IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 10-30701

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

ASHTON R. O'DWYER, JR.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLANT, THE UNITED STATES OF AMERICA

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November 29, 2010

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. R. 28.2.4, the government respectfully submits that oral argument would assist the Court in its decision in this case.

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STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to Title 28, United States Code, Section 1291. This is an appeal from a final judgment of the United States District Court for the Eastern District of Louisiana in a criminal case.

STATEMENT OF THE ISSUE

Whether the district court erred exercising exceptional authority to dismiss a federal criminal indictment pursuant to Title 18, United States Code, Section 875(c) (interstate transmission of a threat), holding that the charged threat could not be a true threat "as a matter of law."

STATEMENT OF THE CASE

I. Course of Proceedings Below[1]

Defendant-appellee Ashton R. O'Dwyer, Jr. (hereafter "O'Dwyer"), was charged by a federal grand jury on February 5, 2010, in a one-count felony indictment alleging a violation of Title 18, United States Code, Section 875(c) (interstate communication of a threat). USCA5 130.[2]

On February 12, 2010, O'Dwyer's continued detention was ordered after a lengthy second detention hearing. USCA5 327.

On February 12, 2010, by order of the Honorable Sarah Vance, Chief Judge of the United States District Court, recusal was entered for judicial officers of the Eastern District of Louisiana, and the matter was transferred to the Honorable Donald Walter, Senior District Judge sitting by designation in the Eastern District of Louisiana. USCA5 287.

On March 4, 2010, a third detention hearing was held before the Honorable

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[1]All references to the record on appeal will be abbreviated as "USCA5 ___," corresponding to the appropriate page number in the record on appeal.

[2]The indictment followed a complaint that was filed alleging the same offense, supported by an affidavit detailing the circumstances of O'Dwyer's threat and subsequent arrest in possession of a loaded revolver. USCA5 13. On January 30, 2010, O'Dwyer had his initial appearance in the Eastern District of Lousiana before the Honorable Daniel E. Knowles, United States Magistrate Judge. USCA5 137. Thereafter, on February 1, 2010, O'Dwyer had his first detention hearing before the Honorable Louis Moore, Jr., United States Magistrate Judge. USCA5 148.

Karen Hayes, United States Magistrate Judge. USCA5 1231-1388.

Pretrial motions were filed, including the government's notice of its intention to offer evidence pursuant to Fed. R. Evid. 404(b), USCA5 469 (filed on June 4, 2010), and O'Dwyer's several motions, including his "Motion No. 6" requesting dismissal of the indictment for failure to state a "true threat," USCA5 578 (filed June 4, 2010), and his "Motion No. 8," requesting dismissal of the indictment on First Amendment "free speech" grounds. USCA5 580 (also filed June 4, 2010).

On Friday, June 18, 2010, the government submitted its opposition to, inter alia, O'Dwyer's dismissal motions. USCA5 1187-1191.

On the following Monday, June 21, 2010, by telephone to all counsel and with no discussion or evidence considered, the district court informed all parties that "I am going to grant the motion to dismiss." USCA5 1456. The district court inquired of the Assistant United States Attorney, "Anything from you[?]" USCA5 1457. The prosecutor stated, "No, sir, just waiting on the order." Id. By minute entry on the same day, the district court entered an "order" indicating "[t]he trial date of July 21, 2010 is hereby upset." USCA5 1200.

As soon as possible, the next day, Tuesday, June 22, 2010, by "Motion To Reconsider Upset of the Trial Date and Request for Oral Argument," the

government opposed dismissal both by seeking reconsideration of the unexpected phone order and also by requesting that the district court permit "the government and defendant to present oral argument on this case determinative motion." USCA5 1202. The government referred to its original opposition to the dismissal motion as well as caselaw and pattern instructions issued by this Court that govern threat prosecutions in this Circuit. USCA5 1203-1204.

