

No. _____

In the
Supreme Court of the United States

Justin Credico
Petitioner

v.

United States
Respondent

Petition for Writ of Certiorari to the Third Circuit Court
of Appeals

CA3 No: 17-1422

Justin Credico #71239066
FCI Allenwood Medium
Box 2000
White Deer PA 17887

Questions Presented

The following questions are a matter of first impression before this Court:

- 1) After a colorable attack was made to the government's case-in-chief evidence, an audio forensics expert was provided to the petitioner, causing the government to raise presumption of regularity. But the expert was unable to conduct forensics analysis due to the government's handling of the evidence. Does this make the petitioner's rebuttable presumption, irrebuttable in favor of the government, denying a fair trial?
- 2) As a matter of law, were the petitioner's communications a proscribable true threat under 18 USC § 115 and First Amendment?
- 3) With the *Elonis* case as guidance; Were the jury instructions proper with regards to subjective intent for 18 USC § 115?

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Jurisdictional Statement

Petitioner was indicted by a grand jury for violation of four counts of violation of 18 USC § 115.

The District Court had jurisdiction pursuant to 18 USC § 3231.

The Appellate Court had jurisdiction as an appeal from criminal conviction per 28 USC § 1291.

This Court therefore has jurisdiction over a Certiorari to the Third Circuit regarding this matter.

Record Below

Petitioner appealed from his conviction after a jury trial for threatening federal agents and their immediate family members, in violation of 18 USC § 115.

He challenged the admission of audio recording evidence, the sufficiency of the evidence that he violated § 115, and the jury instructions on subjective intent.

However, the Appellate Court concluded that his claims were without merit and affirmed his convictions

"After consideration of all the contentions raised, it is adjudged and ordered that the May 25th, 2017 judgment of the District Court be and hereby is affirmed. All in accordance with the opinion of the Court."
(see A.13-A.14)

Statement of the Case

A criminal complaint was filed in early February 2014, and an indictment returned March 11th 2014. Petitioner was detained on February 12th, 2014, and has remained in federal custody since that date.

The indictment charged petitioner with four counts of violating 18 USC § 115. On February 16th, 2017, at the conclusion of a 3-day trial, petitioner was found guilty on all 4 counts of the indictment.

Sentencing transpired on May 22nd, 2017, and the petitioner was sentenced to 70 months incarceration on each of the four counts, with all of the terms to be ran concurrently to one another.

On appeal, the Third Circuit affirmed the lower Court's judgment. Petitioner's En Banc was denied, and this timely Certiorari has followed

Statement of the Facts

A. Background

As early as 2008, petitioner would contact the FBI and other federal agencies via phone, email, and also voicemail. Doing so partially for Hactivism purposes concerning world events that he disagreed with, and, partially for personal attempts to petition orally for the government to provide redress. In all, petitioner has left over 600 messages to the FBI alone. Often, these contacts contained content directed to Joseph Milligan. The content was often vulgar and laced with profanities. However, over the course of years of doing this, petitioner was never approached, told to cease, nor prosecuted until 2014.

Despite no action being taken against petitioner, even after years and hundreds of contacts, the government decided that it had all changed on February 6th, 2014. And on that date, Agent Milligan decided to seek charges.

B. First Pre-trial Hearing Challenging Accuracy and Authenticity

On July 2nd, 2015, the District Court conducted a hearing - which the Third Circuit calls a "Starks" hearing - concerning some challenges to the government's case-in-chief evidence of audio recordings. At this hearing, petitioner brought up technical aspects of the government's evidence. I.e., 8 messages being cut and pasted into one big audio file, the audio file being in a MP3 format when a government expert explained that the recording system won't create MP3. The government's case agent, Hubiak, stated:

The original voicemail messages had been forwarded from FBI Special Agent #1 (Milligan) mailbox to a system known as ITACC. Using ITACC, Hubiak copied the messages to a CD, which was the medium the government intended to use at trial

However, the hearing had to be continued since Hubiak was unable to answer petitioner's technical questions.

