No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

Joy McShan Edwards, *Petitioner*,

v.

United States of America, *Respondent.*

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

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 20-3767

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 10, 2020
DEBORAH S. HUNT, Clerk

JOY MCSHAN EDWARDS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

Before: SUHRHEINRICH, Circuit Judge.

Joy McShan Edwards, a federal supervisee represented by counsel, appeals the district court's judgment denying her motion to vacate, set aside, or correct her sentence under 28 U.S.C. § 2255. Edwards moves the court for a certificate of appealability ("COA").

A confidential informant made controlled purchases of narcotics from Edwards's two brothers and testified against them in the federal criminal trial that ensued. Her brothers were each convicted of multiple offenses and received lengthy prison sentences. Several months after the conclusion of that trial, Edwards reposted pictures of the confidential informant on her Facebook page and posted or reposted a number of comments in which she and other Facebook users called the informant a "snitch" and a "snitch ass bitch," among other things.

Edwards's Facebook commentary about the informant prompted the government to charge her with one count of retaliating against a witness, in violation of 18 U.S.C. § 1513(e). Section 1513(e) calls for up to ten years of imprisonment for any person who "knowingly, with the intent to retaliate, takes any action harmful to any person . . . for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." Edwards moved to dismiss the indictment, arguing that § 1513(e) violates the First Amendment because it is vague and overboard on its face. In her overbreadth challenge, Edward

argued that § 1513(e) is unconstitutional because it prohibits any kind of speech and conduct about witnesses and informants, including speech that is protected by the First Amendment. The district court concluded that § 1513(e) is neither vague nor overbroad. As to Edwards's facial challenge to the statute, the district court found that § 1513(e) does not violate the First Amendment because it contains a scienter element that "criminalizes speech only upon proof that the defendant intended to retaliate against a witness." *United States v. Edwards*, 291 F. Supp. 3d 828, 832 (S.D. Ohio 2017). The district court therefore denied the motion to dismiss.

The case proceeded to a bench trial, after which the district court entered written findings of fact and conclusions of law convicting Edwards. The district court sentenced Edwards to three months of imprisonment, three months of confinement in a halfway house, three months of home confinement, and three years of supervised release.

In her direct appeal, Edwards's appellate attorney raised the following assignments of error in the table of contents of her brief: (1) the evidence was insufficient for the district court to convict her of violating § 1513(e); (2) the district court erred in denying her motion to dismiss because § 1513(e) is vague and overbroad; and (3) the government selectively prosecuted her. We rejected Edwards's sufficiency, selective-prosecution, and vagueness claims on the merits. But we concluded that Edwards had abandoned her overbreadth claim because she failed to brief that issue. *See United States v. Edwards*, 783 F. App'x 540, 545 n.3 (6th Cir. 2019). We thus affirmed Edwards's conviction.

Edwards then filed a pro se § 2255 motion in the district court, claiming that her appellate attorney performed ineffectively by abandoning her overbreadth challenge to § 1513(e). A magistrate judge issued a report that the recommended that the district court deny this claim. Although the magistrate judge characterized Edwards's overbreadth claim as being "significant and arguable," he found that Edwards's attorney had not performed ineffectively because Edwards had failed to show that this claim was clearly stronger than the claims that her attorney did raise. The magistrate judge also concluded that Edwards was not prejudiced by counsel's omission because she failed to demonstrate that her overbreadth claim had a reasonable probability of success. The district court overruled Edwards's objections to the report and recommendation, concluding that a threat to retaliate is not speech that is protected by the First Amendment and

therefore that her attorney did not perform ineffectively by not raising a meritless overbreadth claim in her appeal. The district court therefore denied Edwards's motion to vacate. The court declined to issue a COA.

Edwards filed a timely appeal of the district court's order and retained new counsel, who filed a COA application on her behalf. Relying principally on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), Edwards contends that speech is protected by the First Amendment regardless of the speaker's intent (i.e., whether or not the speaker intended to retaliate). And she argues that § 1513(e) is overbroad because it criminalizes a substantial amount of truthful and therefore protected speech about cooperating witnesses, which she claims is all that her comments about the informant involved. Edwards concedes, however, that "the statute could be constitutionally applied in the context of unprotected speech, such as incitement, true threats, defamation, or speech integral to criminal conduct." She believes, however, that since we found that the claims that her appellate counsel did raise were meritless, her overbreadth claim, which the district court and the magistrate judge both agreed was "arguable," must have been clearly stronger than the other claims. Despite Edwards's criticism of her appellate counsel, she admits that no court of appeals has considered whether § 1513(e) is unconstitutionally overbroad.

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of [her] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

In order to establish ineffective assistance of counsel, the petitioner must establish both (1) that her trial "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. An attorney's performance is strongly presumed to be effective. *Id.* at 690. To prevail on an ineffective-assistance claim in the appellate context, the petitioner must demonstrate that the

issue omitted by counsel "was clearly stronger than the issues that counsel did present," *Webb v. Mitchell*, 586 F.3d 383, 399 (6th Cir. 2009) (quoting *Smith v. Robbins*, 528 U.S. 259, 288 (2000)), and a reasonable probability that she would have prevailed but for counsel's failure to raise the issue, *Moore v. Mitchell*, 708 F.3d 760, 776 (6th Cir. 2013). Under this standard, reasonable jurists would not debate the district court's resolution of Edward's ineffective-assistance claim.

Proving that § 1513(e) is unconstitutionally overbroad would have been an exceedingly difficult hurdle for Edwards's appellate counsel to clear. Because the overbreadth doctrine is "strong medicine," it is employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Consequently, to prevail on an overbreadth claim, Edwards's counsel would have to have shown that § 1513(e) "reaches a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982). Moreover, a statute's overbreadth must be "judged in relation to [its] plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

But here, Edwards admits that § 1513(a) can be applied legitimately to a number of types of unprotected speech, including true threats, incitements, defamatory statements, and statements integral to criminal conduct. On the other hand, other than her own comments, which she claims were nothing more than truthful statements about the confidential informant, Edwards has not identified any other protected speech that would be criminalized by § 1513(e).[1] And it is not reasonable to believe, for instance, that § 1513(e) criminalizes comments that are generally critical of the government's use of confidential informants or which generally cast doubt on the character and reliability of confidential informants. *See City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will

[1] Moreover, in making this argument, Edwards is really claiming that § 1513(e) is unconstitutional as applied to her. But the district court rejected Edwards's as-applied claim in denying her motion to dismiss the indictment, *see Edwards*, 291 F. Supp. 3d at 832-34, and she did not raise it on direct appeal or in the context of the ineffective-assistance claim in her § 2255 motion. Consequently, Edwards has procedurally defaulted any substantive as-applied claim by not raising it on direct appeal, *see Elzy v. United States*, 205 F.3d 882, 884 (6th Cir. 2000), and she forfeited appellate review of that issue in the context of her ineffective-assistance claim by not raising it in the district court. *See Harris v. Klare*, 902 F.3d 630, 636 (6th Cir. 2018). And in any event, on direct appeal, we concluded that the evidence supported the district court's verdict that Edwards's conduct did not involve protected advocacy about confidential informants. *See Edwards*, 783 F. App'x at 543-44.

significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds."). Additionally, the fact that § 1513(e) is restricted to statements made with intent to retaliate weighs heavily against a conclusion that the statute is overbroad. *See Edwards*, 783 F. App'x at 545 ("[T]he scienter requirements of 'knowingly' and 'with intent to retaliate' dramatically narrow the universe of possible offending activity . . . ."); *Edwards*, 291 F. Supp. 3d at 832. Edwards's suggestion that § 1513(e) is so clearly unconstitutional that her attorney would not have needed any specific cases on point in order to prevail on her overbreadth claim is contradicted by her concession that the statute has constitutional applications to speech. So even at this late date Edwards has not made a substantial case that § 1513(e) is overbroad.

Claiborne Hardware and *Wisconsin Right to Life* do not assist Edwards's overbreadth claim, nor do they support her contention that her retaliatory comments about the confidential informant are protected by the First Amendment.

To be sure, as Edwards notes in her COA application, the Supreme Court stated in *Wisconsin Right to Life* that "a speaker's motivation is entirely irrelevant to the question of constitutional protection." 551 U.S. at 468 (quoting M. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)). But Edwards quotes that statement out of context. *Wisconsin Right to Life* involved an *as-applied* challenge to a federal statute that prohibits corporations from spending money on political advertisements that target a candidate for federal office within thirty days of an election. The issue presented in the case was whether an issue-advocacy advertisement was the functional equivalent of an advertisement that advocated for the election or defeat of candidate for political office and therefore was subject to the statute. The Court rejected an intent-based test for making that determination because such a test "would chill core political speech" and "could lead to the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another." *Id.* So in other words, the Court did not want to criminalize issue-advocacy advertisements (which are core political speech) even if the intent of the speaker in creating the advertisement was to influence an election for political office. The Court did not hold that the

speaker's motivation is irrelevant in all First Amendment cases. *Wisconsin Right to Life* simply does not apply to Edwards's case.