On June 24, 2010, the district court issued its written conclusion that the charged threat was "not a threat, conditional or otherwise, rather it was a cry for help seeking money to pay for...prescription medicine." USCA5 1214. The district court reviewed the sequence of e-mails contained in the government's Rule 404(b) motion and held that O'Dwyer "did not threaten bodily harm," and that whereas "[p]hrases taken out of context could suggest a threat...reading the sentences as a whole, no threat as a matter of law was made." USCA5 1217-1218. In one sentence, the district court distinguished this Court's cases stating "all deal with explicit threats." USCA5 1218 (distinguishing United States v. Morales, 272 F.3d 284 (5th Cir. 2001); United States v. Myers, 104 F.3d 76 (5th Cir. 1997); United States v. Murillo, 234 F.3d 28 (5th Cir. 2000)).

Also on June 24, 2010, the district court denied the government's reconsideration motion and request for oral argument, USCA5 1219, and ordered

that "[t]he indictment against the defendant is hereby dismissed with prejudice." USCA5 1220 (bold and capitalization omitted).

On July 23, 2010, the government noticed its appeal. USCA5 1221.

II. Statement of the Facts

The indictment charged that on January 29, 2010, O'Dwyer transmitted in interstate commerce to "Sean McGinn, an employee of the Bankruptcy Court for the Eastern District of Louisiana" a "threat to injure the Court Personnel of both the District Court for the Eastern District of Louisiana and the Bankruptcy Court for the Eastern District of Louisiana, and the parties and counsel associated with [O'Dwyer's] bankruptcy proceedings...." USCA5 130. More specifically, the indictment quoted verbatim as the aforementioned "threat" an e-mail containing the following content:

> Well, please convey to Judge Brown my belief that he can "try" to protect the CRIMINALS Duval, Lemelle and Dennis, but he can't protect them from themselves, and the "damage" is already done. As is the case with Judge Porteous, their impeachment is "just a matter of time". Also convey to Judge Brown a reminder that I have been totally without money since the weekend of January 8, 9, and 10, and that I have been without my anti-depressant medication, for which I have sought leave to pay Walgreen's from my most recent Social Security check, since last weekend. I could not sleep last night, which I attribute to the effects of abruptly stopping my medication on Sunday, the 24th (my pills "ran out", and I have no money to purchase more). Maybe my creditors would benefit from my suicide, but suppose I become "homicidal"? Given the recent "security breach" at

> 500 Poydras Street, a number of scoundrels might be at risk if I DO become homicidal. Please ask His Honor to consider allowing me to refill my prescription at Walgreen's, and allowing me to pay them, which is a condition for my obtaining a refill. Please communicate this missive to creditors and their counsel. Thank you.

USCA5 130-131. As described by the district court, O'Dwyer was at the time "going through a bankruptcy proceeding before Bankruptcy Judge Jerry Brown...and [u]pon receipt of the e-mail, Mr. McGinn contacted the United States Marshals. They in turn contacted Mr. O'Dwyer and he was arrested later that day." USCA5 1214-1215.

SUMMARY OF ARGUMENT

Defendant-appellee O'Dwyer's argument that his threat constitutes protected speech under the First Amendment, accepted by the district court dismissing the instant indictment "as a matter of law," is inconsistent with this Court's settled caselaw that "[w]hether a statement is a true threat is to be decided by the trier of fact." United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983); see also United States v. Daughenbaugh, 49 F.3d 171, 173 & n.2 (5th Cir. 1995).

This Court, in agreement with other Circuits and adhering to Supreme Court direction, has settled caselaw protective of First Amendment speech which requires that the government prove beyond a reasonable doubt to a jury that a threat have "a reasonable tendency to create apprehension that its originator will act according to its tenor," United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001), and also, still more protectively, that the jury be told that "words used as mere political argument, idle talk, exaggeration, or something said in a joking manner" do not constitute a criminal threat. 5th Cir. Pattern Crim. Jury Instr. 2.39-2.41 (2001).

