No. 08-757

In the Supreme Court of the United States

STEVEN J. PARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction for threatening to use a weapon of mass destruction against a federal government building, in violation of 18 U.S.C. 2332a(a)(3) (2000 & Supp. III 2003), requires proof that a reasonable person would regard the communication as threatening, or instead requires proof that the defendant intended for the communication to be taken as threatening.

2. Whether evidence that is probative of the defendant's intent is admissible, even if the listener were unaware of the information.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 545 F.3d 491.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2008. The petition for a writ of certiorari was filed on December 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of threatening to use a weapon of mass destruction against property leased and used by departments and agencies of the United States, in violation of

18 U.S.C. 2332a (2000 & Supp. III 2003). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed petitioner's conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-28a, 48a; Pet. C.A. Br. App. 3.

1. In the summer of 2004, while petitioner was incarcerated in a Wisconsin prison, his cellmate John Schultz wrote to the FBI warning that petitioner repeatedly threatened to blow up a federal building in Milwaukee. The letter indicated that petitioner was due to be released soon and that petitioner should be taken seriously because he knew about making bombs and was a devotee of Timothy McVeigh. The FBI's preliminary investigation confirmed some of Schultz's information. Pet. App. 3a.

The day before petitioner was to be released, Schultz secretly recorded a conversation with petitioner. Petitioner expounded on his hatred of the government and described his past experiences with making and detonating explosives. He admitted that he burned down an ex-girlfriend's house using napalm and that he constructed a bomb hidden in a cosmetics container that he initially intended to use to disfigure another ex-girlfriend. The two men also engaged in a technical discussion of bomb-making components. Pet. App. 3a-5a.

Petitioner described his detailed plan to blow up the Reuss Federal Plaza in Milwaukee. Pet. App. 4a-5a. He explained that he chose the Reuss building because it was a predominantly glass structure located close to the street and that bombing a federal building in "down-home America" would "make a wonderful statement." *Id.* at 5a. The plan involved parking a delivery truck containing the device outside the building as if he were

making a delivery. He would then briefly enter the building, dressed in clothing that would appear similar to a delivery service uniform, and escape quickly before the bomb detonated. Although he did not specify when he would carry out his plan, he intended to spend the eight years of his probation refining his technique and assured Schultz that he "absolutely" intended to follow through with the bombing within ten years. *Id.* at 5a-6a; Pet. C.A. App. Tab 7, at 87-94.

The next day, petitioner was released from prison to a halfway house, and FBI agents arrested him. During an interview with the agents, he denied making verbal threats to blow up the Reuss Federal Plaza. Pet. App. 6a.

2. Petitioner was charged with threatening to use a weapon of mass destruction against a federal building, in violation of 18 U.S.C. 2332a (2000 & Supp. III 2003). At trial, Schultz described his discussions with petitioner, and the jury heard the recorded conversation. Schultz testified that he took petitioner's threats seriously. Pet. App. 1a, 6a-7a.

Three of petitioner's ex-girlfriends and two of his former neighbors testified to petitioner's hatred of the government and his admiration for domestic terrorists, including Timothy McVeigh and Theodore Kaczynski. Petitioner's nickname was "Uni," a reference to the Unabomber. The testimony revealed petitioner's obsession with bomb making, experience with explosives (including the construction of about a dozen pipe bombs), prior threats to blow up buildings, and possession of chemicals. An expert witness testified that petitioner would have been capable of carrying out his threat. The government also introduced books and notebooks found in petitioner's possession at the time of his earlier arrest

for drug distribution that contained detailed explanations of how to construct various explosive devices. Petitioner's collection included *The Anarchist Cookbook*, a 1970s handbook that contained instructions for conducting a myriad of illegal activities, including manufacturing explosives. Pet. App. 6a-8a, 12a.

Petitioner testified in his own defense. He did not deny the statements in the recording but claimed that he had been joking. Pet. App. 6a.

Petitioner requested that the court instruct the jury that it had to find that he "actually intended to threaten to use a weapon of mass destruction." Pet. Proposed Substantive Jury Instruction 2. Accordingly, in instructing the jury that it had to find that the "threat was a true threat," Pet. App. 97a, the court defined "true threat" as follows:

> To constitute a true threat, you must find that the statement attributed to the defendant was made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza. *You must also be satisfied that the defendant intended his statement to be understood in that manner.* A "true threat" is a serious statement expressing an intention to do an act which under the circumstances would cause apprehension in a reasonable person, as distinguished from idle or careless talk, exaggeration, or something said in a careless manner. To constitute a true threat, however, it is not necessary that the defendant actually intended to use a weapon of mass destruction to damage the building or that he had the

> capacity to do so. Nor it is required that he communicated the threat to anyone connected with the Reuss Federal Plaza.