And *Claiborne Hardware* is no help to Edwards either. There, black civil rights activists organized a long-term boycott of white merchants in Claiborne County, Mississippi, in order to protest racial discrimination. The merchants sued the organizers of the boycott to recover money damages for the loss of business they sustained because of the boycott. The Supreme Court held that the protestors' non-violent political activities were protected by the First Amendment even though the secondary effect of the boycott was to cause economic harm to the merchants. *See Claiborne Hardware*, 458 U.S. at 907-15. But as the district court pointed out, *Claiborne Hardware* was not a retaliation case, and, in contrast to Edwards, the protestors in that case were engaged in speech that "has always rested on the highest rung of the hierarchy of First Amendment values." 458 U.S. at 913 (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *cf. United States v. Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985) (holding that threats to retaliate cannot be considered social or political commentary or discourse).

In summary, no reasonable jurist could conclude that an overbreadth challenge to § 1513(e) would have had a reasonable probability of success on appeal. As a result, reasonable jurists would not debate the district court's resolution of Edwards's ineffective-assistance claim.

Accordingly, the court **DENIES** Edwards's COA application.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 2:17-cr-170
Also 2:19-cv-5340

District Judge Edmund A. Sargus, Jr.
- vs - Magistrate Judge Michael R. Merz

JOY McSHAN EDWARDS,

Defendant. :

DECISION AND ORDER

This is an action on a Motion to Vacate under 28 U.S.C. § 2255 brought *pro se* by Defendant Joy McShan Edwards to obtain relief from her conviction in this Court on one count of retaliation against a witness. Magistrate Judge Michael R. Merz, to whom this case was referred, filed a Report and Recommendations recommending that the Motion to Vacate be denied (ECF No. 72). Defendant has now filed Objections to the Report (ECF No. 73).

As required by Fed.R.Civ.P. 72(b), the Court has reviewed *de novo* each portion of the Report to which specific objection has been made and rules on the Objections herein.

As the Report notes, Defendant was indicted on one count of violating 18 U.S.C. § 1513(c) by taking harmful action against a cooperating witness for providing truthful information to a law enforcement officer relating to the commission of a federal criminal offense. (ECF No. 12.) The case was tried to the bench and Defendant was found guilty in a written decision a month after the

trial. *United States v. Edwards,* 2017 U.S. Dist. LEXIS 201968 (S.D. Ohio Dec. 7, 2017)(copy at ECF No. 40)("*Edwards I*"). Defendant appealed, but the Sixth Circuit affirmed. *United States v. Edwards*, 783 Fed. Appx. 540 (6th Cir. Aug. 16, 2019)(unpublished; copy at ECF No. 62)("*Edwards II"*. In her Motion to Vacate, Defendant pleads one claim of ineffective assistance of appellate counsel:

> Appellate Counsel failed to raise a 1st Amendment/overbreadth challenge to the witness retaliation statute under which Defendant was convicted. This issue was amply preserved in the trial court, and was included in the subject headings of the brief; however no argument in the appellate briefs was made in support of the overbreadth challenge that prior trial counsel had made. The Sixth Circuit explicitly noted in its opinion that the appeal failed to brief the 1st Amendment/overbreadth issue. This issue had merit and a reasonable likelihood of modifying the outcome on appeal; thus Defendant was prejudiced by its omission. Ms. Edwards incorporates the argument in support of her 1st Amendment/overbreadth challenge as set forth in Document #10 of this matter.

(Motion, ECF No. 64, PageID 397.

Applying *Strickland v. Washington,* 466 U.S. 668 (1984), in the context of ineffective assistance of appellate counsel claims, the Report concluded that Defendant had not shown this omitted First Amendment/overbreadth claim was stronger than claims actually raised on appeal or that it would have been successful. The Magistrate Judge therefore recommended the Motion to Vacate be denied and that Defendant be denied a certificate of appealability (Report, ECF No. 72, PageID 423-24).

Analysis

In her Objections, Defendant cites a number of federal cases that have considered the statute under which she was convicted. 18 U.S.C. § 1513(c). Most of them were cited to the Court when it considered her motion to dismiss.

After citing those cases, she admits "Because the courts have never substantively considered this issue, there is no controlling case law to cite." (Objections, ECF No. 73, PageID 426. She continues: "However, the plain language of the act so obviously contradicts basic constitutional principles that an appeal would almost certainly succeed. The statute does not require any proof of speech. It does not require proof of a true threat, of defamatory content, or incitement." *Id.*

As the Court construed the statute in denying Ms. Edwards' facial challenge, the Government was required to prove "beyond a reasonable doubt that (1) Defendant knowingly took an action with intent to retaliate against CI 1; (2) Defendant harmed CI 1; and (3) her retaliation was induced by CI 1's testimony against her brothers." *Edwards I* at *7. At trial the Government proved to the Court's satisfaction. a jury having been waived, that Ms. Edwards took several actions by way of posting material on Facebook, that she intended to harm CI 1 in doing so by exposing him to obloquy by disclosing his role as a government witness against her brothers, and that her actions harmed CI 1 in the way that she intended (Decision and Order, ECF No. 40).

The Court agrees with Defendant that 18 U.S.C. § 1513(c) does not require proof of speech, although Ms. Edwards' Facebook posts constitute speech for First Amendment purposes. The Court also agrees the statute does not require proof of a "true threat," "defamatory content or incitement." But those constructions of the statute do not render it unconstitutional. As the Court

has previously noted, the Supreme Court held the burning of a cross with intent to intimidate could be criminalized. *Edwards I* at *4, citing *Virginia v. Black*, 538 U.S. 343, 358, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

Defendant relies on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which held that speech intended to cause economic harm to others by way of an economic boycott to discourage racially discriminatory practices was protected speech. In that case the Supreme Court overturned a judgment of the Supreme Court of Mississippi which held all participants in an economic boycott liable for violent actions taken by some participants. The purpose of the boycotters was not in any way to retaliate against the boycotted merchants for providing assistance to federal law enforcement.

Defendant relies on *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), for the proposition that "under well accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *Id.* at 468. The Court was quoting Martin Redish, Money Talks: Speech, Economic Power, and the Values of Democracy 91 (2001), on the danger of using the ad purchaser's intent to draw a line between protected and unprotected campaign ads under the Bipartisan Campaign Reform Act of 2002. Ultimately the Court found the ads by Wisconsin Right to Life were constitutionally protected and the BCRA as applied to them unconstitutional.

Neither case supports the proposition that Congress may not constitutionally punish persons for retaliating against witnesses in federal criminal prosecutions.

The Supreme Court has held that

> imprecise laws can be attacked on their face under two different doctrines. First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial

> when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

City of Chicago v. Morales, 527 U.S. 421 (1999). Edwards' attack is based on the overbreadth doctrine, but she has not shown that 18 U.S.C. § 1513(c) reaches "a substantial amount of constitutionally protected conduct." In other words she has not shown or even suggested what conduct that was intended to retaliate against a witness and actually had that effect would be constitutionally protected.

Many acts which involve only speech can be criminalized: extortion, bribery, witness intimidation, perjury. The fact that Defendant's acts were speech acts does not bring them within the protection of the First Amendment. To use the most famous example from First Amendment jurisprudence, falsely crying "fire" in a crowded theater, though it involves only speech, is not protected. *Schenck v. United States*, 249 U.S. 47 (1919)(Holmes, J.).

In sum, Defendant has not shown that her omitted issue on appeal – that 18 U.S.C. § 1513(c) is unconstitutionally overbroad – has any merit. Therefore it was not ineffective assistance of appellate counsel to fail to raise that claim.

Defendant also objects to denial of a certificate of appealability. However, while the question of whether the statute is constitutional under the First Amendment is itself arguable, the Magistrate Judge's conclusion that it would not have been any stronger than the issues actually raised on appeal is not debatable among reasonable jurists – Edwards cites no jurist who holds the

contrary view. She has therefore not met her burden of proving entitlement to a certificate of appealability.

Conclusion

In accordance with the foregoing analysis, Magistrate Judge's Report is ADOPTED and Defendant's Motion to Vacate is DENIED. Pursuant to Fed.R.Civ.P. 58, the Clerk shall enter a separate judgment to that effect.

