

IN THE  
SUPREME COURT OF THE UNITED STATES

No. \_\_\_\_\_

OCTOBER TERM, 2020

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CRAIG SHULTS,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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### **QUESTION PRESENTED FOR REVIEW**

Whether, in an 18 U.S.C. § 115(a)(1)(B) prosecution for threatening a federal judge, subsequent act evidence of additional threats made months after the charged conduct is inadmissible when the government proves its case as to the charged threat by playing a clear and unambiguous recording of the communication at issue?

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on July 22, 2020.

## **JURISDICTION AND CITATION OF OPINION BELOW**

On July 22, 2020, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

## **FEDERAL RULE OF EVIDENCE AT ISSUE**

### **Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons**

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 403.

## **INTRODUCTION**

This case presents a novel question, in the context of Fed. R. Evid. 403, regarding the probative value of subsequent act evidence in an 18 U.S.C. § 115(a)(1)(B) prosecution where the government proves up its case by playing for the jury a clear and unambiguous recording of the communication at issue. Petitioner originally was charged in this case with four separate instances of threatening a federal judge. These statements allegedly were made by Petitioner to another inmate, and the latter of these instances was recorded by the inmate at the behest of the government. Prior to trial, the government argued to the district court that it needed to introduce subsequent act evidence of additional threats Petitioner communicated months after the charged conduct in order to help establish that the three unrecorded threats had been made. At trial, however, the government elected to go forward only as to the recorded threat and it established its case by playing the recording of that conversation for the jury.

Petitioner argued on appeal that when the government elected to go forward only as to the recorded statement which it played for the jury, this significantly diminished the probative value of the subsequent act evidence, including the government's need for this evidence, and required its exclusion. The Ninth Circuit disagreed, finding that the subsequent act evidence remained probative as to

intent and to disprove the defense theory that Petitioner was merely bluffing, and its probative value was not “materially diminished” by the fact that the government limited its case to the single recorded communication. [Ex. A]. Petitioner asks the Court to review this case in order to determine whether the Ninth Circuit incorrectly discounted in its subsequent act admissibility analysis the government’s decision to limit its case to a single threat which it presented to the jury by playing a recording of the conversation itself.



## **STATEMENT OF FACTS AND CASE**

In 2014, U.S. District Judge Guilford sentenced Petitioner to 90 months of custody, three years of supervised release, and \$2,000,000 of restitution, following a fraud conviction. [PSR ¶ 49].<sup>1</sup> This was Petitioner's first criminal conviction, and he began serving his sentence at FCI Taft. In 2016, another inmate at Taft (Knox) reported to the FBI that Petitioner had made comments to him threatening to harm the judge, the prosecutors on his case, and his pre-trial services officer. The FBI investigated, and secretly recording a lengthy conversation between Petitioner and Knox. The government subsequently charged Petitioner with one count of making threats against a public official, in violation of 18 U.S.C. § 115(a)(1)(B). [ER 1]. More specifically, the government alleged that on four separate occasions between September and December 11, 2016 – Petitioner threatened to assault District Judge Guilford with the intent to retaliate against him on account of his performance of his official duties. Id.

Prior to trial, the government moved to introduce alleged additional threats made by Petitioner after he had been transferred from Taft to another prison (Lompoc) in 2017. [CR 21]. The government intended to call an inmate at Lompoc

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<sup>1</sup> “PSR” refers to the pre-sentence investigation report. “CR” refers to the district court clerk's record. “ER” refers to Appellant's excerpts of record filed in the Ninth Circuit.

who was prepared to testify that in 2017, Petitioner had approached him and offered him money to kill the judge. Id. The government argued that it needed to present this evidence to prove that Petitioner indeed threatened the judge on multiple instances between September and December 2016. Id. Over Petitioner's objection, the district court admitted the subsequent act evidence, finding that this evidence was admissible under Rule 404(b) to prove intent, and its probative value was significant since the case centered on Petitioner's credibility.

