and received. Davila sent a letter containing a piece of paper with foreign handwriting and prayers, references to Osama bin Laden, and a white powdery substance that was represented to be anthrax -- less than a year after the attacks of September 11, 2001, and the anthrax scares that followed in late 2001. Even though the letter was purportedly sent by a prison inmate, there was no way for the recipients to know for sure whether that was, in fact, the case. The defendant went to great lengths to convince the recipients that his threat was real; it is peculiar for him now to complain that

they did not immediately see through his imposture. In short, the evidence at trial provided a reasonable basis for the jury to conclude that "an ordinary, reasonable recipient who [wa]s familiar with the context of the letter would [have] interpret[ed] it as a threat of injury." *Malik,* 16 F.3d at 49; *see also Zavrel*, 384 F.3d at 136; *Lewis* 220 F. Supp. 2d at 557-58.

III. THE DEFENDANT'S CONVICTION UNDER 18 U.S.C. § 2332a DID NOT REQUIRE A SHOWING OF AN ACTUAL, DIRECT EFFECT ON INTERSTATE COMMERCE

A. Relevant Facts

The evidence pertinent to consideration of this issue is set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

In his motion for judgment of acquittal the defendant made an argument, which he renews on appeal, that the government was required to show, and failed to show, an actual and direct effect on interstate commerce caused by the defendant's fully consummated actions. This Court reviews *de novo* both legal questions and denials of motions for judgment of acquittal. *See United States v. Holland*, 381 F.3d 80, 86 (2d Cir. 2005); *United States v. Reyes*, 302 F.3d 48, 52-53 (2d Cir. 2002).

C. Discussion

The defendant argues that the Government was required to prove a direct and substantial impact on interstate commerce. In support of this proposition, the defendant relies primarily on the Supreme Court's decisions in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000).

As a statutory matter, Davila is incorrect. At the time of Davila's indictment and trial, 18 U.S.C. § 2332a required only a showing that commerce "would have" been affected by the threatened use, not that any such effect in fact materialized:

> A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction . . .
>
> (2) against any person within the United States, and the results of such use affect interstate commerce or foreign commerce *or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce* . . .
>
> shall be [guilty of a crime].

(Emphasis added). While this Court has not had any occasion to construe this language, every other court to have addressed the issue to date has expressly held that the government need not establish a substantial effect on interstate commerce for a violation of the "threat" provisions of § 2332a(2). *See United States v. Wise*, 221

F.3d 140, 151-52 (5th Cir. 2000), *reh'g denied*, 233 F.3d 576 (5th Cir. 2000), *cert. denied*, 532 U.S. 959 (2001); *see also United States v. Reynolds*, 381 F.3d 404, 407 n.2 (5th Cir. 2004); *United States v. Slaughter*, 116 F. Supp. 2d 688, 691 (W.D. Va. 2000).[6]

In *Wise*, the defendants were convicted of threatening to use a weapon of mass destruction by sending e-mails from Texas to a number of government agencies outside Texas, threatening, among other things, to use "bacteria and/or viruses for the purpose of killing, maiming, and causing great suffering." *Id*. at 145-47. On appeal, the defendant argued that the district court erred in refusing to charge that the § 2332a offense must have "substantially affected" interstate commerce. *Id*. at 151. In rejecting this claim, the Fifth Circuit stated:

> The statute on its face makes clear that, in the case of a threat, it applies where the results *would have* affected interstate or foreign commerce. . . . The statute does not require, in the case of a threat, an actual or substantial effect on commerce; it requires only a showing that the use *would have* affected commerce.

Id. at 151-52 (emphasis in original). As below, the defendant has not referenced *Wise* in his brief.

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[6] Notably, the Fifth Circuit's decision in *Wise* was issued on July 31, 2000, and rehearing *en banc* was denied on September 5, 2000 -- both *after* the Supreme Court's decisions in *Lopez* and *Morrison*.