Because reasonable jurists would not disagree with this conclusion, Defendant is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

May 13, 2020

s/Edmund A. Sargus, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

UNITED STATES OF AMERICA,

Plaintiff, : Case No. 2:17-cr-170
Also 2:19-cv-5340

District Judge Edmund A. Sargus, Jr.
- vs - Magistrate Judge Michael R. Merz

JOY McSHAN EDWARDS,

Defendant. :

REPORT AND RECOMMENDATIONS

This is an action under 28 U.S.C. § 2255 brought *pro se* by Defendant Joy McShan Edwards to obtain relief from her conviction in this Court on one count of retaliation against a witness. The matter is ripe for decision on the Motion to Vacate (ECF No. 67), the Government's Response (ECF No. 69) and Defendant's Reply (ECF No. 70).

Litigation History

Defendant was indicted August 3, 2017, and charged with one count of violating 18 U.S.C. § 1513(c) by taking harmful action against a cooperating witness for providing truthful information to a law enforcement officer relating to the commission of a federal criminal offense. (ECF No. 12.) Defendant waived her right to a jury trial (ECF No. 35) and the case was tried to the bench

on December 11, 2017 (Minute Entry, ECF No. 37). On January 17, 2018, the Court found Defendant guilty (Opinion and Order, ECF No. 40). After considering a presentence investigation report, the Court sentenced Defendant on May 25, 2018 (ECF No. 48). Defendant appealed to the Sixth Circuit which affirmed her conviction. *United States v. Edwards*, 783 Fed. Appx. 540 (6th Cir. Aug. 16, 2019)(unpublished; copy at ECF No. 62). Although she sought bail pending a petition for certiorari (ECF No. 64), the Court has received no notice that such a petition was filed and the time for doing so has now expired. Defendant filed her Motion to Vacate December 4, 2019, pleading one ground for relief, to wit, that she received ineffective assistance of appellate counsel in that

> Appellate Counsel failed to raise a 1st Amendment/overbreadth challenge to the witness retaliation statute under which Defendant was convicted. This issue was amply preserved in the trial court, and was included in the subject headings of the brief; however no argument in the appellate briefs was made in support of the overbreadth challenge that prior trial counsel had made. The Sixth Circuit explicitly noted in its opinion that the appeal failed to brief the 1st Amendment/overbreadth issue. This issue had merit and a reasonable likelihood of modifying the outcome on appeal; thus Defendant was prejudiced by its omission. Ms. Edwards incorporates the argument in support of her 1st Amendment/overbreadth challenge as set forth in Document #10 of this matter.

(Motion, ECF No. 64, PageID 397.

Analysis

In her Motion, Defendant relies on the argument made on her behalf by trial counsel to show that the First Amendment/overbreadth argument had merit. That argument was essentially

that he allegedly offending posts on Facebook were either truthful or expressions of her opinion of the cooperating witness, D.B. (ECF No. 10; incorporated by reference in Motion to Dismiss the Indictment, ECF No. 30). The Court read Defendant's Motion as raising both a facial and an as-applied challenge to the statute (Opinion and Order, ECF No. 36, PageID 157). It found the statute was not facially overbroad (*Id.* at PageID 160), but deferred ruling on the as-applied challenge until factual development of context at trial. *Id.* at PageID 163. Defendant renewed her First Amendment argument in her motion for judgment of acquittal at trial and the Court denied it. *Id.* at PageID 174, relying on *Virginia v. Black*, 538 U.S. 343 (2003).

Defendant's claim in her Motion to Vacate is that this issue should have been pursued on appeal and indeed that it was ineffective assistance of appellate counsel to fail to do so. She cites no case law in her Motion to show that the claim would have been successful if it had been raised. The Government's Answer notes this omission and cites controlling Supreme Court precedent to the effect that effective appellate counsel need not raise every possible arguable claim (ECF No. 69, PageID 411, citing *Jones v. Barnes*, 463 U.S. 745 (1983), and *Coleman v. Mitchell*, 268 F.3d 417, 430-31 (6th Cir. 2000).

In her Reply, Edwards notes that the Sixth Circuit, in the context of denying her void-for-vagueness claim, found that the language of the statute "potentially sweeping." *Edwards*, 783 Fed. Appx. at 545. However the court also wrote "Edwards abandoned her First Amendment overbreadth claim on appeal. Nothing in this opinion should be construed to comment on whether § 1513(e) is overbroad or violative of the First Amendment. That issue was neither brought nor briefed before us." *Id.* at note 3. But the note explicitly disclaims any comment on a First Amendment issue and certainly does not suggest such a claim would have been successful. Edwards argues the issues actually briefed were not very strong because they were unavailing, but that does not imply the First Amendment overbreadth claim would have been stronger.

Edwards disagrees with the Government's reliance on *McFarland v. Yukins*, 356 F. 3d 688, 699 (6th Cir.2004), for the proposition that there must be clear existing authority in support of an omitted claim of error (Reply, ECF No. 70, PageID 415). *McFarland* does hold that failure to raise an issue can amount to ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal. *McFarland, citing Greer v. Mitchell,* 264 F.3d 663, 676 (6th Cir. 2001); *Joshua v. Dewitt,* 341 F.3d 430, 441 (6th Cir. 2003); *Lucas v. O'Dea*, 179 F.3d 412, 419 (6th Cir. 1999); and *Mapes v. Coyle,* 171 F.3d 408, 427-29 (6th Cir. 1999). Counsel can be ineffective by failing to raise a "dead-bang winner," defined as an issue which is obvious from the trial record and which would have resulted in a reversal on appeal, even if counsel raised other strong but unsuccessful claims. *Mapes, supra, citing Banks v. Reynolds*, 54 F. 3d 1508, 1515 n. 13 (10th Cir. 1995); see also *Page v. United States*, 884 F. 2d 300, 302 (7th Cir. 1989).

"In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions." *McMeans v. Brigano*, 228 F.3d 674(6th Cir. 2000), citing *Strickland v. Washington*, 466 U.S. 668 (1984), and *Rust v. Zent*, 17 F.3d 155, 161-62 (6th Cir. 1994). "Counsel's performance is strongly presumed to be effective." *McFarland, quoting Scott v. Mitchell,* 209 F.3d 854, 880 (6th Cir. 2000)(*citing Strickland*). "To prevail on a claim of ineffective assistance of appellate counsel, a petitioner must show that appellate counsel ignored issues [which] are clearly stronger than those presented." *Webb v. Mitchell,* 586 F.3d 383, 399 (6th Cir. 2009); *Smith v. Robbins*, 528 U.S. 259, 288 (2000), *quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986).

But Edwards cites no case authority from the Sixth Circuit or any other court to show that her overbreadth claim was stronger than the claims actually raised or that are contrary to the authority this Court relied on in denying her motions to dismiss and for acquittal. To put it a different way, even if it was deficient performance to fail to raise and brief the overbreadth issue, Edwards has not shown prejudice because she has not shown a reasonable probability that the outcome would have been different. Yes, as this Court and the Sixth Circuit acknowledged, the issue is significant and arguable, but that does not mean it would probably have succeeded.

An appellate attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones* at 751-752 (1983)("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Id.* Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003). *Williams v. Bagley*, 380 F.3d 932, 971 (6th Cir. 2004), *cert. denied*, 544 U.S. 1003 (2005); see *Smith v. Murray*, 477 U.S. 527 (1986). "Only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of [appellate] counsel be overcome." *Dufresne v. Palmer*, 876 F.3d 248 (6th Cir. 2017), quoting *Fautenberry v. Mitchell*, 515 F.3d 614, 642 (6th Cir. 2008).

Edwards has simply not shown that the omitted issue is stronger than the issues raised and argued.

Conclusion

Based on the foregoing analysis, it is respectfully recommended that the Motion to Vacate be denied. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

April 4, 2020.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

NOT RECOMMENDED FOR PUBLICATION
File Name: 19a0428n.06

No. 18-3541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 16, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE
v.	)	UNITED STATES DISTRICT
	)	COURT FOR THE
JOY EDWARDS,	)	SOUTHERN DISTRICT OF
	)	OHIO
Defendant-Appellant.	)	

BEFORE: BATCHELDER, ROGERS, and THAPAR, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Joy Edwards made numerous derogatory posts on Facebook about a confidential informant who testified against her brothers during their criminal trial. The Facebook posts revealed the informant's identity and called him—among other things—a "snitch." Edwards was indicted on a single count of retaliating against a witness in violation of 18 U.S.C § 1513(e). At a bench trial, the district court found that the informant suffered harm as a result of these Facebook posts and that the posts were intended to retaliate against the informant. Edwards was convicted and sentenced to short terms of prison and lesser forms of confinement. Edwards appeals. We affirm.

I.

In 2015, D.B. agreed to work with law enforcement as a confidential informant against two brothers in the town of Steubenville, Ohio. These two brothers, Fred and David McShan, were suspected of running a drug-trafficking operation. D.B. wore audio and video surveillance

equipment while performing controlled buys from the McShan brothers. As a result of D.B.'s assistance, law enforcement indicted the McShan brothers on multiple charges, including conspiracy to possess with intent to distribute heroin. D.B. also testified at the McShan brothers' trial.

