

No.

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD DOUGLAS LATKA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether an indictment for threatening a federal law enforcement officer, 18 U.S.C. § 115(a)(1)(B), must specifically allege the threatening statements supporting the theory of guilt found by the grand jury.

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OPINION BELOW

The Ninth Circuit issued an unpublished memorandum that can be found at *United States v. Latka*, 696 Fed. Appx. 287 (9th Cir. Aug. 18, 2017).

JURISDICTION

The court of appeals filed its memorandum on August 18, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the

witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 115(a)(1)(B):

Whoever . . . threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

STATEMENT OF THE CASE

A federal grand jury in the Central District of California returned an indictment charging petitioner with threatening a federal law enforcement officer with intent to impede the officer's official duties in violation of 18 U.S.C. § 115(a)(1)(B). The indictment alleged: "On or about October 12, 2014, in Riverside County, within the Central District of California, defendant RICHARD DOUGLAS LATKA knowingly threatened to assault and murder a Federal law enforcement officer, namely, United States Forest Service Law Enforcement Officer C.E., with the intent to impede, intimidate, and interfere with C.E. while C.E. was engaged in the performance of official duties."

Petitioner moved to dismiss the indictment, contending that it was defective on multiple grounds, including that it failed to provide adequate notice

of the threat charged and was duplicitous. In its opposition, the government acknowledged that it would be relying upon multiple alleged threats that were stated by petitioner to different people and at different locations but contended that the offense was a continuing one, and that a specific unanimity instruction could cure any problems. Petitioner disputed that a specific unanimity instruction could cure the defects in the indictment. At the hearing on the motion, the district court commented that it was “a very difficult issue.” The district court rejected the government’s continuing offense argument, but it denied the motion, asserting that any inadequacies in the indictment could be cured by the government electing a particular threat or by giving a specific unanimity instruction.

Petitioner proceeded to a jury trial in October of 2015. At trial, the government’s principal witness was the alleged victim, Chad Ellsworth, a law enforcement officer with the United States Forest Service. Ellsworth testified that, on October 12, 2014, he was informed of a trash dump in the San Bernardino National Forest. He went through the trash that was dumped and found several pieces of mail addressed to a Mr. Morales at a nearby address in Hemet, California. He drove to the Hemet address to investigate.

When he arrived at the residence, he found petitioner standing in the driveway. Ellsworth was in uniform and armed with a firearm and a taser.

Ellsworth approached petitioner and asked if he lived there, and petitioner replied that he did. Ellsworth testified that petitioner seemed aggravated with his presence, and he asked petitioner if he was Mr. Morales. Petitioner replied that Mr. Morales was in the hospital and hostilely asked him what he wanted. Ellsworth did not respond, and petitioner began screaming, demanding to know what Ellsworth wanted with Mr. Morales. Ellsworth could not make out everything that petitioner was yelling but did hear him say that he was a retired officer and that Ellsworth needed a warrant.

Ellsworth testified that petitioner took a couple of steps towards him with his fists in a ball. Ellsworth drew his taser, and petitioner backed away but was still yelling. Ellsworth returned to his vehicle. Petitioner yelled at his neighbors, who had come out to see what was going on, asking whether they had seen Ellsworth pull a gun on him. Petitioner banged on the window of Ellsworth's car simultaneously yelling: "Shoot me now. I have witnesses." Ellsworth opened his door and warned petitioner that if he did not stop hitting the vehicle, he would arrest him. Petitioner backed away.

Ellsworth drove off and proceeded down the block where he encountered two neighbors, who waved him down and asked what was going on. Petitioner then entered his vehicle and approached them. Ellsworth drove off.

Petitioner pulled up to the neighbors, rolled down his window, and said: “No one points a gun at me. . . . This isn’t over yet. He’s going to get his.” He also told the neighbors that “when someone points a gun at him, he kills him.”

Petitioner left the neighbors and drove after Ellsworth. After Ellsworth made a couple of turns, he pulled up to a stop sign. Petitioner caught up and pulled along side of him. Both of their windows were down, and petitioner said to Ellsworth: “Next time you’re dead.” Petitioner drove off and, about ten minutes later, returned to the residence and asked his neighbor whether he knew the ranger. The neighbor informed him that he did not know the ranger or his name. Petitioner said: “No one points a gun at me. . . . This individual is going to get his due. I’m going to contact his supervisor. I’m going to make sure that he gets his.” Petitioner “said that if he saw him again, he was going to kill him.”