At trial, the government changed its manner of prosecuting the case. Instead of calling Knox to testify as to the four alleged threats and to introduce the recorded conversation, the government instead elected not to call Knox and to simply play the recording of the December conversation to prove up only that threat to the jury. Despite the government electing to proceed on only the one recorded threat which it played for the jury, the district court allowed the government to introduce the subsequent act evidence. The jury convicted Petitioner of the lone count, but found only that the December 2016 instance had occurred.

On appeal to the Ninth Circuit, Petitioner challenged the admission of this subsequent act evidence, arguing that when the government elected not to call Knox to prove up the four charged instances, the probative value of the subsequent act testimony was significantly diminished and required exclusion. The Ninth Circuit

disagreed, finding that the evidence remained admissible under Rule 404(b) to show plan, opportunity, and intent, and that its probative value was not “materially diminished” by the government’s decision not to call Knox and to rely on the recording to prove up its case. [Ex. A].

## ARGUMENT

### **THE COURT SHOULD REVIEW THIS CASE TO DETERMINE WHETHER, IN AN 18 U.S.C. § 115(a)(1)(B) PROSECUTION, THE GOVERNMENT’S RELIANCE ON AN UNAMBIGUOUS RECORDING TO ESTABLISH THE CHARGED THREAT RENDERS SUBSEQUENT ACT EVIDENCE OF ADDITIONAL THREATS MADE MONTHS AFTER THE CHARGED CONDUCT INADMISSIBLE**

To obtain a conviction under section 115(a)(1)(B), the government must prove that a defendant threatened a federal official with the intent to impede, intimidate, or interfere with the individual in the performance of official duties, or with the intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties. See 18 U.S.C. § 115(a)(1)(B). Although the statute criminalizes speech, the Court has held that the First Amendment does not afford protection to speech that constitutes a “true threat.” Watts v. United States, 394 U.S. 705, 708 (1969).

Pursuant to United States v. Bagdasarian, 652 F.3d 1113, 1117-18 (9th Cir. 2011), the district court in this case instructed the jury with both an objective and subjective test. “Because the true threat requirement is imposed by the Constitution, the subjective test set forth in [Virginia v. Black, 538 U.S. 343 (2003)] must be read into all threat statutes that criminalize pure speech.” Id. at 1117. Specifically, the district court instructed the jury that in order to convict Petitioner, it had to find that

“[Petitioner] made the communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat,” and that “a reasonable person would have foreseen that the communication would be interpreted by the listener as a serious expression of intent to assault.” [RT 777].

**A. The Probative Value Of The Subsequent Act Evidence Was Negligible Given The Manner In Which the Government Presented Its Case**

The district court admitted the subsequent act evidence from Lompoc on the basis that the government needed these additional threats to prove that, as charged in the indictment, Petitioner also threatened the judge in September, October, and November of 2016. The government’s subsequent decision not to call Knox and not to attempt to establish these other occasions had a profound impact on the probative value of the subsequent act testimony.

Petitioner agrees that the 2017 subsequent act evidence was relevant and probative insofar as it went to the threats alleged to have been made by Petitioner prior to the December 2016 recorded conversation. Because there were no recordings of those earlier threats, the question existed as to whether Petitioner actually made such statements on those occasions and, if so, what the statements actually were. As the district court found, evidence that Petitioner made threatening statements several months later while at Lompoc was probative on these points, and would have

corroborated testimony from Knox that Petitioner also had threatened the judge on these prior occasions.

When the government elected not to attempt to prove up those allegations and to go forward only as to the recorded December conversation, however, this significantly diminished the probative value of the other act evidence. The Ninth Circuit found that this evidence still went to demonstrating intent, plan, and opportunity. [Ex. A at 2-3]. Plan and opportunity, however, were not at issue as to whether Petitioner's recorded statements demonstrated that he "made the communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat," and whether "a reasonable person would have foreseen that the communication would be interpreted by the listener as a serious expression of intent to assault." [RT 777].