The trial took place in Columbus, Ohio, 150 miles from Steubenville. D.B. testified in an open, public courtroom. A number of Steubenville residents attended the trial. During the trial, United States Marshals had to remove several of the McShan brothers' relatives and friends from the courtroom for recording witness testimony and taking pictures of witnesses, including D.B., on the stand. A jury found both brothers guilty and the district court sentenced Fred to 288 months in prison and David to 74 months in prison.

Several months after the trial, Steubenville residents began posting on the social-media website Facebook pictures of D.B testifying at the trial. Among the people to do so was Joy Edwards, a sister of the McShan brothers. Over the course of several days, some of her online activity included:

- Re-posting another user's photo of D.B. on the witness stand and calling him a "snitch" in the comments section
- Commenting on her own post saying "f*** him," "Look at that bitch ass snitch lips! They are crack up and ashey white from running it so much! His bitch ass needs some WD40!"
- Re-posting another user's doctored photo of D.B. holding a t-shirt with a police badge on it
- Re-posting another user's photo of D.B. with the caption "stop snitching" over it, to which Edwards added, "Snitch ass bitch"
- Commenting on her own post in response to another user's question about the identity of D.B., saying, "This guy is snitching! He snitched on my brothers! And lied about everything!"
- Re-posting another user's photo of D.B. with the caption "Snitching like a bitch"
- Re-posting another user's picture featuring hands in police handcuffs with the caption "Man up . . . Shut your mouth. Take the charge and don't snitch."
- "Liked" numerous other users' posts of similar material

Edwards did not capture any photos of D.B. at the trial, nor did she create any of the images herself. She primarily re-posted others' images and added her own captions. Her Facebook page was set to "Public," meaning that any one of her more than 600 Facebook friends could share her posts and anyone on Facebook could view them. These Facebook posts by Edwards and others revealed and broadcast D.B.'s name, nickname, location, family members, and his cooperation with law enforcement—in addition to generating numerous other derogatory comments by other persons in the Steubenville area.

After the nearly week-long flurry of Facebook posts regarding D.B., the government indicted Edwards on one count of retaliating against a witness in violation of 18 U.S.C. § 1513(e). The government did not indict any other persons. Edwards moved to dismiss the indictment, arguing that § 1513(e) violates the First Amendment, is unconstitutionally vague, and is unconstitutionally overbroad. The district court denied the motion to dismiss, holding that § 1513(e) is consistent with the Supreme Court's ruling in *Virginia v. Black*, 538 U.S. 343 (2003), because it requires as an element of the crime "proof that the defendant intended to retaliate." Summarizing the order, the district court said, "[i]t is the scienter requirement of the statute that renders it constitutional."

Edwards waived her right to a trial by a jury. At the bench trial, the government called three witnesses. U.S. Marshal Denzler testified about the process of investigating Edwards' Facebook posts. DEA Special Agent Heufelder testified that law enforcement considers the label "snitch" to be a threat to its informants. D.B. testified about how his life changed after the Facebook posts, including his increased difficulty in seeing his children, decreased employment opportunities in the area, and his fear for his safety and for the safety of his family. At the close of the government's arguments, Edwards did not present a defense, and instead orally moved for

judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. The district court denied the motion and found Edwards guilty under § 1513(e), sentencing her to three months in prison, followed by three months in a halfway house, three months of home detention, and three years on supervised release.

On appeal, Edwards makes three claims challenging her conviction. Edwards argues that, (1) there was insufficient evidence to support her conviction; (2) § 1513(e) is unconstitutionally vague; (3) she was selectively prosecuted by the government.

II.

A.

First, Edwards argues that there was insufficient evidence for her conviction and therefore the district court erred in denying her Rule 29 motion. "Although we review the district court's denial of [a motion for judgment of acquittal] de novo, we must affirm its decision if the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt." *United States v. Canan*, 48 F.3d 954, 962 (6th Cir. 1995). Section 1513(e) of the witness retaliation statute states:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 1513(e). Edwards concedes that she knowingly took an action and that D.B. has suffered harm. However, Edwards complains that there was insufficient evidence to find beyond a reasonable doubt that (a) she took the action with intent to retaliate, and that (b) her actions were the cause of D.B.'s harm.

Intent.[1] Intent may, and generally must, be proven with circumstantial evidence. *United States v. Ross*, 502 F.3d 521, 530 (6th Cir. 2007). There is no question that Edwards's posts were in response to D.B.'s testimony. She repeatedly referred to D.B. as a "snitch" and a "rat." When asked in the comments section by a friend who D.B. was,[2] Edwards shot back that he "snitched on [her] brothers" and that she thought he lied about them. She also posted that "His bitch ass needs some WD40!"

The district court found credible the government witness's testimony about the increased risk of harm associated with the label "snitch." The trier of fact "is free to infer the intent to retaliate from the natural consequences likely to flow from the defendant's actions." *United States v. Stoker*, 706 F.3d 643, 646 (5th Cir. 2013). Given the context of the Facebook posts, particularly the negative comments about D.B. that were generated by the posts, a rational trier of fact could easily conclude beyond a reasonable doubt that someone who continued to engage in that activity intended the foreseeable negative consequences. Indeed, the district court found that "there is no competing or other purpose for which Defendant's postings were made, other than to retaliate."

Edwards counters with three arguments. First, Edwards draws attention to the statute's lack of definition for "retaliate." But "when a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). Second, Edwards complains everything she communicated online was both accurate and already public knowledge. Again, this has nothing to do with whether Edwards intended to retaliate against D.B by disseminating allegedly true and accurate information. Third, Edwards points out that she did not create any of the content she shared. However, Edwards was convicted

[1] The government argues that the issue of intent was forfeited because it was not included with specificity in the Rule 29 motion at trial. While that appears to be true, the record also shows that the government conceded that the intent element was "what the whole case is about" when discussing the Rule 29 motion orally with the district court judge.

[2] In context, the commenter was basically asking Edwards, "Why are you posting this?"

for using the content to spread awareness of D.B.'s performance, not for creating the content at hand—which is, again, irrelevant to the question of her intent in sharing the content. Fourth, Edwards claims that "she never advocated any retaliatory conduct (physical violence or otherwise) against [D.B.]." However, § 1513(e) does not require that a defendant expressly advocate retaliation. It rather applies to "[w]hoever knowingly, with intent to retaliate, makes any action harmful" to a government witness. 18 § U.S.C. § 1513(e). There is evidence upon which a rational trier-of-fact could find retaliatory intent, and Edwards does nothing to call into question the *sufficiency of that evidence* as to the intent element of § 1513(e).

Causation. Edwards concedes D.B. suffered harm from the collective Facebook posts. But because numerous other people posted (often much worse) things about D.B., Edwards argues, her posts alone cannot be sufficient evidence to establish that she caused D.B.'s harm. Unfortunately for Edwards, federal criminal law does not employ a several liability standard. Indeed, the statute clearly applies to "Whoever . . . takes any action harmful to any person . . . ." 18 U.S.C. § 1513(e). In this case, there was evidence of close temporal proximity between Edwards' Facebook posts and the subsequent harm suffered by D.B., making it possible for a rational trier of fact to determine that § 1513(e)'s causation element was satisfied. Although D.B. conceded that some Steubenville residents knew about his cooperation with the government before Edwards posted on Facebook, he also claimed that "[w]hen the photos got posted, that's when mostly the drama picked up." D.B. testified that he received "a lot of friend requests" from strangers on Facebook after Edwards posted, which caused him to feel "a little intimidated" and to doubt whether he "could safely return to Steubenville." He also feared for the safety of his family, especially given that his little sister received a threat after Edwards posted on Facebook in May of 2017. In light of these concerns, D.B. reduced the frequency of his family visits and refrained from living with family

members in Steubenville. Viewing this testimony in the light most favorable to the government, there was sufficient evidence for a rational trier of fact to conclude that Edwards caused D.B.'s harm by sharing the posts on Facebook.

B.

