NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

MARK HILLSTROM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL CARUSO
Federal Public Defender
Gail M. Stage
Assistant Federal Public Defender
Counsel for Petitioner
1 East Broward Boulevard, Suite 1100
Fort Lauderdale, Florida 33301-1100
Telephone No. (954) 356-7436

QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's holding in *Elonis v. United States,* 135 S. Ct. 2001 (2015), that, to obtain a conviction under 18 U.S.C. § 875(c), the government must prove that a defendant knowingly intends his communications to be a threat, can it be harmless error if the defendant's subjective mental state was never an element presented to a grand jury or pled by the government in an indictment?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

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Mark Hillstrom respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-10079 in that court on January 17, 2019, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on January 17, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating a federal criminal law. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law[.]

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation [against him.]

18 U.S.C. § 875(c) provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On January 21, 2014, a single count indictment charging Mark Hillstrom with knowingly and intentionally transmitting in interstate commerce a communication over the internet containing a threat to injure the person of another, in violation of 18 U.S.C. § 875(c), was returned by a grand jury.

The single-count indictment stated in its entirety:

> On or about November 27, 2013, in Palm Beach County, in the Southern District of Florida and elsewhere, the defendant
>
> **MARK RICHARD HILLSTROM**
>
> did knowingly and intentionally transmit in interstate commerce a communication over the internet, which communication contained a threat to injure the person of another, specifically M.S., in violation of Title 18, United States Code, Section 875(c).

On March 7, 2014, Mr. Hillstrom pled guilty to the indictment. He entered into a plea agreement with the government. Mr. Hillstrom also signed a Factual Proffer drafted by the government. At the change of plea hearing, the proffer was not read into the record, but the parties agreed it was accurate and satisfied all of the required elements of the offense known to the parties at that time. The proffer set forth the following facts:

On November 27, 2013 at approximately 9:52 a.m., on JAABlog, a blog devoted to coverage of the Broward County, Florida courts and judiciary, HILLSTROM posted the following entry:

> Rouge asa will die wrote: by the end of this year a rouque asa will be executed for his abuse of prosecutorial power that hurt my kids and ruined my life. His kids will be spared but he has too much power to the left to his sma minded sick decptions to get convictions and further his career. He will be accompanied by current and former judges who abused their judicial power to destroy good lives and decent people. [M.S.] goes first.
>
> HILLSTROM posted the entry on the internet blog using a computer. HILLSTROM was in Palm Beach County, Florida at the time he made the post. JAABlog's website is hosted by Go Daddy. Go Daddy's computer servers are located in Arizona. As a result, the posting/message was sent in interstate commerce.
>
> HILLSTROM knowingly posted the threat, which was a true threat to injur M.S., after years of disagreement with the Broward State Attorney's office, of which M.S. is the head.

(Incorrect spellings in original).

On May 15, 2014, Mr. Hillstrom was sentenced to ten (10) months imprisonment to be followed by three years of supervised release. After his release from prison, Mr. Hillstrom was placed on supervised release, which has now been terminated.

On June 1, 2015, this Court reversed the defendant's conviction in *Elonis v. United States*, 135 S. Ct. 2001 (2015). The defendant had been charged with communicating a threat over interstate wire facilities in violation of 18 U.S.C. § 875(c). *Id.* at 2007. This Court held that the government must prove a defendant had the requisite *mens rea* in that the defendant intended for the communication to be a threat. *Id.* at 2012. Relying upon the *Elonis* decision, Mr. Hillstrom filed a timely motion, pursuant to 28 U.S.C. § 2255, arguing that *Elonis* should be applied retroactively and that his conviction should be vacated. On

September 29, 2017, a Magistrate Judge entered a Report agreeing that *Elonis* applied retroactively to Mr. Hillstrom's case, but recommending that Mr. Hillstrom's motion be denied because the record below established that Mr. Hillstrom admitted to facts demonstrating he knowingly transmitted a threatening communication and specifically intended for such communication to be a threat as is now, after *Elonis*, required under § 875(c).