Other cases to have addressed the question have similarly held that a threat case under § 2332a requires proof of only a minimal, potential effect on interstate commerce. In *United States v. Slaughter*, 116 F. Supp. 2d 688, 691 (W.D. Va. 2000), the district court granted the defendant's motion for judgment of acquittal because it found insufficient evidence that the defendant's threatened use of anthrax, in letters sent from Virginia to a Virginia prosecutor and a Kentucky television station, would have affected interstate commerce. In that regard, however, the *Slaughter* court simply found that "under th[e] limited set of facts" elicited in that case, "there [was] insufficient evidence that the threatened use of anthrax would have affected interstate commerce . . . ." *Id*. at 693. This was because the *only* evidence on which the government relied to establish the requisite effect on interstate commerce "was that an unspecified number of military doctors and scientists would have responded." *Id*. at 692. The Court reasoned:

> The government did not introduce evidence that the military personnel would have had to bring or use supplies that had traveled in interstate commerce, or that they would have traveled in commercial carriers, lodged in hotels, or eaten at restaurants that engage in interstate commerce.

Id. at 693. Although the court found the government's limited evidence lacking, it confirmed that § 2332a requires only that "each act prosecuted would have at least a minimal effect on interstate commerce," *id.* at 691, and that this showing can be established by proof of probabilities, *id*. at 691-93 ("the government does not have

to prove that identifiable transactions in interstate commerce would be affected, but that there is a probability or likelihood of such an effect"). In that regard, the district court cited Second Circuit law regarding the Hobbs Act for the proposition that where, as here, the statute includes such a jurisdictional element, the government need only show a minimal effect on interstate commerce. *Id*. at 691 (citing *United States v. Farrish*, 122 F.3d 146, 148-49 (2d Cir. 1997)).

That the government does not need to prove a direct or substantial effect on interstate commerce is consistent with this Court's precedent. The defendant argues that *Lopez* and *Morrison* stand for the proposition that, where a statute targets non-economic, violent criminal conduct, the conduct must have a direct or substantial effect on interstate commerce. This Court, however, has distinguished between statutes that require a particularized showing of federal jurisdiction (like § 2332a) and the statutes at issue in both *Lopez* and *Morrison*, which lacked such an express jurisdictional requirement. In *United States v. Fabian*, 312 F.3d 550, 553-55 (2d Cir. 2002), this Court held that because the Hobbs Act contains an express jurisdictional element, the government need prove only "a showing of a very slight effect on interstate commerce" notwithstanding *Lopez* and *Morrison*. *See also Farrish*, 122 F.3d at 149.

Applying these principles here, the same *de minimis* standard should apply with regard to § 2332a, because it contains a jurisdictional element as part of the statute, and the government clearly met that standard in the present case. As set forth above, the jury heard testimony

regarding the impact that Davila's mailing would have had on interstate commerce had the defendant used anthrax as threatened. The manager of the Wallingford postal facility testified that, had Davila's letter to the Bridgeport State's Attorney's Office tested positive for actual anthrax, a significant portion of the facility would have been shut down, delaying the processing of interstate commercial mail, and diverting commercial mail to other facilities outside Connecticut. The jury also heard the expert testimony of Special Agent Donnelly that, had Davila's mailing been determined to have contained actual anthrax, dispatches from the national strategic stockpile of antibiotics, which is maintained through purchases from private pharmaceuticals, would have been shipped interstate on trucks for distribution in Connecticut.

In short, on this record, the evidence easily sufficed to meet the government's burden of establishing a probable or potential *de minimis* effect on interstate commerce.

IV. COUNT TWO OF THE INDICTMENT PROPERLY ALLEGED A VIOLATION OF 18 U.S.C. § 876

A. Relevant Facts

The evidence pertinent to consideration of this issue is set forth in the Statement of Facts above.

B. Governing Law and Standard of Review

The defendant claims, for the first time on appeal, that Count Two of the Indictment failed to allege an element

of 18 U.S.C. § 876. The defendant not only failed to assert this claim below, but also failed to object to the trial court's jury instructions in that regard. Accordingly, review of this claim is for plain error. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005).