LAW AND ARGUMENT

I. Standard of Review

Pretrial dismissal of a federal grand jury's indictment "as a matter of law," without submission to petit jurors, is reviewed by this Court de novo. See United States v. Flores, 404 F.3d 320, 326 (5th Cir. 2005); United States v. Ollison, 555 F.3d 152, 160 (5th Cir. 2009); United States v. Jho, 534 F.3d 398, 402 (5th Cir. 2008).[3] Similarly, whether a written communication is protected speech or an unprotected true threat will be reviewed de novo. See, e.g., United States v. Bly, 510 F.3d 453, 457 (4th Cir. 2007) ("We review de novo whether a written communication is...a 'true threat.'").

The government preserved its opposition to the summary dismissal first by its initial opposition and then through a next-day motion to reconsider because the unexpected dismissal was ordered during a two-minute pretrial telephone

[3]This Court's decision in Flores is instructive because the Court devotes considerable attention to the question which has divided Circuits about whether a district court has authority to dismiss an indictment on the merits pretrial at all, as opposed to through submission to a jury and supervision thereafter pursuant to Fed. R. App. P. 29. See United States v. Flores, 404 F.3d at 323-326 (discussing especially United States v. Salman, 378 F.3d 1266 (11th Cir. 2004)). This Court's controlling conclusion is that a challenge may be entertained pretrial but only as to the legal sufficiency of an indictment when "the facts are undisputed." Id. at 325-326. There are no stipulated facts in the instant matter, and no evidence was taken–no attorney argument even was heard–as to O'Dwyer's dismissal motion and the government's reconsideration motion. For example, the recipient of O'Dwyer's charged communication was not heard from by the district court.

conference. USCA5 1456.

II. Law and Argument

The district court held that O'Dwyer's charged threat about "becom[ing] homicidal" "was not a threat...rather it was a cry for help," and that whereas "[p]hrases taken out of context could suggest a threat...reading the sentences as a whole, no threat as a matter of law was made." usca5 1217-1218. These factual conclusions were made by the district court with reference to the government's Rule 404(b) submission containing O'Dwyer's history of similar and escalating communications to court officials. See USCA5 1075-1093. Legally, the district court stated tersely, without citation to any caselaw authorizing pretrial dismissal of an indictment, that the "plain language" of the charged threat contains "no threat as a matter of law...." USCA5 1217-1218. The caselaw acknowledged but distinguished by the district court is this Court's line of decisions affirming Section 875 threat convictions after submission to juries at trial. USCA5 1218 (district court distinguishes United States v. Morales, 272 F.3d 284 (5th Cir. 2001); United States v. Myers, 104 F.3d 76 (5th Cir. 1997); United States v. Murillo, 234 F.3d 28 (5th Cir. 2000)).

A. Even When a District Court Has Exceptional Authority To Grant Pretrial Summary Dismissal of a Federal Indictment, This Court Has Been Clear That Distinguishing a "True Threat" From Hyperbole Is For the Jury

Preliminarily, the district court erred under settled law from this Court by removing the question of fact of a "true threat" from the jury. This Court has instructed district courts repeatedly that whether language contained in a communication constitutes a "threat" is an issue of fact for the jury. That direction was quoted and urged by the government in its opposition to O'Dwyer's dismissal motion, and then citation to the same authority was given in the government's reconsideration motion, but that decisional law from this Court was not mentioned in the summary dismissal ruling. Compare USCA5 1190 (original opposition, citing and discussing United States v. Daughenbaugh, supra, and United States v. Turner, 960 F.2d 461, 465 (5th Cir. 1992)); USCA5 1208-1209 (reconsideration request and request for argument, citing United States v. Daughenbaugh, supra); with USCA5 1217-1218 (district court's dismissal ruling, containing no consideration of this Court's caselaw instructing that whether a statement is a "threat" is an issue of fact for the jury).