Id. at 97a-98a (emphasis added). The jury found petitioner guilty. *Id.* at 8a. After calculating an advisory Sentencing Guidelines range of 360 months to life imprisonment, the district court sentenced petitioner to 120 months of imprisonment. *Ibid.*

3. The court of appeals affirmed petitioner's conviction, but remanded for resentencing. Pet. App. 1a-28a. As relevant here, the court first observed that "[a] statement qualifies as a 'true threat,' unprotected by the First Amendment, if it is 'a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" *Id.* at 9a (quoting *Virginia* v. *Black*, 538 U.S. 343, 359 (2003)). Because petitioner "explicitly disclaimed" any challenge to the jury instruction on the definition of "true threat," *id.* at 10a, the court construed his claim as a challenge to the sufficiency of the evidence, *ibid.* The court held that "abundant" evidence supported the jury's finding that petitioner's threats were "true threats" as defined by the district court. *Ibid.*

The court also concluded that, with the exception of *The Anarchist Cookbook*, the evidence about petitioner's interest in and past use of explosives, as well as the expert testimony about petitioner's ability to carry out his threat, was properly admitted as probative of petitioner's intent. Pet. App. 13a, 20a-21a. The court reasoned that the evidence was relevant to whether petitioner was serious or joking when he made the threat: "A person who says he is going to bomb a building is more likely to give the impression he is serious if he actually *is* serious—if he actually plans to carry out his

threat and is able to do so." *Id.* at 12a-13a. The court concluded that the evidence was "highly relevant" because, at petitioner's request, the jury had to find that petitioner "intended his statement to be understood" as a threat in order to convict. *Id.* at 17a. Although it noted its belief that the courts are not in accord over whether a true threat is purely objective or whether this Court's decision in *Black* introduced a subjective element into the test, the court ruled that it "need not resolve the issue here" because petitioner "put his intent" at issue by "ask[ing] the district court to instruct the jury on his intent." *Id.* at 14a-17a. For similar reasons, the court also rejected petitioner's argument that such contextual background information is not relevant if the recipient of the threat is unaware of it. *Id.* at 17a-20a. Finally, the court held that the district court abused its discretion in admitting *The Anarchist Cookbook* in its entirety because portions of the book had nothing to do with explosives, and was therefore more prejudicial than probative, but it concluded that the error was harmless. *Id.* at 20a-22a.

The court agreed with petitioner on one of his sentencing claims, holding that the district court improperly applied a 12-level enhancement, under Sentencing Guidelines § 3A1.4(a), for an "offense * * * that involved, or was intended to promote, a federal crime of terrorism." Pet. App. 24a-26a. Because the court remanded for resentencing on that basis, it did not reach the government's cross-appeal, which challenged petitioner's below-Guidelines sentence as unreasonable. *Id.* at 26a-27a.

ARGUMENT

1. As an initial matter, this Court's review is unwarranted at this time because this case is in an interlocutory posture. The court of appeals vacated petitioner's sentence and remanded for resentencing. Following the district court's disposition of the case on remand, petitioner will be able to raise the instant claims—together with any other claims that may arise on remand—in a single petition for a writ of certiorari seeking review of the final judgment against him. The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

2. Petitioner contends (Pet. 16-35) that the circuits are in conflict on "[w]hether the 'true threat' doctrine, as articulated by this Court in *Virginia* v. *Black*, 538 U.S. 343 (2003), requires a speaker to have a subjective intent to threaten in order for the speech to be constitutionally proscribable under the First Amendment, or whether the speech need only be objectively threatening." Pet. i. This case does not present an occasion for resolving the purported conflict, as the jury was required to find that both standards were satisfied, and no further review is warranted.

a. Section 2332a(a)(3) makes it unlawful to "threaten[] * * * to use, a weapon of mass destruction * * * against any property that is owned, leased or used by the United States or by any department or agency of the United States." 18 U.S.C. 2332a(a)(3) (2000 & Supp. III 2003). Because Section 2332a(a)(3) targets communications, it "must be interpreted with

the commands of the First Amendment clearly in mind." *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Accordingly, like other statutes that target threatening communications, Section 2332a(a)(3) reaches only "true 'threat[s].'" *Id.* at 708. It does not reach "political hyperbole" or "vehement," "caustic," or "unpleasantly sharp attacks" that fall short of true threats. *Ibid.* Once Section 2332a(a)(3) is confined to true threats, its application is consistent with the First Amendment. As the Court has explained, true threats are "outside the First Amendment," *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), and "[t]he speaker need not actually intend to carry out the threat." *Black*, 538 U.S. at 359-360.