Next, Edwards argues that § 1513(e) is unconstitutionally vague. We review de novo questions of law. *United States v. Hill*, 167 F.3d 1055, 1063 (6th Cir. 1999). A statute is unconstitutionally vague if it "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or if the statute "authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Criminal statutes are held to a higher standard than civil statutes. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). In criminal statutes, "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.*

As to the notice component of her vagueness challenge, Edwards argues that "an ordinary person would not likely realize that he is subject to criminal prosecution for everyday activity on Facebook." We disagree. The statute prohibits the taking of "any action harmful to any person." 18 U.S.C. § 1513(e). This is plain, common language. *Hill*, 530 U.S. at 732. None of the words used is particularly complex or exclusive to arcane legal texts. An ordinary person can understand that posting on Facebook falls under "any action." Indeed, Edwards has no trouble in her brief paraphrasing even the most advanced word of the statute, "retaliate," using more common language: "to get revenge." Furthermore, the scienter requirements of "knowingly" and "with intent to retaliate" dramatically narrow the universe of possible offending activity such that an ordinary person has notice of what conduct is prohibited. *See Hill*, 530 U.S. at 732; *see also*

Village of Hoffman Estates, 455 U.S. at 499. Is the language of the statute potentially sweeping?[3] Absolutely. But is it vague such that an ordinary person could not understand what conduct it prohibits? No.

As to the enforcement component of her vagueness challenge, Edwards argues that "one need to look no further than this case" for evidence of arbitrary enforcement. Edwards complains that many others engaged in similar or worse behavior, but she alone was prosecuted—evidence of arbitrary enforcement, she argues. She also claims she was "[s]ingl[ed] out . . . for prosecution just because she is related to the McShan brothers"—evidence of discriminatory enforcement, she argues. However, Edwards unwittingly highlights the flaw in this argument. The government must prove beyond a reasonable doubt that an offender had an "intent to retaliate" in order to prevail on a § 1513(e) prosecution. In common parlance, "to retaliate" is to return injury for perceived injury. It could be difficult for the government to prove that these Facebook postings by a person unrelated to the McShan brothers and thus unaffected by D.B.'s testimony were done to "retaliate" against D.B. Not so with Edwards. Family relations have long been recognized in law to be extensions of the personal domain in all kinds of contexts. *See Salman v. United States*, 137 S. Ct. 420, 429 (2016) (holding that gifts to family relatives accrue to personal benefit). The government has broad discretion to choose among its potential cases which to bring for prosecution. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). That the government chose to bring only its strongest § 1513(e) case is unremarkable, and certainly not evidence of arbitrary enforcement.

[3] Edwards abandoned her First Amendment overbreadth claim on appeal. Nothing in this opinion should be construed to comment on whether § 1513(e) is overbroad or violative of the First Amendment. That issue was neither brought nor briefed before us.

C.

Finally, Edwards argues that the government selectively prosecuted her. A claim of selective or vindictive prosecution must be made on a motion before trial. Fed. R. Crim. P. 12(b)(3)(A)(iv). Here, it was not. Because this claim is first raised on appeal, we review for plain error. *United States v. Soto*, 794 F.3d 635, 654–55 (6th Cir. 2015) (holding that untimely 12(b)(3) motions raised for the first time on appeal are subject to plain error review). "Plain error exists where there is (1) error (2) that was obvious or clear, (3) that affected [the] defendant's substantial rights and (4) that affected the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Donadeo*, 910 F.3d 886, 893 (6th Cir. 2018) (internal quotation marks and citations omitted). "Accordingly, plain error is a standard that is extremely deferential to the district court, and it should be found sparingly, only in exceptional circumstances, and solely to avoid a miscarriage of justice." *Id*. (internal quotation marks omitted).

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Among those forbidden reasons are a defendant's "race, religion, or the desire to prevent the exercise of [the defendant's] constitutional rights." *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1983). In order to succeed on a selective-prosecution claim, the defendant must "present clear evidence" that (1) the government had a discriminatory intent, and (2) that the prosecutorial policy had a discriminatory effect. *Armstrong*, 517 U.S. at 465 (internal quotation marks omitted). *See also United States v. Jones*, 159 F.3d 969, 976 (6th Cir. 1998).

Edwards claims that her exercise of her First Amendment rights on Facebook was the motivation for her prosecution, and because she was the only person among many other people

engaged in "similar or worse activity" to have been prosecuted, she must have been selectively prosecuted. Edwards misunderstands the nature of a proper selective-prosecution claim.

Selective-prosecution occurs when impermissible considerations motivate the prosecution of an individual but otherwise "similarly situated individuals" who could have been charged "were not similarly prosecuted." *Jones*, 159 F.3d at 977. Specifically, those impermissible considerations must be *unrelated* to the criminal acts for which the person was prosecuted. A valid selective-prosecution claim might arise, for example, if a group of individuals conspired to rob a bank but only the racial minority among them was prosecuted; or if a number of protestors were trespassing on private property but the only protestor who was prosecuted was known to be a vocal critic of the local police department.

With Edwards, there is no such dynamic. Of course, by virtue of her prosecution, Edwards was *selected* for it. And yes, as the government agrees, it prosecuted her because of her Facebook posts. But her Facebooks posts were not the "motivation" for her being prosecuted for an otherwise unrelated crime—*her Facebook posts were the crime*. It is hardly remarkable that in response to the flurry of online activity endangering D.B., the government indicted only the person against whom the government had the strongest case. Furthermore, Edwards makes no claim that the government's selection of her was in bad faith, nor does she produce any "clear evidence" that would have satisfied her burden had she brought a timely 12(b)(3) motion, let alone one we review for plain error.

III.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

18-3541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOY EDWARDS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Hon. Edmund A. Sargus
2:17-cr-00170-1

BRIEF OF DEFENDANT-APPELLANT JOY EDWARDS

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. Edwards requests oral argument to address any questions the panel of the United States Court of Appeals for the Sixth Circuit may have regarding the facts and applicable law.

STATEMENT OF JURISDICITON

The judgment of the District Court for the Southern District of Ohio was entered on May 25, 2018. Appellant gave timely notice of appeal on June 6, 2018. The district court's subject matter jurisdiction was based on Edwards' retaliation against a witness under 18 U.S.C. §1513(e). The jurisdiction of this Court to hear Edwards' appeal from the final decision of the district court is invoked under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

Whether there was sufficient evidence to sustain Ms. Edwards' conviction for retaliation against a witness under 18 U.S.C. §1513(e).

Whether the district court erred in overruling Ms. Edwards' motion to dismiss based on First Amendment grounds.

STATEMENT OF THE CASE

On June 14, 2017, Defendant-Appellant Joy Edwards ("Edwards") was charged with one count of retaliation against a witness under 18 U.S.C. §1513(e) in a

complaint. (R.1, Complaint). At a preliminary hearing on July 10, 2017, Edwards raised a First Amendment defense to her alleged violation and the parties were ordered to brief the issue, which was done shortly thereafter. (R.8 Order, R.9, Response, R.10, Response). Subsequently, Edwards was indicted for the same charge on August 3, 2017. (R.12, Indictment).

Edwards then filed a motion to dismiss, reiterating and incorporating all issues, defenses, and arguments, both legal and factual, raised in her previous brief. (R.30, Motion). The government filed a response, reincorporating its previous brief, as well. (R.32, Response). A hearing was held on December 1, 2017, and the motion and it was denied. (R.36, Opinion and Order). Right to a jury trial was waived and the case was tried to the Court on December 11, 2018. (R.35, Waiver). Edwards moved for acquittal pursuant to Fed.R.Crim.P.29(c). (Page ID # 350). Ruling on Edwards' Rule 29 motion was deferred until the same time as a determination of guilt. (Page ID # 351). The district court found Edwards guilty of the sole count on January 17, 2018. (R.40, Opinion and Order).

On May 25, 2018, Edwards was sentenced to three months incarceration, three months at a halfway house, three months home confinement, and three years of supervised release, all stayed pending appeal. (R.50, Judgment). Notice of appeal was timely filed on June 6, 2018. (R.54, Notice of Appeal).

Edwards is the biological sister of David and Fred McShan, against whom the victim, "D.B.", was working as a confidential informant. (Page ID # 317-319). D.B.

started working as a confidential informant in 2015. (Page ID # 334). In February of 2016, D.B. posted on his personal Facebook page that he was going to "shock the Valley." (Page ID # 330). D.B. testified against the McShan brothers in March of 2017. (Page ID # 319). When he testified in March of 2017, D.B. did so in an open courtroom in front of a handful of people, including a number of people from Steubenville. (Page ID #327-328). Members of the public in a courtroom are typically not admonished not to share information regarding a confidential informant's testimony when they leave the courtroom. (Page ID # 348).

A few months later, D.B. became aware of posts on Edwards' personal Facebook page with D.B.'s picture and disparaging language referencing his role as a "snitch." (Page ID # 319-320, 324). Some of the images were created and initially shared by someone other than Edwards and merely re-shared or re-posted by Edwards. (Page ID # 313). It is unclear whether Edwards created any of the images. (Page ID # 311). The posts did not contain any untrue information, D.B.'s name, address, place of employment, any personal information, or any threat or solicitation of harm. (Page ID # 310-311). Other people posted photos of D.B. and disparaging comments, but none were investigated. (Page ID # 311-312). Nobody indicated on the Facebook posts that they were unaware of D.B.'s testimony prior to the Facebook posts, implying that they were previously aware. (Page ID # 313).