In Turner, 960 F.2d at 465-466 & nn. 4 & 5, considering a claim like O'Dwyer's about whether a threat to court officials could be "political statements

protected from prosecution by the first amendment of the constitution," this Court was explicit that "[w]hether or not the language contained in Turner's letters constitutes a 'threat' is an issue of fact for the jury." Indeed, in assessing the jury's finding of a criminal threat, this Court went to lengths to review (1) the use of proper and protective pattern instructions given to the jury; (2) the jury's adequate deliberations; and (3) the trial presentation of proof as to "[t]he reactions of the recipients of the letters [as] lend[ing] weight to the jury's conclusion that the letters contained 'threats.'" Id.

Two years later, in Daughenbaugh, in response to a similar argument to O'Dwyer's about criminalizing rhetoric and "political speech," this Court was clear again that

> "whether or not the language contained in [the defendant's] letters constitutes a 'threat' is an issue of fact for the jury." Guided by instructions...removing protected speech from the definition of "threat," the jury is to determine the nature of the subject communication.

Id. at 173 & nn. 1 & 2 (citing and quoting Turner approvingly, as well as protective instructions to be given to juries excluding categories of speech as non-threats).

As support in Daughenbaugh, the Court cited the decision of the United States Court of Appeals for the Second Circuit in United States v. Malik, 16 F.3d

45 (2nd Cir. 1994). See Daughenbaugh, 49 F.3d at 173 n.3. In Malik, the Second Circuit noted not only that "[w]hether a given writing constitutes a threat is an issue of fact for the trial jury," but also that this true even in "the absence of explicitly threatening language...and...a conditional threat...." Malik, 16 F.3d at 49. Like this Court, the Second Circuit emphasized that trial proof of the effect of language on a recipient is "highly relevant" and also that protective jury instructions safeguard hyperbole, rhetoric and discontent. Id. at 50-51.[4]

This Court in other similar caselaw has cited a second decision also from the Second Circuit for the same settled proposition that "[w]hether a statement is a true threat is to be decided by the trier of fact." United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983) (citing United States v. Carrier, 672 F.2d 300 (2nd Cir. 1982)). In Howell, this Court acknowledged expressive speech protections and the importance of "'uninhibited, robust, and wide-open' debate on public issues," but was categorical nonetheless that when objective proof of threatening language is given "to the satisfaction of the jury that it was a true threat[]...[n]othing more is required." Howell, 719 F.2d at 1261; see also United States v. Lincoln, 589 F.2d

[4]The Second Circuit has pointed out that such instructions buttress the Supreme Court's decision in Watts v. United States, 394 U.S. 795 (1969), discussed below, infra Part II.C, which overturned a conviction of speech hostile to the President uttered during a public rally. Malik, 16 F.3d at 51. As the Second Circuit noted, remarking on Watts, "[a]bsent such an unusual set of facts, however, existence *vel non* of a 'true threat' is a question generally best left to a jury." Id.

379, 382 (8th Cir. 1979) (bitter attack on judicial process charged as a threat "at most raised an issue of fact for the jury"); United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990) ("the task of interpretation [of an allegedly "ambiguous" and "conditional" threat against "'public serpents'"] was for the jury"); United States v. Roberts, 915 F.2d 889, 891 (4th Cir. 1990) (same).[5]

Finally, this Court and other Courts of Appeal, when assessing whether a "true threat" existed, have done so in circumstances either where trial proof exists, United States v. Murillo, 234 F.3d 28, *2 (appeal from denial of new trial motion); United States v. Turner, 960 F.2d at 465 (appeal from denial of judgment of acquittal); United States v. Morales, 272 F.3d at 287 (same); United States v. Myers, 104 F.3d at 78-79 (same); United States v. Howell, 719 F.2d at 1260-1261 (same); United States v. Cvijanovich, 556 F.3d 857 (8th Cir. 2009) (same), or where a conditional plea with a factual basis exists. See United States v. NAPA, 370 Fed. Appx. 402 (4th Cir. 2010); United States v. Bly, 510 F.3d 453 (4th Cir. 2007).[6]

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[5]Although the First Amendment protects "simply hyperbolic or rhetorical expressions of anger or discontent," United States v. Malik, 16 F.3d 45, 50 (2nd Cir. 1994), it does not protect true threats of violence. See R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992).