As to Petitioner's intent, the recorded statements spoke for themselves and the jury should have been required to decide the case based on the words spoken by Petitioner, not from contested alleged statements from several months later. The recording was clear, Petitioner's statements were unambiguous, and the context was established both from the recording itself and through other emails and calls the government introduced to provide a background for these statements. For the objective element, what Petitioner allegedly said in 2017 had no bearing whatsoever

on whether a reasonable person would have foreseen that the listener -- in this case inmate Knox -- would have interpreted the statement at that time as a serious expression of intent to assault.

For the subjective element, assuming arguendo that Petitioner indeed made the additional threatening statements several months after the charged conduct, such statements did not tend to prove that Petitioner made the communication at issue for the purpose of issuing a threat, or with knowledge that the communication would be viewed as a threat. As to the latter component of this element, this is a judgment based on the language used at that time in the communication itself, all of which is reflected in the recording. As to whether Petitioner made the communication for the purpose of issuing a threat, again, the recorded communication spoke for itself and well after-the-fact communications of a similar kind did not tend to establish one way or another whether, in December 2016, Petitioner intended to issue a threat. When the government elected to limit its case to the one communication and to prove it up by playing the recording which contained all of the relevant statements, it significantly diminished the probative value of the subsequent act evidence.

**B. The Subsequent Act Evidence Required Exclusion Under Fed. R. Evid. 403**

Fed. R. Evid. 403 states that relevant evidence may be excluded if its

probative value is substantially outweighed by the danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. “Rule 403 requires the district court to weigh the probative value of evidence against the effect of its non-probative aspect -- and to assess the danger that admission of the evidence will unfairly prejudice the defendant. When the effect on the jury of the non-probative aspect of the evidence is likely to be substantially greater than the effect of the probative aspect, the evidence should be excluded under Rule 403.” United States v. Bailleaux, 685 F.2d 1105, 1111 (9th Cir. 1982).

“As the Advisory Committee Notes to FRE 403 explain, unfair prejudice means ‘undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” United States v. Hankey, 203 F.3d 1160, 1172 (9th Cir. 2000). The major function of Rule 403 “is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.” United States v. Mills, 704 F.2d 1553, 1559 (11th Cir. 1983).

In Old Chief v. United States, 519 U.S. 172, 184 (1997), the Court advised that in determining admissibility under Rule 403, a district court’s “discretionary judgment may be informed not only by assessing an evidentiary item’s twin tendencies, but by placing the result of that assessment alongside similar



assessments of evidentiary alternatives.” “The availability of other, less prejudicial, evidence on the same point ordinarily reduces the probative value of a given item of extrinsic evidence.” United States v. Lighty, 616 F.3d 321, 354 n.39 (4th Cir. 2010) (quoting 2 Weinstein, Federal Evidence, § 404.21). “In balancing the probative value of evidence against the danger of unfair prejudice, the trial court should also consider the need for evidence of prior criminal conduct to prove a particular point.” Bailleaux, 685 F.2d at 1112.

Here, the evidence the jury received as to whether Petitioner intended to communicate a threat to Knox during their conversation in prison was the best possible evidence the jury could have been presented on this point – a clear and verbatim recording of the communication itself. Instead of the district court requiring the jury to decide whether Petitioner communicated a “true threat” based upon his own words and in a well-established context, it allowed the government to drag in disputed statements from several months later which, at best, were marginally probative. The admission of this subsequent act evidence unduly prejudiced Petitioner and invited the jury to convict Petitioner on the basis of alleged repeated and inflammatory misconduct. See United States v. Martin 796 F.3d 1101, 1105 (9th Cir. 2015) (when other acts lack probative value, “they can only be viewed as being presented to inflame prejudice in the trier of fact.”). The Court should review this

case in order to decide whether subsequent act evidence of additional threats made months after the charged conduct is rendered inadmissible in a section 115(a)(1)(B) case when an unambiguous recording which captured the only charged communication at issue is presented to the jury.

### **CONCLUSION**

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: September 30, 2020

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