Although petitioner relies on *Black* (*e.g.*, Pet. 18), that case did not present the question whether a subjective intent to threaten is always required to satisfy the First Amendment. This Court held that a Virginia statute prohibiting cross burning with "an intent to intimidate," *Black*, 538 U.S. at 347 (quoting Va. Code Ann. § 18.2-423 (1996)), was not unconstitutionally content-based, but a plurality concluded that the statute's provision that the burning of a cross was "prima facie evidence of an intent to intimidate," *id.* at 363 (plurality opinion) (quoting Va Code Ann. § 18.2-423 (1996)), impermissibly diluted the statutory requirement of an intent to intimidate, *id.* at 364-367 (plurality opinion). The Court observed that "'[t]rue threats' *encompass* those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence," *id.* at 359 (emphasis added), and that a statement made "with the intent of placing the victim in fear of bodily harm or death" is a "*type* of true threat," *id.* at 360 (emphasis added). But *Black* did not hold that

the category of true threats is limited to such statements. The Court had no occasion to consider whether the fear and disruption brought about by true threats justify a prohibition of such statements when a person knowingly making statements would reasonably understand them as expressing a serious intent to do harm.

In this case, the district court instructed the jury that it had to find that petitioner made a "true threat." Pet. App. 97a. The court explained that petitioner's statement had to be "made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to use a weapon of mass destruction to damage Reuss Federal Plaza." *Id.* at 97a-98a. At petitioner's request, *id.* at 17a, the court further instructed the jury that it had to find that petitioner "intended his statement to be understood in that manner." *Id.* at 98a. Accordingly, even assuming that *Black* articulated a subjective-intent requirement for a "true threat," see *Black*, 538 U.S. at 359, the jury instructions in this case satisfied that requirement.

b. Petitioner contends (Pet. 18) that, since *Black*, the courts of appeals have divided on what the government must show to prove a "true threat." No review of that claim is currently warranted.

As was the case before *Black*, a majority of the courts of appeals have interpreted various federal threat statutes to reach communications that, objectively viewed, constitute "true threats," without requiring the government to prove that the defendant specifically intended for the statement to be taken as a threat. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 15-17 (1st Cir. 2003), cert. denied, 540 U.S. 1132 (2004);

United States v. *Davila*, 461 F.3d 298, 304-305 (2d Cir. 2006), cert. denied, 549 U.S. 1266 (2007); *United States* v. *Guevara*, 408 F.3d 252, 257-258 (5th Cir. 2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Hankins*, 195 Fed. Appx. 295, 301 (6th Cir. 2006) (per curiam); *United States* v. *Stewart*, 411 F.3d 825, 827-828 (7th Cir.), cert. denied, 546 U.S. 980 (2005); *United States* v. *Alaboud*, 347 F.3d 1293, 1297-1298 (11th Cir. 2003); see also *United States* v. *Himelwright*, 42 F.3d 777, 782 (3d Cir. 1994) (pre-*Black* decision); *United States* v. *Darby*, 37 F.3d 1059, 1063-1066 (4th Cir. 1994) (same), cert. denied, 514 U.S. 1097 (1995); *United States* v. *Patrick*, 117 F.3d 375, 377 (8th Cir. 1997) (same); *United States* v. *Welch*, 745 F.2d 614, 619-620 (10th Cir. 1984) (same), cert. denied, 470 U.S. 1006 (1985). That interpretation is correct. The text of threat statutes such as Section 2332a contains no requirement that the government prove that the defendant subjectively intended for his communication to be regarded as a threat. And a requirement of subjective intent to threaten would undermine the purposes that are served by a prohibition against threats. In addition to protecting persons from the possibility that threatened violence will occur, a prohibition against threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders." *R.A.V.*, 505 U.S. at 388; see *Black*, 538 U.S. at 360 (quoting same). A statement that a reasonable person would regard as a threat creates fear and disruption, regardless of whether the speaker intended for the statement to be regarded as a threat.