[6]The single exception to this approach that the undersigned has been able to find is a decision identified, distinguished and criticized by this Court in Murillo, namely United States v. Alkhabaz, 104 F.3d 1492, 1496 (6th Cir. 1997), where the Sixth Circuit upheld a dismissal of an indictment on the ground that the indictment failed to contain the elements of an offense

B. The District Court Mistakenly Distinguished This Court's Caselaw Affirming "True Threat" Convictions

O'Dwyer argued in his dismissal motion that his charged threat about homicide "contained hyperbole of the type which was routinely employed by [himself], post-Katrina, and was never intended to threaten anyone with bodily harm (nor did he)." USCA5 578; see also, USCA5 893-895 (excusing his "'strident'" language as necessary "to get Bankruptcy Judge Jerry Brown's (or Mr. McGinn's) 'attention'"; describing it as "hyperbole (and 'conditional' hyperbole at that)"; and terming the threat as "'a cry for help'").[7] This unsworn self-description of his intent and statement factually was adopted verbatim by the district court. USCA5 1214 ("The plain language of the e-mail is not a threat...rather it was a cry for help...."). Legally, O'Dwyer argued to the district court that this Court's cases affirming threat convictions relate to more direct and explicit threats, USCA5 904-

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inasmuch as the charged e-mails were sent between friends "to foster a friendship based on shared sexual fantasies...." Notably, this Court in Murillo, 234 F.3d at *2, distinguished Alkhabaz as a friend-to-friend communication and, furthermore, disagreed with the decision to the extent that it implies that courts will focus on the communicant's subjective intent. Id.; see also United States v. Jongewaard, 567 F.3d 336, 340 (8th Cir. 2009) (rejecting Alkahbaz; agreeing instead with the dissent). Notably in Alkhabaz itself, the Sixth Circuit majority acknowledged that its affirmance was in circumstances where neither the district court nor either party "contained any discussion" about whether the indictment stated an offense. Alkhabaz, 104 F.3d at 1493.

[7]Specifically explaining his use of the word "homicidal," and the phrase "scoundrels might be at risk," O'Dwyer argued rhetorically in district court that his e-mail did not actually confirm that he was "then homicidal," nor did it clarify "[a]t risk for what?" USCA5 895.

908, and regardless are cases which legally are mistaken in their consideration of apprehensions of a recipient of a threat. USCA5 910-913 (tracing "the erroneous rule within the Fifth Circuit that in identifying 'a true threat,' the Court must (or should) take into account the subjective opinion of the recipient of the alleged threat"). Again, the district court accepted O'Dwyer's distinguishing of this Court's caselaw, ruling succinctly that "[t]he cases in this Circuit that deal with convictions arising under 18 U.S.C. Sec. 875(c) all deal with explicit threats." USCA5 1218.

O'Dwyer's rejection of this Court's objective test for a threat (and consideration of a threat recipient's reactions), like determinative focus on the explicitness of a threat, however, not only displaces the jury's role as fact-finder, supra Part II.A, but also is contradicted by the three cases that O'Dwyer and the district court find are wrong or distinguishable.

First, in Myers, this Court squarely rejected adoption of what it termed "an outlier" Ninth Circuit interpretation holding that Section 875 requires speaker-based specific intent proof, 104 F.3d at 81, despite the fact that it was urged in part to shield persons with a mental illness. Id.; see also id. at 77 (noting that Myers blamed failure to take medication as an instigator). On the other hand, the Court pointed out that expert testimony at trial could be adduced pertaining to

involuntariness due to mental illness, but that such proof "was squarely within the province of the jury to weigh...[as would be the defendant's] tone and content" in his communications. Id. at 79.