A trilogy of decisions by the Supreme Court interpreting Fed. R. Crim. P. 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

C. Discussion

The defendant argues, for the first time on appeal, that Count Two of the Indictment was fatally defective because it failed to contain an explicit allegation that Davila's mailing was "addressed to a person." Davila's claim is without merit.

First, Davila's claim has been waived because, "as unambiguously required by the law of the Circuit," pursuant to Fed. R. Crim. P. 12, any challenge to the

sufficiency of an indictment must be made prior to trial. *United States v. Spero*, 331 F.3d 57, 61 (2d Cir. 2003); *United States v. Crowley*, 236 F.3d 104, 108 (2d Cir. 2000); *see also* Fed. R. Crim. P. 12(b)(2) (2002); Fed. R. Crim. P. 12(b)(3) (2005).[7] As this Court has explained,

> [the] mandate [of Rule 12(b)(2)] is no mere pleading technicality. Rather, it serves a number of important purposes, including deterrence of gamesmanship -- Rule 12(b)(2) prevents a defendant from deciding whether to object to an indictment's purported lack of specificity based solely on whether he is convicted or acquitted -- and insuring that indictments are not routinely challenged (and dismissed) after the jury has been seated and sworn, a result that would waste jurors' time and force courts frequently to confront complex Double Jeopardy questions.

Spero, 331 F.3d at 62 (quoting *Crowley*, 236 F.3d at 108). Moreover, although a failure to raise a challenge to an indictment prior to trial may be excused upon a showing of cause for failure to raise the claim and prejudice, *see Crowley*, 236 F.3d at 110 & n.8, Davila has offered no reason why he did not raise this claim prior to trial. Absent a showing of cause, his claim must be rejected.

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[7] In 2002, Rule 12 was amended and the requirement that challenges to the indictment be made prior to trial, which was formerly set forth in Rule 12(b)(2), now appears at Rule 12(b)(3)(B).

To the extent that Davila is arguing more broadly that Count Two of the Indictment failed to state an offense,[8] he has failed to demonstrate any error, much less plain error. In *United States v. De La Pava*, 268 F.3d 157 (2d Cir. 2001), this Court affirmed a defendant's conviction under 8 U.S.C. § 1326 for being an alien who had illegally reentered the United States, notwithstanding the indictment's failure to explicitly allege that the defendant was an alien. *See id*. at 160. In upholding the conviction, the Court held that where, as here, a defendant did not challenge the sufficiency of the indictment before judgment entered below, nor did he contend that he lacked notice of the elements of the charges against him, the indictment is to be interpreted liberally in favor of sufficiency. Because other language in the indictment implicitly alleged that the defendant was an alien and because the defendant could not in good faith contend that he lacked notice of that element of his offense, the Court concluded that the indictment sufficiently alleged that the defendant was an alien. *Id.* at 162-63; *see also United States v. Wydermyer*, 51 F.3d 319, 323-26 (2d Cir. 1995) (rejecting post trial claim that indictment was insufficient for failure to include particular allegations); *United States v. Thompson*, 356 F.2d 216, 226 (2d Cir. 1965).

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[8] Rule 12(b)(3)(B) provides "at any time while the case is pending, the court may hear a claim that the indictment . . . fails . . . to state an offense." This phrase has been interpreted to include motions made while the case is on direct appeal. *See United States v. Ivic*, 300 F.2d 51, 59 n.5 (2d Cir. 1983); *see also Chacko v. United States*, No. 96 CR. 519(JGK), 04 Civ. 2258(JGK), 2005 WL 1388723 at *4 (S.D.N.Y. June 8, 2005).

In light of this canon of liberal construction, the fact that Count Two of Davila's Indictment failed to explicitly allege that his mailing was *addressed* to another person is of no moment. Count Two reads:

> On or about August 18, 2002, in the District of Connecticut, NOEL DAVILA, a/k/a "Monk," the defendant herein, willfully and knowingly did cause to be delivered by the U.S. Postal Service to the Connecticut State's Attorney's Office in Bridgeport, an envelope containing a white powdery substance represented to be anthrax, and a letter, which together threatened to injure the person of another. In violation of Title 18, United States Code, Section 876.