Mr. Hillstrom filed objections to the Report arguing that the Magistrate Judge erroneously concluded Mr. Hillstrom was not entitled to relief because, according to the record in the original criminal case, Mr. Hillstrom knew at the time of his guilty plea that the elements of the crime charged included his specific intent to communicate a threat.

The district court overruled Mr. Hillstrom's objections and adopted the legal reasoning in the Report. The district court also denied Mr. Hillstrom's request for a certificate of appealability. *Id.*

Mr. Hillstrom filed a Notice of Appeal on January 5, 2018, and he filed a Motion for a Certificate of Appealability in the Eleventh Circuit Court of Appeals, on January 26, 2018, seeking a Certificate of Appealability on three issues. On May 16, 2018, a judge from the Eleventh Circuit entered an Order granting the Motion for a Certificate of Appealability only as to the first issue--whether, under 28 U.S.C. § 2255, Mr. Hillstrom is entitled to vacate his guilty plea for a violation 18 U.S.C. § 875(c), pursuant to *Elonis v. United States,* 135 S. Ct. 2001 (2015).

After the parties briefed the issue, the Eleventh Circuit Court of Appeals issued an opinion and found that any error arising out of the indictment, which omitted the required *mens rea* element for a violation of 18 U.S.C. § 875(c), was harmless. *Hillstrom v. United States,* 2019 WL 245475 (11th Cir. Jan 17, 2019). For purposes of the decision, the Eleventh Circuit assumed that *Elonis* applied retroactively to Mr. Hillstrom's conviction because "it appears to be the kind of substantive rule that 'narrow[s] the scope of a criminal statute by interpreting its terms.' [Citations omitted]." *Id.* at *2. The Eleventh Circuit also assumed that there was actually an *Elonis* problem with Mr. Hillstrom's indictment. *Id.*

Despite the above assumptions, the Eleventh Circuit found that any error was harmless in light of the conduct Mr. Hillstrom admitted in his factual proffer. "That statement, signed and sworn, averred that Hillstrom 'knowingly posted the threat.'" *Id.* at *3. The court found that the proffer supplied the basis for inferring the required scienter because Mr. Hillstrom "freely and voluntarily admitted all of the elements of the offense" and so any error was "therefore harmless." "To put it another way, Hillstrom has not established that he suffered any actual prejudice from the error, nor has he argued that he is actually innocent of the charge." *Id.*

REASON FOR GRANTING THE WRIT

Certiorari is Warranted to Review Whether the Material Change in Proof Required After *Elonis* to Establish a Defendant's *Mens Rea* Renders Harmless Error Review Unconstitutional.

The United States Constitution entitles a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (citation omitted). As part of this protection, the Due Process Clause requires that every element of the offense be charged. *United States v. Gaudin*, 515 U.S. 506, 524 (1995) (J. Rehnquist, concurring). An indictment or information is sufficient if it (1) contains the elements of the offense charged and fairly informs the defendant of the charge and (2) enables the defendant to plead in a manner to bar future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117 (1974). A defective information may deprive a defendant of constitutionally required notice. *United States v. Odom*, 252 F.3d 1289, 1298 (11th Cir. 2001) (Due Process requires an indictment to provide notice sufficient to allow the defendant to prepare an adequate defense).

This Court has recognized that, although "most constitutional errors can be harmless," certain violations "defy harmless error review." *Neder v. United States*, 527 U.S. 1, 9 (1999). "[T]hese errors deprive defendants of 'basic protections' and no criminal punishment may be regarded as fundamentally fair." *Neder,* 527 U.S.

9-10. A criminal proceeding cannot reliably serve as a vehicle for determining guilt or innocence where the defendant lacks notice or the opportunity to defend the relevant charges because it is a "basic principle" of due process "that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him." *Russell v. United States*, 369 U.S. 749, 766 (1962). "Of like relevance is the guaranty of the Sixth Amendment that 'In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.'" *Id.* at 761 (citation omitted).

18 U.S.C. § 875(c) prohibits an individual from transmitting in interstate commerce any communication containing a threat to injure the person of another. In *Elonis*, this Court made it clear that § 875(c) requires proof of the defendant's mental state. Now, to obtain a valid conviction under § 875(c), the government is required to allege and prove not only that Mr. Hillstrom intended to send a communication, but also that he had a subjective intent to threaten.