None of those circuits has held that *Black* altered the objective standard for "true threats." See Pet. App. 17a ("We need not resolve the issue here."); *United States* v. *Cope*, 283 Fed. Appx. 384, 389 (6th Cir. 2008) (concluding

that it need not decide whether *Black* requires adding a subjective-intent requirement to "threat statutes * * * that do not already contain such a requirement"); *United States* v. *Floyd*, 458 F.3d 844, 848 (8th Cir. 2006) (adhering to post-*Black* precedent that "specifically noted that the intent of the sender is not an element of a section 876(c) offense") (citing *United States* v. *Koski*, 424 F.3d 812, 817 (8th Cir. 2005)), cert. denied, 549 U.S. 1236 (2007).[1] Contrary to petitioner's contention (Pet. 22, 28), the Tenth Circuit in *United States* v. *Magleby*, 420 F.3d 1136 (2005), cert. denied, 547 U.S. 1097 (2006), did not "depart[] from its 'reasonable speaker test'" (Pet. 28). Although the Tenth Circuit did cite *Black* for the proposition that "[t]he threat must be made 'with the intent of placing the victim in fear of bodily harm or death,'" *id.* at 1139 (quoting *Black*, 538 U.S. at 360), that statement was dicta. The court was reviewing petitioner's claim on collateral review that his appellate counsel rendered ineffective assistance by failing to challenge the jury instructions on the ground that they did not "convey that he could be convicted only if his cross burning constituted a threat of unlawful violence to identifiable persons." *Ibid.* The court's decision did not turn on whether subjective intent to threaten is required for a "true threat." *Id.* at 1141-1143.[2]

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[1] The court noted that only the en banc court could correct whether its reasoning in *Koski* was "faulty in light of *Black*." *Floyd*, 458 F.3d at 848. The Eighth Circuit subsequently denied the *Floyd* defendants' petition for rehearing en banc.

[2] In *United States* v. *Pinson*, 542 F.3d 822 (10th Cir.), cert. denied, 129 S. Ct. 657 (2008), the court, in reviewing the jury instructions in a prosecution under 18 U.S.C. 871, stated that "[o]ur Court, like most others, employs an objective standard to evaluate whether a defendant 'willfully' made a threat." *Pinson*, 542 F.3d at 831-832. Although the

As was true before *Black*, the Ninth Circuit has failed to establish a consistent standard. In *United States* v. *Cassel*, 408 F.3d 622 (2005), the court of appeals held that, in order to obtain a conviction for intimidating a person from bidding on federal land in violation of 18 U.S.C. 1860, the government must prove an intent to intimidate. After canvassing its prior decisions and noting their inconsistency, the Ninth Circuit concluded that, under *Black*, "speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." *Cassel*, 408 F.3d at 633. After *Cassel*, however, the Ninth Circuit reaffirmed its earlier holding that, in order to prove a threat against the President in violation of 18 U.S.C. 871(a), the government need only establish that a reasonable person would view the statement as threatening. *United States* v. *Romo*, 413 F.3d 1044, 1051 & n.6 (2005), cert. denied, 547 U.S. 1048 (2006). The court explained that *Cassel* "did not address whether statutes like 18 U.S.C. § 871(a) require intent." *Id.* at 1051 n.6. Most recently, the Ninth Circuit has noted that "[t]his circuit has thus far avoided deciding whether to use an objective or subjective standard in determining whether there has been a 'true threat,'" and that, since *Black*, it has "analyzed speech under both an objective and a subjective standard." *Fogel* v. *Collins*, 531 F.3d 824, 831 (2008).

Thus, as matters currently stand, a majority of the circuits apply an objective standard to measure "true

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court also stated that "[t]he burden is on the prosecution to show that the defendant understood and meant his words as a threat, and not as a joke," *id.* at 832, that language is at most dicta, because the issue on appeal was whether the instructions required that the jury find that the defendant actually intended to carry out the threat, *ibid.*

threats." And with the exception of the Ninth Circuit—in which the law is in a state of flux—no court of appeals has squarely held that *Black* altered that standard. There is therefore no conflict in the circuits that warrants this Court's review at this time.

c. Even if the question whether a "true threat" requires a speaker to have a subjective intent to threaten would otherwise merit this Court's review, this case is not a suitable vehicle to resolve that question, for several reasons. First, the court of appeals did not reach it. Instead, it expressly left open whether *Black* redefined the constitutional requirements for a "true threat." Pet. App. 16a-17a. Second, as the court of appeals noted (*id.* at 17a), the district court gave a subjective-intent instruction at petitioner's request, and petitioner expressly disclaimed any objection to the "true threat" instruction on appeal. *Ibid.* Third, petitioner would not benefit from the resolution of any purported conflict in the circuits because the verdict demonstrated that petitioner's communication was a true threat under either the subjective or the objective standards. Further review is not warranted.

3. Petitioner also challenges (Pet. 34-42) the admissibility of evidence of his statements and conduct before the date of his recorded conversation with Schultz. That claim does not warrant further review.