C. 2nd Hearing (Starks)

At the 2nd hearing petitioner testified on his own

behalf and consistently disputed the voicemail messages.

Specifically, petitioner stated that these recordings were left in 2012, and denied being the speaker on others.

The District Court determined that the recordings were accurate and could not have been altered since an established chain of custody had been established due to the fact that, the Itaac system creates a digital chain of custody.

D. Audio Forensics Expert

Petitioner was able to finally allow appointment of an expert after arguing for more than the maximum allotted funds for CJA to be used for a defendant (\$10,000)

Petitioner's expert, Paul Ginsburg, met with case agent Hubiak at the Phila. FBI Office. Hubiak denied Ginsburg's access to the audio evidence, claiming that:

The recordings were no longer available to Hubiak because upon making an evidence copy, the system archives the originals, and he no longer has access

Ginsburg asked to see the CD that the government used at the Starks hearings. An analysis performed upon that CD determined 7, not 8, messages. And, out of those 7, only 2 voicemails were on the discovery files given to petitioner.

Ginsburg then stated:

Hubiak showed me a cassette that was loose, not in an evidence envelope, and told me that was the original cassette Milligan used to make the recordings of the 8 voicemails. According to Hubiak, Milligan played the 8 voicemails using a speakerphone from the voicemail system while recording the cassette on a cassette recorder placed near the speakerphone.

This was troubling since that now meant the CD evidence the government was using at trial was not produced from the Itacc, but by holding a cassette recorder to a voicemail speakerphone.

Petitioner then filed for reopening of the Starks issue based upon Ginsburg's findings. Reopening of that issue was granted by the District Court.

E. 3rd Starks Hearing

It's noted that in reply to petitioner's Mot. to Reopen, the government that the recordings did not come from the Itacc, and admitted, "the disc used to prepare its trial exhibit, and which it will [now] present at trial, was actually made from a cassette recorder."

The government was then given a second attempt to prove that the recordings were authentic and accurate.

Moreover, the government's lack of a chain of custody log as to the recorder, caused them to raise the presumption of regularity defense at issue in this writ. In doing so, several agents testified as to who handled the new case-in-chief evidence, and where it was placed.

In attempt for petitioner to raise his rebuttable presumption argument, Ginsburg was needed to testify. But, Ginsburg testified that the manner in which the cassette

evidence was handled limited his ability to perform a complete and necessary examination, and the government's handling created flaws which prevented him from stating the evidence had any evidentiary value at all. Nonetheless, the Court ruled against the petitioner.

E. Trial

Trial began February 14th, 2017. Despite the government's claims that everything had changed, petitioner sought to show that nothing changed, because he used the same words and left the same messages since 2008.

While Milligan testified he had become accustomed to receiving threats from petitioner, such as fist fights. According to Milligan, these voicemails escalated relations. And the agent stated that petitioner blamed the FBI for his being removed from a State College (West Chester University.)

Yet, Milligan stated that he nor the FBI had ever

Communicated with the college.

At the close of trial, petitioner moved for acquittal. Arguing that a required intent was lacking. To wit, he did not impede nor interfere with duties, because no true duties existed regarding the college. And, none of the voicemails were directly communicated to anyone but Milligan.

6. Jury Instructions

Petitioner did have a hearing to decide the proper jury instructions due to the "Elonis" case. The Court denied that Elonis had any bearing on the matter. Petitioner still tried to have an instruction as follows:

You should consider whether the statements were conditional or they specified the precise date, time, or place for carrying out the supposed threat

This was because the voicemails were conditioned upon the signing of a release form, and this release form was conditional, and bore upon the subjective intent argument. Petitioner was denied.

Summary of the Argument

I. Presumption of Regularity

Now that the world has passed through the dawn of the digital age, and evidence leans more towards the electronic and/or digital side, we would expect the government's handling of that type of evidence would be more methodical rather than onerous.

Here we're presented with a case wherein the original case-in-chief evidence was a digital CD. At the first pre-trial hearing, serious inconsistencies and falsities popped up. This required the petitioner to be given, not only a second hearing on the subject, but also an appointed audio forensics expert.