The indictment that Mr. Hillstrom pled guilty to tracked the language of § 875(c), but failed to include the required element of his subjective intent to threaten. The indictment instead relied upon the "reasonable person" standard rejected in *Elonis*. Prior to the *Elonis* decision, in the Eleventh Circuit Court of Appeals, the government only had to prove that a defendant knowingly transmitted a communication—not that the defendant had to have the subjective specific intent that the communication would be a threat. Prior to 2016, the Eleventh Circuit Court of Appeals' standard jury instruction set forth what the government had to

prove beyond a reasonable doubt in order to obtain a conviction under § 875(c):

> The Defendant can be found guilty of this crime only if the Government proves beyond a reasonable doubt that the Defendant knowingly sent a message in [interstate] [foreign] commerce containing a true threat [to kidnap any person] [to injure the person of another].
>
> * * *
>
> A "true threat" is a serious threat—not idle talk, a careless remark, or something said jokingly—that is made under circumstances that would lead a reasonable person to believe that the Defendant intended to [kidnap] [injure] another person.
>
> The heart of the crime is intentionally sending a true threat in interstate or foreign commerce. The Government doesn't have to prove that the Defendant intended to carry out the threat.

Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2010, 30.3. Since *Elonis* was issued, the Pattern Jury Instruction for a violation of § 875(c) has been changed to reflect the fact that the government must ***now prove*** that the defendant sent the message with the intent to communicate a true threat or with the knowledge that it would be viewed as a true threat. Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2016, O30.3. So it is clear that an indictment which fails to track the elements of § 875(c), including an allegation that the defendant had the necessary intent to threaten, does not state an offense. *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir. 1976) ("We conclude that because the necessary allegation of criminal intent is missing from the complaint, the complaint does not properly allege an offense against the United States.").

The Eleventh Circuit, in a case directly on point, vacated a conviction under § 875(c) after *Elonis* because the indictment lacked the *mens rea* element and did not

comport with the Fifth Amendment grand jury requirement. *United States v. Martinez*, 800 F.3d 1293, 1294 (11th Cir. 2015) (*Martinez II).* The indictment in *Martinez* was almost identical to the indictment in this case and tracked the language of the statute but failed to include the necessary *mens rea* required of the defendant. In an earlier opinion, the Eleventh Circuit rejected Martinez's argument that the government had to prove she had the necessary knowledge her communications were a threat. *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013)(*Martinez I*). Relying, in part, on the Third Circuit's original *Elonis* opinion, the *Martinez I* panel found:

> [T]he Third Circuit clearly and precisely explained why [the *Virginia v. Black*, 538 U.S. 343 (2003)] decision did not alter the well-established understanding of the true threats doctrine. *See* [*United States v.*] *Elonis*, 730 F.3d [321], 327-32 [(3rd Cir. 2013]. Particularly noteworthy is the Third Circuit's insight that '[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening.'" (Citing *Elonis*).

Id. at 987-88. The defendant, in *Martinez I*, filed a Petition for a Writ of Certiorari in this Court which granted the petition and remanded the case back to the Eleventh Circuit based on the *Elonis* opinion. *Martinez v. United States*, 135 S. Ct. 2798 (2015). In *Elonis*, this Court expressly rejected the Third Circuit's reasoning, and, therefore, the reasoning in *Martinez I*. This Court refused to limit the definition of true threats and concluded that a defendant could not be convicted based on the "reasonable person" standard. *Elonis*, 135 S. Ct. at 2011. "Such a 'reasonable

person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct—*awareness* of some wrongdoing.'" (Citations omitted). *Id.* (Emphasis in original).

After applying the principles set forth in the *Elonis* opinion to the facts of the *Martinez II* case, the Eleventh Circuit held that the requirement that an indictment set forth the essential elements of the offense serves the purposes of (1) informing the defendant of the nature and cause of the accusation, as required by the Sixth Amendment; and (2) ensuring a grand jury found probable cause to support all the necessary elements of the crime, as required by the Fifth Amendment. *Id.* at 1295, *citing United States v. Fern*, 155 F.3d 1318, 1324-25 (11th Cir. 1998).