Likewise, in Morales, this Court did not adopt O'Dwyer's focus on the subjective intent of the accused, or the explicitness of the threatener's threat, but instead made clear, oppositely, that the directness of a threat is not determinative as distinct from "focus...on whether the threat 'in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor.'" 272 F.3d at 288 (quoting Myers). This Court could not have been more clear that "our precedent in Myers does not require that the threat be made directly to the victim." Id.

Finally, in the Court's per curiam Murillo decision, the Court rejected the contention that "a subjective intent not to harm invokes First Amendment protection...." Murillo, 234 F.3d at *2.

None of these cases, criticized by O'Dwyer and distinguished by the district court, requires focus on the explicit intention or words of the accused. More generally, with the possible exception of the Ninth Circuit, other Courts of Appeals have interpreted the various federal threat statutes, including Section 875 and its companion, Section 876, to reach communications that, objectively viewed,

constitute "true threats," and have not required the government to prove that the defendant had the subjective, specific intent to communicate a threat. See, e.g. United States v. Malik, 16 F.3d at 49 (whether a writing is a threat is for the jury and "[a]n absence of explicitly threatening language does not preclude the finding of a threat"). United States v. Francis, 164 F.3d 120, 121-124 & n. 4 (2nd Cir. 1999) (summarizing Circuit caselaw and noting Ninth Circuit variance, before reversing pretrial indictment dismissal). These Courts have held that whether a communication is a true threat, and hence criminal, is not to be determined by probing the maker's subjective purpose, but rather is determined objectively from all the surrounding facts and circumstances. Id.

O'Dwyer's reliance on the Supreme Court's 1969 decision in Watts to support his claim of protected speech is unavailing. In Watts, the Court reversed a conviction for violation of 18 U.S.C. § 871(a), which proscribes threats against the President. 394 U.S. at 705. At a public anti-war rally held on the Washington Monument grounds, a group of young adults was discussing police brutality. Watts, an 18-year old, was overheard stating the following: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."

Id. at 706. The crowd laughed in response. Id. at 707. The Supreme Court, reviewing this evidence submitted at trial, concluded that "in context" and given the "expressly conditional nature of the statement and the reaction of the listeners," that the statement was "political hyperbole" and "a very crude offensive method of stating political opposition to the President," rather than the "true 'threat'" within the meaning of the statute. Id. at 708. Unlike this case, the Supreme Court explicitly considered the response of the evidence: laughter. See id. at 707.

Regardless, this Court has held that Watts is inapposite in cases that involve private communications rather than public rallies. Daughenbaugh, 49 F.3d at 17. The Court in Daughenbaugh also found that the fact that a threat is accompanied by "political rhetoric" "furnishes no constitutional shield." Id.; see also Morales, 272 F.3d at 288 ("Unlike Watts, Morales was not engaged in political speech as part of a public debate, in which the listeners laughed in response to Watts's comments."); United States v. Whiffen, 121 F.3d 18, 22 (1st Cir. 1997) ("The primary concern of the Court in Watts was the protection of constitutionally protected political speech."); Francis, 164 F.3d at 122-123 & n.4.