(JA 19-20). Because Count Two explicitly alleged that Davila's envelope and letter threatened to injure the person of another, it follows that his communication would logically have been addressed to another person, whether legal or natural. Moreover, Count One, which Davila was aware was based upon the same conduct, expressly identified to whom Davila's threats were addressed, alleging that he "threaten[ed] the use of a weapon of mass destruction . . . *against persons within the United States, namely members and employees of the Connecticut State's Attorney's Office at Bridgeport* . . . ." (JA 19) (emphasis added). Accordingly, Davila cannot reasonably contend that the indictment was "so obviously defective that by no reasonable construction can it be said to charge the offense[s] for which conviction was had."

The defendant's reliance on *United States v. Brownfield*, 130 F. Supp. 2d 1177 (C.D. Cal. 2001), is

unavailing. There, the district court held that, because, in its view, the Dictionary Act and 1 U.S.C. § 1 did not apply to 18 U.S.C. § 876(c) and because the specific mailing at issue was addressed to the Federal Bureau of Investigation rather than to a natural person, the indictment would be dismissed because an agency of the federal government was not a "person" within the meaning of the statute. The court, however, expressly "agree[d] that a threatening letter is 'addressed' to a person within the meaning of § 876 if the letter itself is directed to the attention of a specific natural person, even though the delivery instructions direct that the mail carrier deliver the letter to an institution, such as a place of employment." *Id*. at 1183 (citing *United States v. Chapman*, 440 F. Supp. 1269 (E.D. Wis. 1977) (upholding conviction under § 876(c) where radio station was alleged as the addressee only for the purpose of identifying the particular mailing which was the focus of the prosecution, but communication identified specific individual as recipient of the threat)).

Davila's mailing *was* "directed to the attention of a specific natural person" -- indeed, it is undisputed that the defendant addressed the envelope: "STATE ATT. SUPERIOR COURT 1061 MAIN ST. BRIDGEPORT CT. 06410."[9] As the defendant concedes in his brief, "[a]t least

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[9] The defendant's claim that the language of Count Two of the indictment charged that the defendant mailed his threat to "the Connecticut State's Attorney's *Office* in Bridgeport" is similarly unavailing because the Court may "look, at a minimum, to both the envelope and the salutation of a letter in determining whether the letter is 'addressed to any other person' within the meaning of § 876." *United States v.* (continued...)

arguably, this address could be construed as having directed the letter to the Bridgeport State's Attorney, who is presumably a person." Appellant's Brief at 38.

Moreover, that the defendant placed a title, rather than a specific individual's name on the outside of the envelope is of no moment, because identification of a person by name is not necessary to sustain a conviction under § 876, particularly where, as here, the defendant addressed the envelope with the title of a state official. *See United States v. Williams*, 376 F.3d 1048, 1053 (10th Cir. 2004) ("a government official is a 'person' within the meaning of § 876 because communications addressed to a specific government official are clearly targeted at the natural person who holds that office at the time, regardless of whether the communication also mentions that individual's proper name.").

Even if the government were strictly limited to the language in Count Two of the Indictment that the defendant mailed his threat to "the Connecticut State's Attorney's *Office* in Bridgeport," it is significant to note that both *Brownfield* and *United States v. Raymer*, 71 Fed. Appx. 669 (9th Cir. 2003) -- the other case on which defendant relies -- have not been followed, and other courts have held that the term "person" in § 876 includes legal persons and institutional entities like the State's Attorney's Office. Thus, in the absence of a controlling decision of this Court, and conflicting authority in other courts, it could not be said that any error was "plain." *Cf.*

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[9] (...continued)
Williams, 376 F.3d 1048, 1052 (10th Cir. 2004).

United States v. Whab, 355 F.3d 155, 158 n.1 (2d Cir. 2004) (holding that error cannot be "plain" in absence of controlling Supreme Court or Second Circuit authority, and in presence of split circuit authority).

