

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Dwight George Mundle

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
(No. 16-2604-CR)

PETITION FOR WRIT OF CERTIORARI

Dwight Mundle (Pro-se Petitioner)
OCA I.D. #: 1702001
Pike County Correctional Facility
175 Pike County Boulevard
Lords Valley, PA 18428

QUESTIONS PRESENTED

- I.** Was there enough or even any evidence to prove the conviction of transmitting a threatening communication, in violation of 18 U.S.C. § 875 (c), was the testimony from Petitioner sister, Anika Mundle, sufficient to prove beyond a reasonable doubt that a treat was actually made, and that Petitioner made the treat “intentionally” and intended a true threat in a phone communication made by her, and does the statute require the Petitioner to be aware of the threatening nature of the communication.
- II.** Did the District Court erred in admitting at trial evidence of uncharged conduct concerning Petitioner’s prior conduct regarding his mother, Sonia Green, and does the testimony of Petitioner mother put him on trial for kidnapping, and not the crime charged in the indictment, and did his mother testimony regarding his prior conduct have a cumulative prejudicial effect on the jury, did his mother testimony overwhelmed and swayed the jury from the probative values regarding the threatening communication in Count One of the indictment.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

| | |
|--|----|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 8 |
| CONCLUSION | 11 |

INDEX TO APPENDICES

| | | |
|------------|---|--------|
| APPENDIX A | Decision of the Court of Appeals For the Second Circuit | App.1 |
| APPENDIX B | Copy of Superseding Indictment | App.6 |
| APPENDIX C | Copy of the Phone Records (Trial Exhibit GX 22-C, GX 23-C) | App.9 |
| APPENDIX D | Copy of Original AT&T Phone Records (Mobility Usage, 06/08/2015, DM_000571) (Mobility Usage, 01/27/2016 page 13 of 127) | App.11 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE NUMBER |
|--|-------------|
| <u>In re Winship</u> | 3 |
| 397 US 358, 364, 25 L. Ed 2d 368, 90 S Ct 1068 | |
| <u>Elonis</u> | 8 |
| 135 S. Ct. 2001, 192 L. Ed. 2d 1 | |
| <u>United States v. Carboni</u> | 9 |
| 204 F.3d 39, 44 (2d Cir. 2000) | |
| <u>United Stated v. Inserra</u> | 10 |
| 34 F.3d 83, (2d Cir. 1994) | |
| STATUTES AND RULES | |
| 28 U.S.C. § 1254(1) | 2 |
| 18 U.S.C. § 875(c)-(2) | i, 3, 4 |
| 18 U.S.C. § 924(c)(1) | 4 |
| Fed.R.Evid. 404(b) | 9 |
| Rule 29 | 10 |

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit appears at Appendix A to the petition, and has not been published.

JURISDICTION

The date on which the United States Court of Appeals for the Second Circuit decided my case was November 7, 2017;

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions that are at issue in this case are as follows:

1. Transmitting a Threatening Communication in Interstate Commerce, Title 18, United States Code, Section 875 (c) and 2.)
2. The Fourteenth amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a crime defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. E.g., *In re Winship*, 397 US 358, 364, 25 L ED 2d 368, 90 S. Ct. 1068.
3. Fifth Amendment's Due Process Clause, which requires that each element of a crime be either admitted by the defendant, or prove to the jury beyond a reasonable doubt. It is well establish that the fundamental fairness guarantee of the Due Process Clause requires that prosecution to be proved beyond a reasonable doubt every element of the offence.

STATEMENT OF THE CASE

Petitioner's Conviction by Jury Trial

The Petitioner was charged in a two-count Superseding Indictment, S1 15 Cr. 315 (NSR) (the "Indictment"), with transmitting a treating communication in interstate commerce, in violation of Title 18, United States Code, Section 875 (c) (Count one), and using, and carrying, and possessing a firearm during and in relation to the crime in violation of Title 18, United States Code, Section 924(c) (Count Two).

Petitioner was convicted by jury, following a verdict of guilty on Count One of the Superceding Indictment and acquitted on Count Two.

Background

On or about January 16, 2015, Petitioner was living in a family home in Boynton Beach Florida, purchased by his mother, Sonia Green, step-father Earl Green and himself, Petitioner's mother traveled from Mount Vernon New York, to visit and vacation for a few weeks. After Petitioner's mother arrived in Florida they had a disagreement about the finances of the property, Petitioner explained to his mother that he no longer was going to pay for half the expenses of the property, because it's becoming a burden, and that he wanted to sell the property and take his percentage and buy a tractor trailer and start his own trucking company, because he went to trucking school and obtain a Class A. CDL licenses. Petitioner wanted to pull cargo cross country, and hoped of eventually buying his own home as to the financial agreement he and his parents agree to.

Petitioner's mother was not happy with Petitioner's idea of selling the property so soon, and it started a disagreement with them. Petitioner's mother informed her husband Petitioner's step-father and he was not happy with the idea of selling the property so soon

either. Petitioner step-father informs Petitioner sister Anika Mundle who was also in Mount Vernon New York, about the finances of the home. Petitioner sister decided to call Petitioner to inquire why he wanted to sell the home.