As an initial matter, petitioner's contention that his evidentiary claim warrants this Court's review is largely dependent on his claim that the courts below applied the wrong standard to assess whether his statements were "true threats." See Pet. 35 (describing the evidentiary consequences as the "crux" of the infirmity with the court's standard). For the reasons stated above, that claim does not merit this Court's review, and there is no

reason to conclude that petitioner's evidentiary claim is independently certworthy.

In any event, the decision below is correct. As the court noted, petitioner put his intent at issue by requesting an instruction that required the jury to find that he "*intended* that his statements be understood as a threat." Pet. App. 13a. The court of appeals applied basic evidentiary principles to hold that the evidence of petitioner's past conduct and statements was probative of that intent. That ruling is consistent with those of other courts of appeals, and petitioner does not claim otherwise. See *United States* v. *Sutcliffe*, 505 F.3d 944, 958-959 (9th Cir. 2007) (distinguishing cases where intent was not required, and holding that district court did not abuse its discretion in admitting evidence of defendant's prior weapon possession to rebut defendant's claim that his threatening statements were ambiguous and to demonstrate that he actually intended to threaten violence); *United States* v. *Sovie*, 122 F.3d 122, 126 (2d Cir. 1997) (holding that evidence that defendant physically abused ex-wives was admissible to show that defendant intended to communicate threat of injury to victim of charged threat); cf. *Koski*, 424 F.3d at 818 (holding that prior conviction for mailing threatening communications was admissible to rebut defendant's defense that his threats were "cr[ies] for help" and to show that he "was aware that his previous correspondence had been found threatening"). See generally *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988) ("Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.").

Petitioner further contends (Pet. 38-39) that the court of appeals erred in concluding that "[c]ontextual information" about a defendant is "potentially admissible" even when the recipient of the threat is unaware of that information. Pet. App. 20a. As this Court has recognized, the meaning of a communication—and, in particular, whether a communication can reasonably be regarded as a serious threat of harm—requires consideration of context. See *Black*, 538 U.S. at 360; *id.* at 367 (plurality opinion) (analyzing message of intimidation of cross burning in light of the "history of cross burning in this country" and invalidating Virginia cross-burning statute because its prima facie evidence provision, which permits a finding of an intent to intimidate based solely on the act of cross burning, "ignores all the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate"); *Watts*, 394 U.S. at 708 (determining whether a statement was a "true 'threat'" under 18 U.S.C. 871(a) in light of the "context" of the statement); see *United States* v. *Viefhaus*, 168 F.3d 392, 397-398 (10th Cir.) (evidence of racially inflammatory material seized from defendant's home was admissible to show context in which defendant made his threatening remarks recorded on hotline operated by white supremacists), cert. denied, 527 U.S. 1040 (1999). And limiting instructions protect against the jury's improper use of such evidence.[3]

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[3] The district court below gave the jury cautionary instructions, explaining that the extrinsic evidence should be considered solely on the question of knowledge and intent; that petitioner's right to express subversive views was protected by the First Amendment; and that the jury should not convict petitioner on the basis of his political views. Pet. App. 93a-94a.

Even assuming that the evidence here was improperly admitted, any error was harmless. The evidence generally duplicated petitioner's statements to Schultz, including his admission that he committed arson and told a woman (who subsequently testified) that he was going to blow up a building, Pet. C.A. App. Tab 7, at 16, 73, 97-98, 115-116; see Pet. App. 7a; his descriptions of explosives that he designed or actually detonated, Pet. C.A. App. Tab 7, at 58-60, 71-72, 75, 77, 79-81, 96, including one that could have killed petitioner and blown up his house, *id.* at 37-38; another that "lifted the roof off the building and moved it about six inches," *id.* at 46-47, and a third that would have exploded in the victim's face when she opened a can of Noxzema face cream because he "was out to disfigure someone," *id.* at 61-65; his possession of books, including *The Anarchist Cookbook*, that instructed the reader on how to make a bomb and his possession of bomb-making ingredients and equipment, *id.* at 22-23, 33-36, 50-51, 68;[4] his application of his chemistry knowledge to bomb making, *id.* at 25-32; his knowledge of Kaczynski's bombs and his own nickname of "Uni," *id.* at 72, 95; his anti-government beliefs, *id.* at 73, 99-101; and his desire to be "the next McVeigh," *id.* at 101.

[4] The court of appeals held that portions of *The Anarchist Cookbook*, including those referring to homemade explosives, were relevant and admissible, even though other portions (referring, for example, to drugs and other weapons) were not. Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2009