In *United States v. Bly*, — F. Supp. 2d — , 2005 WL 2621996 (W.D. Va. Oct. 14, 2005), for example, the court declined to follow either *Brownfield* or *Raymer* and held that the University of Virginia was a "person" for purposes of § 876(b).[10] The court reasoned that the Dictionary Act and specifically, 1 U.S.C. § 1, provides a broad "definition of the term person that includes corporations, companies, associations, firms, partnerships, societies, joint stock companies and individuals." *Id.* at *3. The court noted that the Supreme Court has applied this definition of "person" to the criminal statutes of Title 18, and noted that the definition is to be used to determine the meaning of any Act of Congress unless the context indicates otherwise. *Id*.

Although "mindful of the strong presumption that identical terms used in the same sentence of a statute carry the same meaning," the court recognized that "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Id*. at *4 (quoting *Yi v. Federal Bureau of Prisons*,

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[10] *See id*. at *4 ("The Court declines to follow *Brownfield* or *Raymer*. *Raymer* is unpublished, little more than a paragraph in length, and offers nothing in the way of explanation. *Brownfield,* though lengthier, is no more persuasive.").

412 F.3d 526 (4th Cir. 2005) (quoting *General Dynamics Land Sys. Inc. v Cline*, 540 U.S. 581, 595 (2004))). In holding that an institution like the University of Virginia was a "person" under§ 876(b), the court observed that "both natural and unnatural persons are subject to extortion is unquestionable, and nothing in 18 U.S.C. § 876(b) indicates that Congress intended only to protect the former."

Accordingly, even if the government were narrowly limited to the language of Count Two that the defendant mailed his threat to "the Connecticut State's Attorney's *Office* in Bridgeport," the definition of "person" in 18 U.S.C. § 876 includes institutional entities like the State's Attorney's Office. Were this not the case, a person could avoid prosecution under § 876 merely by addressing his threat to injure someone to the threatened person's workplace. Neither logic nor reason supports such a result, which would effectively defeat the very purpose of the statute. *Cf. Williams*, 376 F.3d at 1053.

Because the language of the indictment, liberally construed, was sufficient to advise Davila of the core of criminality to be proven at trial; because the mailing was addressed to a specific natural person -- namely, the "State's Attorney" in Bridgeport; and in any event, because the term "person" in 18 U.S.C. § 876(c) properly includes institutional entities such as the "Connecticut State's Attorney's Office," Davila cannot reasonably contend that the indictment was "so obviously defective that by no reasonable construction can it be said to charge the offense[s] for which conviction was had" or that the absence of an express allegation that the mailing was

addressed to a specific person seriously affected the fairness, integrity or public reputation of the case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: November 14, 2005

Respectfully submitted,

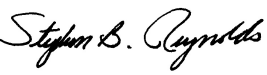
KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,914 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES

1 U.S.C. §1. Words Denoting Number, Gender, and so Forth.

In determining the meaning of any Act of Congress, unless the context indicates otherwise –

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

18 U.S.C. § 876. Mailing Threatening Communications.

(a) Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a

Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

(d) Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 2332a Use of Certain Weapons of Mass Destruction (2002).

(a) Offense against a national of the United States or within the United States. – A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction (other than a chemical weapon as that term is defined in section 229F), including any biological agent, toxin, or vector (as those terms are defined in section 178) –

(1) against a national of the United States while such national is outside of the United States;

(2) against any person within the United States, and the results of such use affect interstate or foreign commerce or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce; or

(3) against any property that is owned, leased or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States,

shall be imprisoned for any term of years or for life, and if death results, shall be punished by death or imprisoned for any term of years or for life.

(b) Offense by national of the United States outside of the United States. – Any national of the United States who, without lawful authority, uses, or threatens, attempts, or conspires to use, a weapon of mass destruction (other than a chemical weapon (as that term is defined in section 229F)) outside of the United States shall be imprisoned for any term of years or for life, and if death results, shall be punished by death, or by imprisonment for any term of years or for life.

(c) Definitions. – For purposes of this section –

(1) the term "national of the United States" has the meaning given in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term “weapon of mass destruction” means--

(A) any destructive device as defined in section 921 of this title;

(B) any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors;

(C) any weapon involving a disease organism; or

(D) any weapon that is designed to release radiation or radioactivity at a level dangerous to human life.