However Petitioner's sister has no financial ties to the property and gave no financial support when purchasing the home, it was only Petitioner's mother and step-father had a financial agreement when the property was purchased. Thus on January 23, 2015, Petitioner sister called Petitioner, while he was in the garage of the home with his mother having a conversation, Petitioner got the phone call but did not answer, Petitioner's sister called again and he rejected the phone call a second time, she called a third time and he accepted the call. Petitioner then asked her, "why she was call and she said that their step-father had informed her that Petitioner wanted to sell the property," "Petitioner answer and inform her that the property and the finances had nothing to with her and that it was none of her business," and disconnect the phone call, she called back and Petitioner pick up the phone and ask her "can I help you" "she replied who do you think you are" and started cursing, Petitioner disconnected the call once again, she called back and Petitioner answer the call with out saying any thing and she started cursing at him and calling him names, Petitioner tried addressing her but she was screaming over him so he disconnected the call.

However on the morning of January 24, 2015, Petitioner left his mother at the Florida home, and went to work, he worked has a produce manager for a supermarket chain in Southern Florida, upon returning to the home he notice that his mother was not there he call her for three days but got no answer, he called his sister and got no answer, he call his step-father and also got no answer.

Procedural History

On January 27, 2015, the United States Attorney's Office for the Southern District of Florida filed a complaint charging Petitioner with Count One of the Indictment, because his mother, step-father, and sister had met with Federal Bureau of Investigation Agents, and made a report that Petitioner had guns and threaten to kill them. The Petitioner was arrested the same day in the Southern District of Florida. Following his arrest a search warrant was executed on the Florida home and no guns were found. Subsequently, the Southern District of Florida complaint was dismissed, and on January 28, 2015, the United States Attorney's Office for the Southern District of New York filed a complaint charging Petitioner with Count One of the prior complaint, and on May 26, 2015, an indictment was returned, and on February 8, 2016, the superseding indictment was return.

Trial was held on April 4, 2016, the jury heard testimony from (6) six witnesses, the trial was completed on April 6, 2016, and jury deliberation began, on April 7, 2016, jury deliberation continues and a verdict was made, Guilty on Count One 1s. Not Guilty on Count Two 2s.

Petitioner was sentenced on July 13, 2016 the Court decline to apply the six (6) level enhancement in computing Petitioner's Total Offence Level, and was sentence to Twenty-Seven (27) months on Count One of the Superseding Indictment. Petitioner reserved is right to appeal and a timely Notice of Appeal was filed on July 6, 2016.

Thus on November 11, 2017, the United States Court of Appeals for the Second Circuit affirmed the judgment of the conviction and sentencing. Petitioner is now seeking the review of the decision by filing a petition for a Writ of Certiorari with this Court.

The Issues Raised on Petitioner's Direct Appeal

On May 1, 2017, Counsel for the Petitioner filed an Appellant Brief and Joint Appendix.

First in the brief Petitioner's Counsel argues that the basis for the appeal was the admission of the testimony of Petitioner's mother regarding the uncharged conduct, and that, the Government moved, in limine, to introduce, among other things, evidence of the Petitioner conduct and actions towards his mother in the period before and after the January 23, 2015, phone call from Petitioner sister as direct evidence. Petitioner opposed the Government's in limine motion, but the District Court, granted that part of the motion regarding evidence of Petitioner conduct before and after the January 23, 2016, phone call from his sister.

Second Petitioner mother introduction and testimony at trial, puts Petitioner on trial for kidnapping her and not solely for the crime charged in the indictment. Testimony was elicited that the mother was held hostage for at least 2 days, and that Petitioner carried a gun and threatened to kill his family and himself. She testified that she feared for her life if she were to leave the Florida home or call the police. None of this conduct was charged in the indictment.

Third Petitioner was acquitted of Count Two which charged the use of a weapon in relation to Count One, the jury concluded that the evidence regarding the weapon was insufficient to sustain a verdict of guilty on that count, their was doubts regarding the credibility of the testimony of the mother regarding the gun.

REASON FOR GRANTING THE PETITION

This Court should grant this petition and review the judgment of the Court of Appeals for the Second Circuit because, Petitioner's mother, step-father, and sister had a motive to lie, and they did not want to sell the Boynton Beach Florida property at Petitioner's request. Petitioner's mother testified and stated, "Okay, Dwight, go ahead, mash up the house. It's your house." Her statement clearly indicates that Petitioner has financial ties to the Florida property. It was a financial disagreement that went wrong.

Also the Second Circuit Court of Appeals decision in relation to the Petitioner's theory-of-defense context, is in conflict with the Supreme Court's decision in *Elonis*, 135 S. Ct. 2001, 192 L. Ed. 2d 1. In *Elonis*, the Supreme Court held that a conviction under the threatening communications statute requires more than proof "that a reasonable person would regard [the] communications as threats." *Id.* at 2012.

In Petitioner's case there was no proof of the threat or any recording to support the proof of guilt, although Petitioner's sister, Anika Mundle claim that she tried to record the communication between her and Petitioner, she called Petitioner on (6) six different occasions but could not obtain a recording her testimony was very speculative with regard to the communication with Petitioner.