However, this audio expert cast doubt as to the case-in-chief CD, causing the government to shift its new case-in-chief to a handheld recorder. Yet, the way the government handled the evidence made it so that

the expert could not analyze it. In response to the petitioner's questioning of this type of evidence handling, the government raised a defense of presumption of regularity. In turn, under a normal run-of-the-mill case, this would allow petitioner to argue rebuttable presumption. Therein lies the problem. The government's handling of the evidence made it so that any rebuttable presumption was irrebuttable in favor of the government.

Normally when there are evidentiary issues present, the government has to be shown to have acted in bad faith. Petitioner argues that in order to have a fair trial in a burden-shifting situation such as this, he must be afforded a chance at a proper rebuttable presumption.

II. 18 USC § 115 and First Amendment

The government's evidence contained eight audio

messages made to an FBI agent's voicemail. The calls were made to the FBI switchboard, then forwarded to the Agent's voicemail - though the content generally was directed to the Agent. The indictment alleged that, specifically; Message three made up counts three and four, Message four was count one, Message five was count two of the indictment.

All communications were made towards one person, though they referenced other third parties. Since the other three alleged victims were involved only through this one Agent's actions, in that, he told the rest of them about the other messages, those other three counts should have been dismissed. With the First Amendment in mind, because petitioner was not alleged to have communicated to them directly, he did not violate 18 USC § 115.

Moreover, as to count one, petitioner's speech was as a matter of law not true threats.

And because in speech related incidents, we must not look at them in a vacuum, but in all surrounding circumstances as well, these communications were more of advocacy of use of force and not true threats.

III. 18 USC § 115, Elonis, Subjective Intent, True Threats, and their Jury Instructions

The jury instructions presented for this case were in error based upon the Supreme Court's case of *Elonis*, and its subjective intent standards regarding the definition of true threats. The true threat definition changed, and as a result, the District Court needed to present to the jury, subjective intent instructions regarding true threats.

The Supreme Court's new definition applied to every communication of threat case that has as an element communicated threats.

Moreover, true threat statements must be viewed in proper context with regards to any expressed conditional nature of the statements.

Petitioner's statements were filled with many conditionals; i.e., if-thens, or sign a release form then something will transpire. Thus, the jury instructions should have also included conditional nature instructions

For these above reasons, this Court should permit Certiorari

Argument

I. Presumption of Regularity and Rebuttable Presumption

When a colorable attack has been made as to the government's audio evidence, District Courts in the Third Circuit will conduct a "Starks" hearing, taken from the case of United States v. Starks, 515 F.2d 112 (3d Cir. 1975) (tape recordings are peculiarly susceptible to alteration, tampering, and selective editing). And, the Second Circuit agrees with such hearings as well. See United States v. Knohl, 379 F.2d 427 (2d Cir. 1967) (to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings...). These cases hold that the government must prove a chain of custody. See Starks, 515 F.2d at 122.

Here the government failed to do so. Nor did it produce any witnesses who testified as to chain of custody.

The cassette tape was not placed into an evidence envelope, nor was any log created to record chain of custody.

Initially, the government claimed that no due process was violated since there was no showing of bad faith on the part of the government. The District Court agreed. More importantly however, and what is at issue here, is the government's reliance upon a presumption of regularity. Although the presumption of regularity is disfavored in the very Starks hearing in which the government uses it here, See Starks at 122, the Court permitted it to bolster chain of custody problems within this case.

Presumption of regularity has arose many times before this and other circuits. Before this Supreme Court it has only been discussed in civil matters (relying upon Habeas Corpus as being a civil matter.) This Court has argued that a government agency is presumed to have acted fairly in its governmental decisions and actions. There was a caveat to this Court's holding though, and one that has now become a matter of first impression regarding criminal cases.

This Court has precisely stated, "so long as that presumption remained a rebuttable one, and fair opportunity for rebuttal were provided, "presumption of regularity may be used. See Hamdi v. Rumsfeld, 542 US 507. In Hamdi, the petitioner there was declared to be an enemy combatant of the United States.