D.B. indicated that all of his family is in Steubenville, and that he has not felt safe to return there since the Facebook posts. (Page ID # 321). D.B. had concerns

about the safety of his family since before the Facebook posts. (Page ID # 323). D.B. had concerns that people knew of his testimony prior to the Facebook posts. (Page ID # 328, 331). D.B. claims that his brother was killed by Edwards' nephew in January of 2013. (Page ID # 330-331).

SUMMARY OF THE ARGUMENT

1. The district court improperly found that the government had proven the causation element of the offense. There was not sufficient evidence to show that Ms. Edwards re-posting, commenting upon, and liking other people's Facebook posts was the cause of any claimed harm suffered by D.B.

2. §18 U.S.C. 1513(e) is vague and overbroad because an ordinary person would not realize that re-posting and liking other people's Facebook posts could be retaliatory conduct subject to criminal prosecution. The government's decision to prosecute only Ms. Edwards demonstrates that the statute invites arbitrary and discriminatory enforcement.

3. The government chose to selectively prosecute Ms. Edwards based upon her decision to exercise her First Amendment right to free speech by re-posting, commenting upon, and liking other people's Facebook posts.

ARGUMENT

1. There was insufficient evidence to sustain Ms. Edwards' conviction for retaliation against a witness under 18 U.S.C. §1513(e)

A denial of a Fed.R.Crim.P. 29(c) motion for judgment of acquittal is reviewed de novo. See United States v. Canan, 48 F.3d 954, 962 (6th Cir. 1995). However, the decision of the district court must be affirmed if the evidence, viewed in a light most favorable to the government, "would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt." Id. (citing United States v. Montgomery, 980 F.2d 388, 393 (6th Cir. 1992)).

18 U.S.C. §1513(e) prohibits knowingly, with the intent to retaliate, taking any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense. The elements of the offense are then: (1) knowingly took an action with intent to retaliate; (2) the action harmed the victim (emotionally, economically, or otherwise); and (3) the retaliation was motivated by the victim's cooperation with law enforcement. See United States v. Camick, 796 F.3d 1206, 1220 (10th Cir. 2015).

Two months after D.B.'s testimony in open court, Ms. Edwards re-posted, liked, and commented upon various Facebook posts originally created or shared by other people. This included various times at which both Ms. Edwards and others called D.B. a "snitch" and other derogatory terms. At no point did Ms. Edwards deny

that she made these comments, and so there is no debate that she knowingly took an action. Further, D.B. testified that he was afraid to go back to Steubenville and that his inability to live at home had cost him money, so he did suffer harm. The more difficult questions here are whether Ms. Edwards actions were done with an intent to retaliate and whether her actions were the cause of D.B.'s harm.

The first of these questions, whether Ms. Edwards actions were done with an intent to retaliate, poses difficulty simply because "retaliate" is not defined anywhere within the statute. Merriam-Webster defines it as either "to repay in kind" as a transitive verb or "to return like for like; especially to get revenge" as an intransitive verb. Retaliate, Merriam-Webster, 2018. Based upon the lack of a direct object to "retaliate" in the statute, it must be assumed that it is an intransitive verb, so "to get revenge."

If Ms. Edwards' ultimate goal in going onto Facebook was to get revenge, it seems unlikely that this would be her course of action. First, she did not create the content, she merely shared or commented upon other people's posts. Second, none of the information shared was untrue – D.B. had testified and thus was a "snitch." Third, she never advocated any retaliatory conduct (physical violence or otherwise) against him. Finally, she never shared anything that was not already public knowledge. D.B. had testified more than two months prior in open court. He was not behind a screen, nor was the court sealed. Anybody that wanted to could have seen him testify. It is

not clear how the district court reached the conclusion that she had an intent to retaliate based upon these few items.

Further and even more troubling, there is absolutely no way to determine that it was Ms. Edwards' conduct that caused harm to D.B. He testified that he had problems with the Edwards family dating back to at least January, 2013, over four years prior to his testimony and two years before he started working as a confidential informant. His testimony was given two months before the Facebook posts, and he said not only that he had issues prior to the Facebook posts, but that other people in the community knew of his testimony prior to the Facebook posts. Lastly, the posts were not created by Ms. Edwards. It is impossible to say that it was Ms. Edwards' actions that caused the claimed harm because countless other people had been doing the same or worse to him for a period of time before she became involved.

The government proved neither that Ms. Edwards' intent was to retaliate nor that her actions were the cause of any harm to D.B., and thus her conviction should be reversed and her motion for acquittal granted.

2. The district court improperly denied Ms. Edwards' motion to dismiss because 18 U.S.C. §1513(e) is vague and overbroad

The doctrine of vagueness "… is the basis for striking down legislation which contains insufficient warning of which conduct is illegal." United States v. National Dairy Products Corp., 372 U.S. 29, 32-33 (1963). "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

"A statute challenged for vagueness must be scrutinized to determine whether it provides both fair notice to the public that a certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription." Kolender, 461 U.S. at 357. Notably, while "the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement," the United States Supreme Court has explained that "the more important aspect of the doctrine 'is … the requirement that a legislature establish minimal guidelines to govern law enforcement." Id., 461 U.S. at 357-8 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

"Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Kolender, 461 U.S. at 358 (quoting Smith, 451 U.S. at 575). The failure of a statute to provide guidelines for enforcement sufficient to thwart the risk of arbitrary and discriminatory enforcement is a sufficient basis for invalidating the law under the void-for-vagueness doctrine. Kolender, 461 U.S. at 359.

The legislation that led to the enactment of §18 U.S.C. 1513(e) was part of the Sarbanes-Oxley Act, which was drafted to protect employees who reported fraud and were the subject of retaliation for corporate whistle-blowing. While it was

incorporated into the code and has legitimate criminal application, this was not its intended usage. Had Ms. Edwards outed D.B. as a confidential informant prior to his testimony, thus reducing his likelihood at the testimony of her brothers' trial, it would be a more obvious outcome. Likewise, had she published untrue statements that caused him harm, her prosecution would be more expected. In this situation, though, an ordinary person would not likely realize that he is subject to criminal prosecution for everyday activity on Facebook.

Further, if the true test for vagueness is whether it invites arbitrary enforcement, one need to look no further than this case for evidence of the statute's failings. Once again, Ms. Edwards did not create the content, nor was she the only one sharing it. The government was aware of this, yet readily admitted that nobody else was investigated. The government was unsure of who created some of the content, only knowing that it was not Ms. Edwards, and made no attempt to investigate. On other content, they knew exactly who created it, but no other arrests were made; no other individuals prosecuted for the same or similar offenses. Singling out Ms. Edwards for prosecution just because she is related to the McShan brothers is a perfect example of the prosecutorial predilections that the are the hallmark of an overly vague statute.

§18 U.S.C. 1513(e) is vague on two levels: first, there is insufficient notice of what constitutes a crime such that an ordinary person would know what conduct is

illegal; second, it invites arbitrary enforcement. For these reasons, Ms. Edwards' motion to dismiss should have been granted.

3. The Government's decision to selectively prosecute Ms. Edwards was based upon an unjustifiable standard.

"[A]lthough prosecutorial discretion is broad, it is not 'unfettered.' Selectivity in the enforcement of criminal laws is … subject to constitutional constraints." Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting United States v. Batchelder, 442 U.S. 114, 125 (1979)). "In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" Wayte, 470 U.S. at 608 (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)). This includes the exercise of protected statutory and constitutional rights. Wayte, 470 U.S. at 608 (citing United States v. Goodwin, 457 U.S. 368, 372 (1982).

Selective prosecution cases are judged according to ordinary equal protection standards. See Oyler v. Boles, 368 U.S. 448 (1962). This standard requires that the petitioner show both that passive enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

"Congress shall make no law … abridging the freedom of speech, or of the press…" U.S. Const. Am. 1. However, the right of free speech is not absolute; and,

some words "by their very utterance" cause injury and incite an immediate breach of peace. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

It is Ms. Edwards' contention that she has been selectively prosecuted for the exercise of her First Amendment right to free speech. The district court agreed with the government's argument that use of the word "snitch" is an example of the unprotected speech contemplated in Chaplinsky, Ms. Edwards would propose that it is not that cut and dry.

As discussed in her last assignment of error, the issue of timing is particularly important here. All of the posts were from two months after the testimony, at which point many people already knew of D.B.'s cooperation with the government. Calling him a "snitch" at that point is not likely to cause any further injury. Again, had she called him a "snitch" prior to his testimony, or even after his testimony but before it became public knowledge, the outcome might have been different. Here, that was not the case, though.