C. Reinstatement of the Indictment Will Not Impede O'Dwyer's Defense of "Strident" Hyperbole

Permitting this case to be heard by a jury will not impede O'Dwyer from giving his exculpatory characterizations of his e-mail as strident language and hyperbole. In fact, the caselaw from this Court, consistent with this Court's Pattern Criminal Jury Instructions, require that these arguments be heard and considered by a jury which, in turn, must be instructed that a true threat is a serious one, not uttered in jest, idle talk, or political argument. 5th Cir. Pattern Crim. Jury Instr. 2.39-2.41 (2001). This Court, when reviewing threat convictions, repeatedly has elaborated on this safeguard to decide whether a "true threat" was proven beyond a reasonable doubt. See, e.g., Howell, 719 F.2d at 1260; Daughenbaugh, 49 F.3d at 173-174; Murillo, 234 F.3d at *2.[8]

Factually, were the instant matter to proceed to trial, the government necessarily will submit proof, and argue inferences from that proof, instead that O'Dwyer's e-mail (1) was unambiguous in his claim to be "homicidal," (2) was focused at identified individual judges O'Dwyer identified as "CRIMINALS," (3)

[8]Other Courts of Appeal likewise rigorously assess whether trial proof of a threat submitted to a jury was accompanied by Watts safeguards against prosecution of idle talk, hyperbole, and political protest. See, e.g., United States v. Lockhardt, 382 F.3d 447 (4th Cir. 2004); United States v. NAPA, 370 Fed. Appx. 402 (4th Cir. 2010); United States v. Bly, 510 F.3d 453 (4th Cir. 2007); United States v. Cvijanovich, 556 F.3d 857 (8th Cir. 2009).

was accompanied by a specific reference to a courthouse security breach and vulnerability O'Dwyer had considered, and (4) caused reasonable persons in the United States Marshals Service to act promptly, seeking to protect judges and arresting O'Dwyer. It is expected that review of trial proof, thereafter, by a jury, and then by the district court on proper motion for judgment of acquittal, and then a third time by this Court on direct appeal of any conviction, would contradict O'Dwyer's opinion given pretrial in his untested dismissal averment that he intended only hyperbole and strident language that should not have triggered a recipient's fear of bodily harm.[9] Cf. United States v. White, 610 F.3d 956, 962 (7th

[9]In district court, at his detention hearings, O'Dwyer characterized his profanity and racial epithets as incensed vitriol, expressing anger and seeking to compel recipients to comply with his demands. USCA5 236 (apologizing for "admittedly strident language"), 241 ("if you take away the admittedly strident language...and focus on what has been done to me...you will see that my so-called escalation in language, not acts or deeds, has been in direct response to escalating pressure being put on me by a corrupt system"), 244 ("I wanted to get their attention. I wasn't threatening them. That's why I left blood out. Do you get it? I mean I'm on one intellectual level and the Government is down here in the gutter."). In that context, O'Dwyer did contend that he intended no harm by his words, e.g. USCA5 238 ("it was never in my mind to"), 258 ("You didn't ask me what I meant by that, though, did you?"); USCA5 1351 (bodily harm was "the furtherest [sic] thing from my mind"), 1358 ("I had no intention of carrying the warning that I was giving him to even remotely inflict bodily harm on him...or anyone else."), which is a contention that the district court accepted as a matter of law. As noted earlier, however, the Supreme Court, this Court and other Courts of Appeal agree that the viability of threat prosecutions centers on the reasonableness of the reaction of recipients of a threat. See USCA5 220 (Magistrate Judge interjects during O'Dwyer cross-examination of Pretrial Services Officer that "[h]e's answering the questions [about his perception of threats of violence], and then you're arguing about it because you don't like the answer that you're getting"); see also USCA5 1365 (during O'Dwyer testimony denying that persons could have been "worried about my threats," standby defense counsel similarly objects that "[w]hen we talk about the substance of this offense, that's for another forum, that's for a trial, that's for a jury....").