The same is true for this case. There is no doubt that Mr. Hillstrom was not adequately apprised of the nature and cause of the government's accusations against him and it is undisputed a grand jury was never asked to find probable cause to the support all of the necessary elements of the crime, as guaranteed by the Fifth Amendment. If he had been adequately informed, Mr. Hillstrom would have, in all likelihood, defended himself differently in this case. Contrary to the Eleventh Circuit's opinion, Mr. Hillstrom did argue that he was actually innocent of intending his communication to be a threat. He undisputedly suffered "actual prejudice," contrary to the Eleventh Circuit's finding, because he is now a convicted felon and is deprived of important rights and privileges.

The errors in the Eleventh Circuit's findings are exactly the reason why a harmless error review should not have been undertaken in a case such as this where

Mr. Hillstrom has been deprived of important constitutional rights under the Fifth and Sixth Amendments. Mr. Hillstrom could not have "admitted" to sufficient facts establishing his mental state when he was completely unaware of the requirement to do so. Unlike the *Elonis* case, this case did not go to a jury and there were not sufficient facts from which the district court could infer Mr. Hillstrom's mental state. The plea colloquy cannot serve as a reliable vehicle for determining Mr. Hillstrom's guilt or innocence when no proof of his mental state was pled or established through the proffer. Mr. Hillstrom merely admitted to knowingly transmitting a threat over the internet—with no proof of whether he intended the communication to be a threat.

Furthermore, a review of the record below does not establish that Mr. Hillstrom had the intent needed to violate 18 U.S.C. § 875(c). The only facts relied upon by the government and the district court were found in the Factual Proffer set forth above. There are no additional facts in the record which could support a finding that Mr. Hillstrom had the necessary specific intent needed to establish beyond a reasonable doubt that he violated § 875(c). The only facts relied upon by the government to prove each element of the crime charged beyond a reasonable doubt are found in the Factual Proffer which says ***nothing*** about Mr. Hillstrom's intent. At the change of plea hearing, Mr. Hillstrom merely affirmed that he read and understood the plea agreement and that he read the indictment, which, unbeknownst to him, his attorney, the government and the district court, did not, at the time, allege a crime. He could not have "admitted to facts demonstrating his

specific intent to communicate a threat" when neither he, nor the government, his attorney or the district court judge knew that he had to admit to such facts. The evidence of his intent was not submitted to the grand jury or included in the indictment. He could not, therefore, somehow admit to having the necessary specific intent when the government failed to establish beyond a reasonable doubt, through the proffer, the facts to support his specific intent.

If Mr. Hillstrom had been properly charged, he might have mounted a defense against the specific intent element which was not presented to the grand jury or set forth in the indictment. If the indictment had included the necessary intent element, it is certain the Factual Proffer would have been worded differently to properly establish the element beyond a reasonable doubt to assure that Mr. Hillstrom pled guilty to ALL of the elements of a violation of 18 U.S.C. § 875(c).

Merely inferring an element of a crime from a one-paragraph statement of facts, as the Eleventh Circuit did, is not the standard necessary to support a criminal conviction. The government must prove each element beyond a reasonable doubt and, in this case, the evidence fell far short of that rigorous standard. Obviously, the parties could not have anticipated the Supreme Court's ruling in *Elonis* at the time of the guilty plea and the law in the Eleventh Circuit Court of Appeals specifically rejected the argument that the government must allege and prove that Mr. Hillstrom had to have the specific intent to communicate a threat. *See Martinez I.*

Had Mr. Hillstrom been properly charged in a post-*Elonis* legal environment, he would have defended against the allegation that he had the required mental state. Harmless error review was improper because this case involves the kind of constitutional error that defies such review. *Neder*, 527 U.S. at 9. "[T]hese errors deprive defendants of 'basic protections' and no criminal punishment may be regarded as fundamentally fair." *Neder*, 527 U.S. 9-10. This Court should accept certiorari in this case.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

MICHAEL CARUSO
FEDERAL PUBLIC DEFENDER

By: Gail M. Stage

Gail M. Stage
Assistant Federal Public Defender
Counsel for Petitioner

Fort Lauderdale, Florida
April 23, 2019