Much like the timing issue, Ms. Edwards argument that she has been selectively prosecuted stems from many of the same issues for which she points out that the statute is overly vague. Multiple other people engaged in similar or worse activity, and yet nobody was prosecuted. Ms. Edwards was prosecuted solely for her exercise of her First Amendment right to free speech, which would not have been curtailed by the word "snitch" based on the circumstances surrounding the situation.

CONCLUSION

Accordingly, Edwards requests that this Court find that the government did not present sufficient evidence to sustain a conviction and order that Edwards' motion for acquittal be granted. Further, Edwards requests that this Court find that the district court erred in denying her Motion to Dismiss, as 18 U.S.C. §1315(e) is vague and overly broad. Finally, Edwards requests that this Court find that the government engaged in impermissible, selective prosecution in charging her with this offense, as its vindictive motivation was based upon her exercising her constitutional right to free speech and the fact that she was related to David and Fred McShan.

Respectfully submitted,

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No. 18-3541
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JOY EDWARDS,	)
	)
Defendant-Appellant.	)

CERTIFICATE OF COPMLIANCE

The undersigned counsel of record for defendant-appellant, Joy Edwards, certifies pursuant to Fed.R.App.P. 32(a)(7)(C) that the Brief of Defendant-Appellant complies with the type-volume limitation of Fed.R.App.P.32(a)(7)(B) because this Brief contains 2,777 words and 246 lines. In addition, this Brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, Garamond font in 14 point size, with footnotes in Garamond font 14 point size.

By: /s/ Stephen T. Wolfe
Attorney for Defendant-Appellant
Joy Edwards

No. 18-3541
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
JOY EDWARDS,	)
	)
Defendant-Appellant.	)

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September, 2018, I electronically filed the foregoing Brief of Defendant-Appellant Joy Edwards with the Clerk of Court using the CM/ECF system, which will send notification of the filing to the following attorney of record: Alexis Zouhary, United States Attorney's Office, 221 East Fourth Street, Suite 400, Cincinnati, OH 45202, alexis.zouhary@usdoj.gov.

By: /s/ Stephen T. Wolfe
Attorney for Defendant-Appellant
Joy Edwards

ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

1. Record 1, Complaint, filed by district court on 6/14/17
2. Record 8, Order, filed by district court on 7/13/17
3. Record 9, Response, filed by United States of America on 7/16/17
4. Record 10, Response, filed by Joy Edwards on 7/18/17
5. Record 12, Indictment, filed by district court on 8/3/17
6. Record 30, Motion to dismiss, filed by Joy Edwards on 11/13/17
7. Record 32, Response, filed by United States of America on 11/14/17
8. Record 35, Waiver of jury trial, filed by Joy Edwards on 12/1/17
9. Record 36, Opinion and Order denying motion to dismiss, filed by district court on 12/1/17
10. Record 40, Opinion and Order finding Defendant guilty, filed by district court on 1/17/18
11. Record 46, Sentencing Memorandum, filed by Joy Edwards on 5/10/18
12. Record 47, Sentencing Memorandum, filed by United States of America on 5/11/18
13. Record 49, Opinion and Order granting Defendant's motion to continue release on bond pending appeal, filed by district court on 5/25/18
14. Record 50, Judgment, filed by district court on 5/25/18
15. Record 52, Amended Judgment, filed by district court on 6/4/18

16. Record 54, Notice of Appeal, filed by Joy Edwards on 6/6/18
17. Record 58, Transcript of Proceedings of Sentencing, filed by district court on 7/20/18
18. Record 59, Transcript of Proceedings of Verdict, filed by district court on 7/20/18
19. Record 60, Transcript of Proceedings of Motion Hearing, filed by district court on 7/20/18
20. Record 61, Transcript of Proceedings of Bench Trial, filed by district court on 7/20/18

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

Case No. 2:17-cr-170
CHIEF JUDGE EDMUND A. SARGUS, JR.

JOY MCSHAN EDWARDS,

Defendant.

OPINION AND ORDER

Defendant Joy McShan Edwards is charged in a one-count indictment with witness retaliation, in violation of 18 U.S.C. § 1513(e). (ECF No. 12.) The Defendant now moves to dismiss the indictment, asserting that her alleged actions are protected under the First Amendment of the United States Constitution. This matter came before the Court for Oral Argument on December 1, 2017. For the reasons that follow, the Defendant's Motion to Dismiss is **DENIED**.

I. BACKGROUND

A. Procedural Background

On June 14, 2017, the Government filed a criminal complaint ("Complaint") against Defendant Joy McShan Edward, charging her with one-count of retaliating against a witness, in violation of 18 U.S.C. § 1513(e). (Compl., ECF No. 1.) On July 10, 2017, Defendant appeared before Magistrate Judge Deavers for a Preliminary Hearing. (ECF No. 5.) At the Preliminary Hearing, Defendant raised a concern regarding the application of the First Amendment to the statute at issue. Magistrate Judge Deavers directed the parties to submit briefs on the issue. (ECF No. 8.) The Government and Defendant subsequently submitted briefs on the applicability

of a First Amendment Challenge to 18 U.S.C. § 15134(e). (ECF Nos. 9, 10.) The Complaint was dismissed without a ruling on Defendant's Motion when Defendant was indicted on August 3, 2017, on one-count of retaliating against a witness in violation of 18 U.S.C. § 1513(e). This matter was then transferred to the Undersigned. On November 13, 2017, Defendant renewed the previously filed briefing as a Motion to Dismiss. (ECF No. 30.) On December 1, 2017, the Court held a Final Pretrial Conference and hearing on the Motion to Dismiss. (ECF No. 34.)

B. Factual Background

The criminal complaint filed in this case describes images of and statements about the Government's confidential informant ("CI 1"), who testified against Defendant's brothers in a separate federal criminal matter. The images and statements were allegedly posted on the purported Facebook account of Defendant. The Government alleges that beginning on May 11, 2017, the day the United States Probation Department released its presentence investigation of Defendant's brothers, Defendant began posting doctored photos of CI 1, depicting him on the witness stand and labeling him, among other terms, as a "snitch." (*see* Compl.)

Without admitting that she posted the controversial images and comments, Defendant claims that even if she did, her actions are protected by the First Amendment to the United States Constitution.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Criminal Procedure 12, "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Courts are limited to resolving motions to dismiss without a trial only if they "involve[] questions of law instead of questions of fact on the merits of criminal liability." *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir. 1997). Accordingly, courts may

make preliminary factual findings necessary to decide questions of law raised, as long as the court's conclusions "do not invade the province of the jury." (*Id.*)

A defense raised in a motion to dismiss an indictment is "capable of determination if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense." *United States v. Jones*, 542 F.2d 661, 665 (6th Cir. 1976) (citing *United states v. Covington*, 395 U.S. 57, 60 (1969)). On a motion to dismiss an indictment, "the [c]ourt must view the [i]ndictment's factual allegations as true, and must determine only whether the [i]ndictment is 'valid on its face.'" *United States v. Campbell*, Case No. 02-80863, 2006 U.S. LEXIS 16779, at *7 (E.D. Mich. April 6, 2006) (citing *Costello v. United States*, 350, U.S. 359, 363 (1956)).

III. LAW AND ANALYSIS

The Defendant mounts both a facial and an as-applied challenge to 18 U.S.C. § 1513(e). In summary, the Court may consider the facial challenge as a pure question of law. The as applied challenge, at least in these circumstances, involves consideration of context and intent, necessarily implicating ultimate factual issues in contravention of Federal Rule of Criminal Procedure 12(b)(1).

A. Facial Challenge

To the extent Defendant asserts 18 U.S.C. § 1513(e) is unconstitutional on its face, the Court disagrees. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. A bedrock principle underlying the First Amendment is the protection of the "free trade in ideas," even if "society finds the idea itself offensive or disagreeable." *Virginia v. Black*, 538 U.S. 343, 358 (2003) (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919); (*Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

The protections afforded by the First Amendment, however, are not absolute. Courts have long recognized that the government may regulate certain categories of expression consistent with the Constitution. *Virginia,* 538 U.S. at 358 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)). For example, the First Amendment "permits 'restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 358–59 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992)). Indeed, "[w]ords often are the sole means of committing crime–think bribery, perjury, blackmail, fraud. Yet the First Amendment does not disable governments from punishing these language-based crimes . . . many of which pre-dated the First Amendment." *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012) (citing *United States v. Varani*, 435 F. 2d 758, 762 (6th Cir. 1970) ("speech is not protected by the First Amendment when it is the very vehicle of the crime itself.")).

Nor does the First Amendment protect "true threats," which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia*, 538 U.S. at 360. The Government's prohibition on true threats exists to "protect individual from the fear of violence" and from "the disruption that fear engenders." *Id.* (citing *R.A.V.* 505 U.S. at 388). In *Virginia*, the Supreme Court reviewed a state statute prohibiting cross burning, which provided in relevant part:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony . . . Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons.