Cir. 2010) (reversing pretrial dismissal of indictment on First Amendment grounds noting that matter properly will be submitted to jury); United States v. Maisonet, 484 F.2d 1356, 1359 (4th Cir. 1973) (rejecting motion for judgment of acquittal inasmuch as Watts claim of protected speech is an issue "of fact for the jury"). In connection therewith, with trial proof, the government will contend that O'Dwyer's reference to a "security breach" accompanied by his warning that "a number of scoundrels might be at risk if I DO become homicidal" is explicit, above all when sent to a court employee and pertaining to particularly identified federal judges O'Dwyer in his threat called "CRIMINALS." Other decisions have upheld jury verdicts involving threats that do not include an explicit statement by a speaker about killing a specific person. See, e.g., United States v. Bly, 510 F.3d 453 (4th Cir. 2007) (defendant asserted that he was skilled with rifles and that "if this remains class warfare, I assure you tragic consequences"); United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997) ("the silver bullets are coming"). By contrast, neither O'Dwyer nor the district court cites any decision from any Circuit authorizing pretrial dismissal based on alleged lack of such explicitness or alleged lack of evidence that the accused intended to carry out bodily harm. Regardless,

again, O'Dwyer's e-mail explicitly identified three judges as "CRIMINALS," and then referenced "scoundrels" "at risk" of murder if he became "homicidal." USCA5 130-131.

Thus, full proof of O'Dwyer's threat context, including his accompanying e-mails, his anger at judges and judicial rulings, and also the reaction of the recipient of O'Dwyer's e-mail and the prompt contact and reaction of the United States Marshals, will be before the jury and considered.[10] Tellingly, only with the advantage of this type of trial testimony was the Supreme Court in its position to overturn Watts' conviction based, in part, on the fact that listeners laughed aloud. Watts, 394 U.S. at 707.

[10]In addition to the protective response by the United States Marshals, the record demonstrates that O'Dwyer's charged--and his escalating previous communications--reasonably were perceived by others to contain threats. USCA5 208(Pretrial Services Officer Timothy Gantner expresses concern about O'Dwyer's "taking it out of your flesh statement"), 217 (Gantner: "[t]hey certainly come across as being implied threatening-type language"), 220 (Gantner: "bring the guns" conveys threat of violence); see also USCA5 1332-33 (defense psychiatrist acknowledges that "a person the receiving end of [O'Dwyer's communications] can certainly perceive that to be a threat"). That is true whether or not O'Dwyer's earlier (uncharged) threats were interspersed with phrases that might be construed as a mix of threatened hostility and offensiveness. Compare USCA5 1088 (August, 2007 O'Dwyer fax stating that he "will exact retribution...in flesh. This is not a threat; it's a promise[]"); and USCA5 1090 (April 2009 email stating "you are both in the cross-hairs"); and USCA5 1091 (April 11, 1009 encounter with a federal judge: "tell the FBI about me and tell them to bring guns"); with USCA5 1091 (April 15, 2009 email expressively talking about a "shit sandwich"); and USCA5 1091 (letter addressed to federal judge using racial epithet).

CONCLUSION

For the foregoing reasons, the government respectfully asks that the district court's dismissal of this criminal case be reversed allowing the prosecution to proceed but subject to this Court's settled but strict trial proof protections of unthreatening and political speech.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 29th day of November, 2010, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to ECF counsel of record. Additionally, undersigned has sent a copy of the foregoing to pro se defendant-appellee Ashton R. O'Dwyer, Jr., 6034 St. Charles Avenue, New Orleans, LA 70118.

I further certify the foregoing document meets the required privacy redactions; that it is an exact copy of the paper document; and the document has been scanned with the most recent version of a commercial virus scanning program and is virus-free.

/s/ Stephen A. Higginson
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Assistant U.S. Attorney, Chief of Appeals

United States Court of Appeals

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No. 10-30701, USA v. Ashton O'Dwyer, Jr.
USDC No. 2:10-CR-34-1

The following pertains to your brief electronically filed on 11/29/2010.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies will result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3.

Sincerely,

LYLE W. CAYCE, Clerk

Gina Randazzo Martin

By:_____
Gina Randazzo Martin, Deputy Clerk
504-310-7687

cc: Mr. Ashton R O'Dwyer Jr.
Mrs. Virginia Laughlin Schlueter

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