There, he argued that several espionage agencies were withholding access to evidence that he deemed to be material towards his declared status of enemy combatant. Respondents argued that due to the top secret classified nature of his case, the regularity of agency action was sufficient enough to permit certain witnesses to testify as to the handling of the case.

This Court agreed, stating that the petitioner's fair opportunity for rebuttable presumption was not being denied.

Contrariwise, sub judice, your petitioner was not given any sort of fair opportunity for a rebuttable presumption. Thus, making the government's presumption of regularity, irrebuttable.

The trial court permitted Credico to retain an audio forensics expert, with special knowledge and skills so extensive, that he has been hired by just about every investigatory agency in the United States. But for the government's handling of the case, "few would dispute that the cassette's chain of custody leaves much to be desired," CA3 Opinion at A.6, "the government's management of this case leaves something to be desired," Trial Court Starks Opinion Document 194 pg. 7, petitioner's expert would have been able to analyze the evidence. Hence, enabling petitioner a fair opportunity at a rebuttable presumption.

Specifically, the expert was to, inter alia, (1) analyze the 8 recordings, for continuity and authentication, (2) collect and analyze the original recordings in the custody of FBI, (3) and then compare the originals to those provided to petitioner in his discovery. In attempting to do this analysis, Ginsburg (the expert) met with Hubiak (the case agent), at the Philadelphia FBI Office. During this visit, Ginsburg was not given any

access to the recordings. Ginsberg then asked to see the CD the government intended to use at trial. Hubiak produced a CD that he said was created by downloading files from Itacc. But, the analysis performed by Ginsberg determined that the CD had 7 not 8 messages. And only 2 of those 7, were on petitioner's discovery. Then a mysterious cassette tape entered the picture (despite all discovery motions being granted well beforehand.) And because of the way the cassette tape was handled and produced, Ginsberg was not able to conduct analysis, and so falls petitioner's rebuttable presumption opportunity.

II. 18 USC § 115, First Amendment and Proscribable Threats

A. Counts 1 and 3 - Threats to Law Enforcement

As a matter of law, petitioner's speech was not a true threat for these counts.

Since 18 USC § 115, "makes criminal a form of speech, it must be interpreted with the commands of the First Amendment

'clearly in mind.'" (see Watts v. United States, 394 US 705). Although vast, "the protections afforded ... are not absolute, and we have long recognized the government may regulate certain categories of expression consistent with the Constitution" (citing Virginia v. Black, 538 US 343); Chaplinsky v. New Hampshire, 315 US 568.

Relevant here, are two such categories, "true threats," and "incitement," (see Brandenburg v. Ohio, 395 US 444). When evaluating speech alleged to lie outside of constitutional protection, we must take care in drawing boundaries. "In defining these limited enclaves ... we have taken great pains to preserve ample breathing space in which expression may flourish." see Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979).

True threats distinguishes from purported threats that are mere "political hyperbole," even if "vituperative, abusive, and inexact" (Watts at 708). Similarly, incitement distinguishes from, "advocacy of the use of force or of law violation." (see Brandenburg at 447). To distinguish true threats from the

the political hyperbole, an objective test is used, "namely, whether an ordinary, reasonable recipient who is familiar with the context would interpret it as a threat of injury." (see United States v. Davila, 461 F.3d 298 (2d Cir. 2006)). "Intimidation in the proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person with the intent of placing the victim in fear of bodily harm or death." Black at 360. Incitement from advocacy however, we look to whether the communication is directed to "inciting or producing imminent lawless action, and likely to produce such action." (Brandenburg at 447); see also Hess v. Indiana, 414 US 105 (no incitement where the statement was not directed to any person or group). But we must be mindful that after "Elonis" a subjective intent has been added, and so, "what [petitioner] thinks does matter." (see Elonis v. United States, 135 S. Ct. 2001), so both objective and subjective tests must be used in "threat" statutes.