Petitioner then made a frantic 911 call to report the incident. A sheriff’s deputy responded to the residence, and petitioner asked the deputy to arrest Ellsworth. The deputy contacted Ellsworth to ask him what happened. Contrary to his trial testimony, Ellsworth told the deputy that petitioner was following him in his vehicle but stated that petitioner terminated his pursuit before any encounter. Ellsworth never mentioned that petitioner pulled along side of him and said: “Next time you’re dead.”

An ambulance also responded to the residence, as petitioner was complaining of chest pains. Paramedics determined that his blood pressure was high, and he had a “tachycardic” heart rate and elevated glucose levels. They then transported petitioner to the hospital. The next day, petitioner called supervisors with the sheriffs department and the Forest Service to complain about Ellsworth’s conduct. Petitioner was not arrested until several months after the incident.

Based on this evidence, the government chose not to elect one specific threat as its theory of liability. Instead, the government proceeded on a three-threat theory before the petit jury, arguing that petitioner made the following threats, each of which constituted a violation of § 115(a)(1)(B): (1) the first threat was when petitioner began to drive after Ellsworth and told the neighbors that he kills someone who points a gun at him; (2) the second threat was when he later allegedly pulled up next to Ellsworth at the stop sign and said, “Next time you’re dead[;]” and (3) the third threat was when he returned to the residence and told the neighbor that if he saw the officer again, he would kill him. Because the first and third alleged threats involved statements made to third parties, the district court instructed the jurors that they could convict under such an indirect threat theory.

The district court also gave the jury a purported specific unanimity instruction. The instruction told the jurors that the “government has alleged that

defendant made three statements that threatened Ellsworth.” The instruction continued: “For each statement alleged by the government to be a threat, the government must prove all of the elements of the offense beyond a reasonable doubt. To find the defendant guilty, you must unanimously agree as to each element of the offense with respect to at least one of the alleged statements.” The verdict form did not specify which statement or statements the jurors found constituted a violation of the statute.

The jury convicted petitioner on the single count in the indictment. The district court imposed a sentence of 18 months in custody and three years of supervised release. The Ninth Circuit affirmed. In rejecting petitioner’s contention that the indictment failed to provide adequate notice of the specific threat charged, the Ninth Circuit summarily concluded that the “indictment was sufficient because ‘it contained the elements of the charged crime in adequate detail to inform him of the charge, and enabled him to plead double jeopardy.’”

ARGUMENT

The Fifth Amendment provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,” U.S. Const. Amend. V, and the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . .

to be informed of the nature and cause of the accusation” U.S. Const.

Amend. VI. As set forth below, this Court has held that some indictments require greater specificity to satisfy these Fifth and Sixth Amendment requirements but has not provided further guidance as to which offenses trigger such heightened specificity. This case is an excellent vehicle to provide further guidance.

The seminal case is *Stirone v. United States*, 361 U.S. 212 (1960), where the defendant was charged with violating the Hobbs Act for the extortionate interference with the interstate movement of materials, namely sand, used to make concrete. At trial, the district court instructed the jury that it could convict the defendant on the additional theory that his extortion would also ultimately affect the prospective interstate shipments of steel. This Court held that the additional theory was improper, explaining: “But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone’s conduct would interfere with interstate exportation of steel And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned.” *Id.* at 217. “The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.” *Id.* at 218.

The government cannot avoid a *Stirone* problem by crafting a charge that is so vague and potentially inclusive that a court can only guess as to what the grand jury found. The landmark case is *Russell v. United States*, 369 U.S. 749 (1962), decided two years after *Stirone*. In *Russell*, the petitioners were indicted for failing to answer questions before a congressional subcommittee, but the indictments failed to identify the subject under inquiry at the time they testified, which was crucial because a witness could rightfully refuse to answer questions that were not pertinent to the matter under inquiry.