Id. at 348. The Court upheld the statute's prohibition on cross burning, but struck down the *prima facie* evidence provision as overbroad, finding criminalization without review of the context "blurs the line" between acts of intimidation and core political speech. *Id.* at 365. The Supreme Court thereafter held the statute did not "run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." *Id.* at 362.

Similarly, Congress enacted 18 U.S.C. § 1513(e) to protect witnesses, victims, and informants by prohibiting an individual from:

> knowingly, with the intent to retaliate, tak[ing] any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense. (Emphasis added).

18 U.S.C. § 1513(e); *United States v. Ferrugia*, 604 F. Supp. 668, 675 (E.D. N.Y. 1985) (noting the purpose of the Victim and Witness Protection Act of 1982, of which 18 U.S.C. § 1513(e) is a part, is "to strengthen existing legal protection for victims and witnesses of federal crimes," who cooperate with the prosecutor at their "own risk.") The statute, consistent with *Virginia*, criminalizes speech only upon proof that the defendant intended to retaliate against a witness. It is the scienter requirement of the statute that renders it constitutional.

From the plain language of the statute, the Government has the burden to prove beyond a reasonable doubt that (1) Defendant knowingly took an action with intent to retaliate against CI 1; (2) Defendant harmed CI 1; and (3) her retaliation was induced by CI 1's testimony against her brothers. 18 U.S.C. § 1513(e); *see also United States v. Stoker*, 706 F.3d 643, 646 (5th Cir. 2013). Because proving intent is a "difficult task", courts do not "require[] the government to produce a 'smoking gun' that explicitly reveals the contents of defendant's mind." *United States v. Camick*, 796 F.3d 1206, 1220 (10th Circuit 2015) (quoting *United States v. Ashley*, 606 F.3d

135, 140–41 (4th Cir. 2010). "Instead, intent 'may be proven via circumstantial evidence; in fact, it is rarely established by other means." *Id.* (quoting *United States v. Nguyen*, 413 F.3d 1170, 1175 (10th Cir. 2005).

Accordingly, the Court finds 18 U.S.C. § 1513(e) constitutional on its face.[1]

B. As-Applied Challenge

Defendant also challenges the application of 18 U.S.C. § 1513(e) to her actions. For Defendant to prevail on her as-applied First Amendment challenge, she must demonstrate that the statute is unconstitutional as applied to her particular expressive activity. She asserts that her alleged Facebook posts are protected by the First Amendment because of their truth and because they did not contain overtly threatening speech.

The Government takes the position that Section 1513(e) is one of several statutory provisions that punishes language-based crimes, such as "true threats" or "fighting words." (Gov. Br. at 2, ECF No. 9.) The Government also contends that the speech at issue here was the very vehicle of the crime itself, similar to perjury, bribery or extortion. (*Id.* at 3.) At bottom, the Government posits that the posts on the social media website were threats intended by the Defendant to retaliate against CI-1 for cooperation with law enforcement, or otherwise "speech" that is unprotected under the First Amendment as "speech integral to criminal conduct."

Ultimately, determining whether Defendant's speech is protected by the First Amendment requires the Court to review the context of her alleged Facebook posts and her intent in posting the material. Federal Rule of Criminal Procedure 12(b) prohibits such finding

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[1] Although legal authority is somewhat sparse, other courts have found 18 U.S.C § 1513(e) constitutional under the First Amendment. *United States v. Brown*, No. 2:15-cr-83-RMP-1, 2016 U.S. Dist. LEXIS 101218 (E.D. Wash. August 1, 2016); *United States v. Nursey*, Case No. 2:15-cr-112-WKW, 2015 U.S. Dist. LEXIS 154410 (M.D. Ala. Aug. 7, 2015); *United States v. Sergentakis*, No. 15-cr-33, 2015 U.S. Dist. LEXIS 77719 (S.D. N.Y. June 15, 2015).

on issues ultimately triable to a jury with regard to a criminal statute otherwise constitutional on its face.[2]

1. Truth of the Statements

Defendant contends that if she in fact posted the comments, she published only truthful statements on Facebook about CI-1 such that her speech is protected by the First Amendment. (Def.'s Br. at 17, ECF No. 10.) By way of this argument, Defendant, in effect, maintains that intent under Section 1513(e) may be inferred only if a person publishes false statements regarding a witness or informant. (*Id.*) The Court disagrees.

Other courts that have addressed the interplay between Section 1513(e) and the First Amendment look to the *context* of a defendant's actions. *See Sergentakis*, 2015 U.S. Dist. LEXIS 77719, at *14–15 (holding that defendant's accusations that the victim had engaged in child molestation and animal cruelty could be protected under the First Amendment in other contexts, but not in the witness retaliation case wherein they were "thinly veiled" revenge for victim's cooperation with investigation that led to defendant's guilty plea on other charges). In *Camick*, the Tenth Circuit upheld the conviction under 18 U.S.C. § 1513(e) for filing a false civil rights complaint against a federal witness. 769 F.3d at 1220. Although ultimately finding defendant's allegations false, the court found the context of the filed complaint more important than the true or false nature of the claim. *Id.* at 1222. The court explained,

> The truthfulness of Mr. Camick's factual allegations does not undermine the fact that the district court found the legal theories Mr. Camick advanced against Ms. Wattley nonmeritorious. In other words, even if Mr. Camick's allegation that Ms. Wattley filed an improper stolen vehicle report were true, a jury could still infer that his legal theories were so divorced from reality that he filed the Civil Rights Lawsuit not because he thought he might win on the merits, but because he

[2] The parties have waived trial by jury. The Undersigned will serve as the trier of fact. These same issues may be reasserted by the Defendant at the close of the Government's case under Federal Rule of Criminal Procedure 29.

> intended to retaliate against Ms. Wattley by forcing her to defend against meritless claims.

Id.

Defendant also contends the intent to retaliate can only be inferred when a defendant "publishes false information regarding a witness or informant," and therefore the government cannot prove intent. (Def.'s Br. at 17.) As noted, not all true statements are protected by the First Amendment to the United States Constitution. Accordingly, determining whether the Government can prove intent to retaliate is inappropriate at this juncture.

2. Non-threatening Statements

Defendant also argues 18 U.S.C. § 1513(e) is unconstitutional as it applies to her statements because her statements were not overtly threatening. Indeed, the Court agrees Defendant's Facebook posts do not contain any overt calls to retaliate against CI 1 as set forth in the Complaint. Again, the context of Defendant's alleged Facebook posts is important to this matter, not the non-overtly threatening nature of the posts. The Government will be required to prove Defendant's specific intent to retaliate and evidence that her actions caused harm to CI 1. 18 U.S.C. § 1513(e).

A determination at this stage of the proceeding as to whether the Government has met its burden in proving intent is inappropriate under Federal Rule of Criminal Procedure 12(b). *United States v. White*, 610 F.3d 956, 962 (7th Cir. 2010) (reversing district court's dismissal of indictment for criminal solicitation based on the First Amendment because "[t]he existence of strongly corroborating circumstances evincing White's intent is a jury question.").

Similar to the instant matter, in *White*, the context of the defendant's online posts could not be determined by the court in a motion to dismiss the indictment. *Id.*; *see also United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976) (A defense raised in a motion to dismiss an

indictment is "capable of determination if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.").

In *White*, the defendant ran a white supremacy website. Following the criminal conviction of a fellow white supremacist, the defendant posted the foreman of the jury's personal information to his website, in a seemingly non-overtly threatening manner as follows:

> Gay anti-racist [Juror A] was a juror who played a key role in convicting Matt Hale. Born [date], [he/she] lives at [address] with [his/her] gay black lover and [his/her] cat [name]. [His/Her] phone number is [phone number], cell phone [phone number], and [his/her] office is [phone number].

Id. at 957–58. The Seventh Circuit concluded that whether or not the First Amendment protected the defendant's right to post personal information about Juror A turned on his intent in posting that information. *Id.* at 961. "If White's intent in posting Juror A's personal information was to request that one of his readers harm Juror A, then the crime of solicitation would be complete." However, if "White's intent was to make a political point about sexual orientation or to facilitate opportunities for other people to make such views known to Juror A, then he would not be guilty of solicitation because he did not have the requisite intent required for the crime." *Id.*

Accordingly, Defendant's Motion to Dismiss is **DENIED** subject to renewal under Federal Rule of Criminal Procedure 29 after the conclusion of the Government's case.

IT IS SO ORDERED.

12-7-2017
DATE

EDMUND A. SARGUS, JR.
CHIEF UNITED STATES DISTRICT JUDGE