Application of this (objective and subjective) must also be analyzed in light of seriousness. See Black at 360. Thus we must decide that speech is not advocacy protected by Brandenburg, and protected threats by Watts. And then decide whether under both objectivity and subjectivity, it was truly serious by Black. Much of what is said by even nonviolent advocates can acquire a tinge of fear, but, "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment" (quoting NAACP v. Claiborne Hardware Co., 458 US 886). So first, the Court must decide whether the recipient is fearful of the execution of the threat. Second, after Elonis, it must decide whether the speaker was truly going to act in furtherance of the threat - taken together, seriousness can be decided.

Therefore, turning to the case at bar, subjectively, petitioner was not shown to have any intent of carrying out any statements made. Nor did he "incite or produce any

imminent lawless action [which was] likely to incite or produce such action" (see Communist Party v. Whitcomb, 414 US 441).

This Court even before Black and Elonis, clearly drew a distinction between mere teaching [and advocating] resort to violence from instances where an individual is "preparing a group for violent action and steeling it to such action" (see Noto v. United States, 367 US 290). Objectively, the record showed that the petitioner was never given any indication that any "real" agency action was being done to him. Nor was the petitioner ever told that he needed to cease contact because he was placing the recipients in fear. Although the agent argues that he was fearful despite years of calls (hundreds even), his fear could not truly been shown to be reasonable. Taking all communications in context with the objective-subjective-seriousness tentative tests, petitioner's conduct can be said to have been under protections of First Amendment.

B. Counts 2 and 4 - Immediate Family

On the evidence here, as a matter of law, petitioner could not have committed a 18 USC § 115 violation for these counts. This is because Milligan is the only alleged victim to whom the statute could apply.

This is because the statute requires, inter alia, intimidation to that "official" or "immediate family member." While "immediate family member" is included within the persons who are potentially caused fear via threats, the statute makes clear that the victim is the persons who are actually threatened.

It is undisputed in this case, that petitioner did not contact any of the FBI agent's immediate family even once, much less that he intended to intimidate any such person. With regard to the family members, the undisputed evidence indicates, at most, that Agent Milligan forwarded or informed one or more family members. In the absence of evidence that

petitioner himself contacted any family member, or had any subjective intent to seriously intimidate them, he could not have violated the statute. And there is no evidence shown via any nexus, by his own conduct, that he caused them intimidation or otherwise.

The government can not show how by Milligan's conduct, not petitioner's, via his forwarding of the content and not petitioner, a violation transpired. Accordingly, petitioner was wrongfully convicted for these two counts

C. Counts 2, 3, and 4 - Direct Communication

As another principal regarding purported threats and true threats, notwithstanding objective, subjective, Watts, Black, Brandenburg, or seriousness; a true threat must be directed towards the victim (see New York ex rel. Spitzer v. Operation Rescue, 273 F.3d 184 (2d Cir.)) X in most cases where courts have found that speech constituted a true threat, the threatening speech was targeted against specific individuals or was

Communicated directly to the subject of the threat); referencing Fogel v. Collins, 531 F.3d 824 (9th Cir.). And in a District Case of the Third Circuit, United States v. Fenton, 30 F. Supp. 2d 520 (WDPA), the Court there held that, since Fenton never intended his voicemails to ever reach the other victims, his calls could not be deemed to be true threats under 18 USC § 115.

Also, repeating for the sake of brevity, those arguments discussed within Section B. herein, nowhere in the record was it ever shown that anyone other than Milligan was ever contacted. Hence, the other alleged victims within Counts 2 through 4 were never directly contacted. Except, when Sgt. Milligan forwarded or told them of the existence of the voicemails. Under these circumstances, the petitioner's speech was not a true threat, and therefore, the First Amendment applies.

III. Elonis Guidepost Regarding 18 USC § 115 and Subjective Intent for Jury Instructions

Petitioner argues that Elonis renders the District Court's instructions to the jury erroneous. A person challenging jury instructions must demonstrate error and prejudice. Error is found when viewed as a whole, the jury instructions either failed to inform the jury the proper law, or misled the jury about the correct legal rule. "No particular wording or phrasing is required for an instruction to be legally sufficient, so long as, taken as a whole, the instruction correctly conveys the applicable law" (Citing Victor v. Nebraska, 511 US 1).