In finding that the indictments were insufficient, this Court explained: “Where guilt depends so crucially upon . . . a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.” *Id.* at 764. In this context, an indictment that merely tracks the language of the statute is not sufficient because it “requires the defendant to go to trial with the chief issue undefined.” *Id.* at 766. “It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.” *Id.* at 766. Stated differently, “[t]o allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a

basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.” *Id.* at 770.

More recently, this Court confirmed that some indictments require *Russell* specificity but did not provide further guidance as to when that is the case. In *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007), this Court held that an indictment alleging that the defendant “attempted” reentry after deportation in violation of 8 U.S.C. § 1326 was sufficient even though it did not specifically allege the “substantial step” sub-component of the attempt element. Because this Court concluded that the indictment did not have to allege a “substantial step,” it followed that the indictment did not have to allege the overt act that constituted a substantial step. *Id.* at 106-08. *Resendiz-Ponce*, however, reaffirmed *Russell* and recognized that it “is of course correct that while an indictment parroting the language of a federal criminal statute is often sufficient, there are crimes that must be charged with greater specificity.” *Id.* at 109. This Court continued to emphasize that an indictment must “provide fair notice to defendants” and “ensure that any conviction would arise out of the theory of guilt presented to the grand jury” *Id.* at 109-10.

Lower courts have reached conflicting views regarding when an indictment requires heightened specificity under *Russell*. Some courts have required *Russell* specificity in various contexts, particularly when the offense is based on oral statements made by the defendant, like the instant case. *See United States v. Nance*, 533 F.2d 699, 701-02 (D.C. Cir. 1976) (reversing false pretenses conviction because indictment failed to identify the actual false pretenses even though it did allege the names of the victims, the dates of the false pretenses, and the amounts of money obtained); *see also United States v. Pirro*, 212 F.3d 86, 92-94 (2d Cir. 2000); *United States v. Tonelli*, 577 F.2d 194 (3d Cir. 1978); *United States v. Curtis*, 506 F.2d 985, 989-92 (10th Cir. 1974).

When an offense is based on oral statements made by the defendant, there is a greater risk of shifting theories of liability because a defendant can make hundreds, if not thousands, of statements in a single day. The potential for such repetitive conduct in a narrow time frame should trigger the need for *Russell* specificity particularizing the offending statements in the indictment.

Furthermore, in *Russell*, 369 U.S. at 768-69, this Court noted that a more specific indictment was required because the criminal statute at issue raised certain threshold legal issues that courts were required to consider. Similarly, in the context of a criminal threats charge, there are threshold First Amendment

considerations that a court must consider to determine whether the charged offense constitutes a “true threat.” *See Watts v. United States*, 394 U.S. 705 (1969); *see also Perez v. Florida*, 137 S. Ct. 853 (2017) (Sotomayor, J., concurring in denial of *certiorari*).

Like the Ninth Circuit in this case, however, other lower courts have not required greater specificity for indictments charging similar threats offenses. *See United States v. Horton*, 580 Fed. Appx. 380 (6th Cir. Sep. 16, 2014); *Mims v. United States*, 332 F.2d 944, 946-47 (10th Cir. 1964). In *Mims*, 332 F.2d at 946, the Tenth Circuit reasoned that if greater specificity of the charge were required, it could be provided through a bill of particulars. This reasoning conflicts with *Russell*, 369 U.S. at 770, which explicitly stated that a bill of particulars cannot cure a defectively vague indictment.

This case is an ideal vehicle for resolving this conflict and for providing further guidance. Due to the lack of specificity in this indictment, this Court has no way of knowing whether the grand jury found all three of the threat theories sent to the petit jury. Indeed, the indictment made no mention of the neighbors, the purported conduits of the “indirect” threats that ultimately were sent to the petit jury. As in *Russell*, the indictment here “left the prosecution free to roam at large – to shift its theory of criminality so as to take advantage of each

passing vicissitude of the trial and appeal.” *Russell*, 369 U.S. at 768. Given the government’s opposition to the motion to dismiss the indictment, which espoused an amorphous continuing threat theory, it is quite possible that the grand jury did not find any of the specific threats sent to the petit jury. In sum, this Court should grant this petition to provide the lower courts with guidance as to when *Russell* specificity is required in an indictment and because the lower court’s determination that such greater specificity was not required in this case was incorrect.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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