The Government presented to the jury an edited copy of the phone records from both Petitioner and his sister as (Exhibit GX 23-C DRAFT as of 03-30-16), and (Exhibit GX 22-C DRAFT as of 03-31-16), [See Appendix C], as proof of the communication between them on January 23, 2015. The edited copy showed that only (3) three attempts or phone calls transpired, but there was an Original AT&T phone record from both Petitioner and his sister that was labeled as (Mobility Usage, 06/08/2015, DM_000571)

and (Mobility Usage , 01/27/2016 page 13 of 127), [See Appendix D], that was not presented to the jury because it show that Petitioner sister actually call him (6) six times and it clearly shows that she was menacing and provoking the situation even after Petitioner rejected that phone calls on numerous occasion, the phone calls was very short and none of them were longer than a (1:12) one minute and twelve seconds, this proves that their was not enough time for Petitioner to make a treat or even acknowledge that a treat was made because his sister was doing most of the talking and cursing. And again, there was no recording or any proof that a treat was made, only Petitioner's sister testimony which was highly speculative.

The Government clearly didn't want the jury to be aware of these phone records, for that reason they presented their edited version of the phone records which seriously affects the fairness and integrity, of Petitioner judicial proceedings.

Furthermore, the conduct towards Petitioner mother was not direct proof of evidence to the threatening communication with him and his sister, the Court in the United States v. Carboni, 204 F.3d 39, 44 (2d Cir. 2000), states that such evidence would not be subjected to Rule 404(b)'s strictures "If it arose out of the same transaction or series of transaction, if it is inextricably intertwined with the evidence regarding the change offence, or if it is necessary to complete the story of the crime on trial." However, the Court in Carboni also notes that, while evidence of uncharged criminal activity is not considered other crimes evidence under Fed.R.Evid. 404(b), "We follow an inclusionary rule, allowing the admission of such evidence for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the

probative-prejudice balancing test of Rule 403 of the Federal rules of Evidence.” United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994).

In comparison, it can be said that seemingly the District Court erred to have admitted at trial the evidence of uncharged conduct concerning Petitioner’s prior actions regarding his mother. Petitioner mother testimony regarding Petitioner conduct prior to the phone call with his sister should not have been admitted, the conduct was not inextricably intertwined in the evidence regarding the phone call with his sister. At trial, the sister testified as to the nature of the threat while she was speaking to her mother on the phone, she heard Petitioner yelling in the background and view the statements of Petitioner as a threat. Therefore, Petitioner mother testimony was not so “inextricably intertwined” as to be admissible in the Government’s case in chief.

Additionally, Petitioner’s mother testimony was presented as if he had kidnapped her and held her hostage for at least (2) two days. Petitioner’s mother testimony overwhelmed and essentially influences the jury verdict of guilt on Count One of the indictment. It is clear that jury did not believe a gun was present at any time during or after the phone call with his sister to convict on Count Two of the indictment.

Thus it is clear that the testimony of Petitioner’s mother put him on trial for kidnapping and out-way the burden of the jury in making a decision on Count One. The evidence of guilt as to Count One is legally insufficient under Rule 29, and not supported by the trial record. The Government failed to prove beyond a reasonable doubt that the Petitioner made a threat or even actually intended a true threat in the phone call with his sister. The Government possession of a gun was the underpinning of its proof that the defendant intended his threat to be real and the victim’s belief that the threat was real.

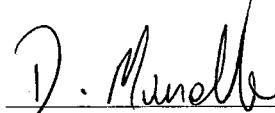
The evidence of Petitioner acquittal on Count Two, the Government failed to establish, beyond a reasonable doubt that the Petitioner possessed a gun in relation to the threatening communication. Consequently, the testimony of the Petitioner's mother with regard to seeing what may have appeared to be a gun was insufficient to support a conviction on Count One.

CONCLUSION

For the above and foregoing reasons, Petitioner requests the issuance of a writ of certiorari for the United States Court of Appeals for the Second Circuit decision be granted.

Dated this 11th day of August 2018;

Respectfully submitted,



Dwight George Mundle
Pike County Correctional Facility
175 Pike County Boulevard
Lords Valley, PA 18428

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Dwight George Mundle

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
(No. 16-2604-CR)

PETITION APPENDIX

Dwight Mundle (Pro-se Petitioner)
OCA I.D. #: 1702001
Pike County Correctional Facility
175 Pike County Boulevard
Lords Valley, PA 18428

Table of Contents

| | | Page |
|------------|--|-------------|
| APPENDIX A | Decision of the Court of Appeals For the Second Circuit | App.1 |
| APPENDIX B | Copy of Superseding Indictment | App.6 |
| APPENDIX C | Copy of the Phone Records (Trial Exhibit GX 22-C, GX 23-C) | App.9 |
| APPENDIX D | Copy of Original AT&T Phone Records (Mobility Usage, 06/08/2015, DM_000571 (Mobility Usage, 01/27/2016 page 13 of 127) | App.11 |