At issue in Elonis was the mental state required by a statute that criminalizes the transmission in interstate commerce or foreign commerce, of any communication containing any threat to kidnap or injure any person. Elonis was charged with threatening, inter alia, an FBI agent.

The trial court instructed the jury, that to convict, it must find only that Elonis communicated what a reasonable person would regard as a threat (see Elonis at 2004).

In particular, that trial court instructed the jury that:

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual

(Id. at 2007)

Enter the Supreme Court. The Court set out to interpret under the dictates of Carter v. United States, 530 US 255, by endeavoring to read into the statute "only that mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct" (Elonis at 2010); Carter quoting United States v. X-Citement Video, 513 US 64 at 72. Upon doing so, this Court found that

the statute (just like the 18 USC § 115) required proof the communication was transmitted, and that it contained a threat. This Court determined "the crucial element separating legal innocence from wrongful conduct, is the threatening nature of the communication" (Elonis at 2011); quoting X-Citement Video at 73. It found that the mental state requirement must apply to the fact that the communication contains a threat.

But unfortunately, the Supreme Court stopped short of determining what mental state was required (Elonis at 2013-2014) (Alito, J., concurring in part and dissenting in part (criticizing the majority for refusing to explain what type of intent is necessary); Elonis at 2018 (Thomas, J., dissenting (all the lower courts know after today's decision is that a requirement of general intent will not do)

Rather, the Court found error in the trial court's instruction that the government need prove only that a reasonable person would regard Elonis's communications as threats, because, "federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state" (Elonis at 2012). In the end the Court rested on the undisputed point that, "the mental state requirement is satisfied if the defendant transmits a communication for the purposes of issuing a threat, or with the knowledge the communication will be viewed as a threat" (Id. at 2012); see Id. at 2013 (declining to decide whether recklessness suffices for liability).

Petitioner argues the jury instructions issued under 18 USC § 115 were erroneous under Elonis. Arguing the definition of "true threat" changed after Elonis. And, as a result his trial court should have presented to

to his jury, an instruction regarding burden of proof on petitioner's subjective intent. The trial court denied the request on subjective intent as announced in *Elonis*, saying that (1) 18 USC § 115 is a different statute, (2) the *Elonis* ruling does not imply that the Court was obligated to apply it, and (3) *Elonis*'s remand upon failure to provide a subjective intent was harmless and irrelevant.

Petitioner argues that insofar as, subjective intent, he had no reason to know that his communications would be so taken as seriously-objective-subjective true threats, since he had been making hundreds communications over several years with no approachment nor evidence of encroachment. At no point in time, did FBI or Milligan say these prior calls alarmed or concerned them. As it stands, no evidence shows that petitioner subjectively knew his communications would be taken as serious true threats.

Moreover, this Court (Supreme Court), explicitly stated that it has "long been reluctant to infer that a negligence standard was intended in CRIMINAL STATUTES" (Id.)(emphasis added). This shows that this Court never limited its Elonis rulings to any particular statute. As a result, the petitioner's requested jury instruction concerning subjective intent should have been given.

Conclusion

Wherefore, this Petition for Writ of Certiorari should issue, to resolve all of the fairly included and presented questions

Dated

Justin Credico

Reasons for Granting Writ

As briefly stated within the Questions Presented, the issues raised herein are one of first impression before this Court, in regards to the 18 USC § 115 statute.

Moreover, a matter of First Amendment review that this Court chose to forego in its *Elonis* ruling is before it once again.

Additionally, with regards to *Elonis*, this Court is asked to determine whether the subjective intent mens rea as discussed in *Elonis*, was properly given within a jury instruction for 18 USC § 115 since the Third Circuit does not have a model instruction for it.

Lastly, in this digital age where evidence is now commonly found upon mediums that are themselves digitally advanced, a matter of serious importance is present when such evidence can be so easily manipulated. Here sub judice, the government's handling of its case-in-chief audio

evidence resulted in petitioner's audio forensics expert being unable to analyze it. And this, resulted in the petitioner not receiving a fair trial.