

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)	CRIMINAL ACTION NO.
)	
Plaintiff,)	1:21-CR-00119-CJN
)	
v.)	
)	
GARRET MILLER,)	
)	
Defendant.)	
_____)	

**TRIAL BRIEF AND OBJECTIONS TO COURT’S CHARGE REGARDING
COUNTS 4 AND 5**

I. COUNT 4

A. Objections

Mr. Miller objects to the Court’s charge to itself because it does not require that he committed an assault in order to be guilty of the lesser included misdemeanor charged in Count 4 and submits that to be convicted of the lesser included misdemeanor the Court charge itself as follows:

The acts proscribed by the offense – assault, resist, oppose, impede, intimidate, and interfere with – each require an underlying simple assault. Simple assault means any intentional attempt or threat to inflict injury upon someone else, when coupled with an apparent present ability to do so.

According to 18 U.S.C. § 111(a), whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes a federal officer engaged in his or her official

duties,

shall, where the acts in violation of this section constitute *only simple assault*, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both. (Emphasis added)

In *United States v. Chapman*, 528 F.3d 1215, 1219 (9th Cir. 2008), the United States Court of Appeals for the Ninth Circuit considered the prior version of the statute and concluded that defendant “could not be convicted [under Section 111(a)(1)] unless his conduct also amounted to an assault.”

The current version of 18 U.S.C. § 111(a) continues to describe a misdemeanor violation as one where “the acts in violation of this section constitute only simple assault. Indeed, the United States Court of Appeals for the Tenth Circuit recognized that Congress’ 2008 amendment of 18 U.S.C. § 111(a) as “effectively codify[ed]” *Hathaway’s* definition of “all other cases” to include “any assault that involves actual physical contact or the intent to commit” certain felonies *United States v. Wolfname*, 835 F.3d 1214, 1220 (10th Cir. 2016), *citing Hathaway* 318 F.3d at 1008-09)).¹

While recognizing a split among the circuits, the United States Court of Appeals for the Second Circuit reached the same conclusion in *United States v.*

¹The Tenth Circuit Pattern Jury Instruction is consistent with this decision. See Attachment A.

Davis, 690 F.3d 127, 135-36 (2d Cir. 2012), *cert. denied*, 568 U.S. 1107 (2013).

B. Trial Brief

Mr. Miller also wants to make clear that, although he agrees with the government and the Court's charge to itself that, in order for him to be found guilty of felony assault under 18 U.S.C. § 111(a) the government must have the specific intent to commit another felony. He likewise understands that the government is alleging that the "other felony" is the violation of 18 U.S.C. § 231 as charged in Count 2. Nevertheless, he submits that, even assuming that Mr. Miller can be found guilty of the lesser included misdemeanor charged in Count 4 and it can be proven that he had the specific intent to commit the violation of 18 U.S.C. § 231 as charged in Count 2, this would be insufficient to make out a felony assault as alleged in Count 4.

Mr. Miller submits that the "intent to commit another felony" element cannot be met in this case by using the § 231 violation set forth in Count 2. This is because the exact same actions constitute both the assault and the "other felony" of the civil disorder. Here, Mr. Miller's alleged actions in "resist[ing], oppos[ing], imped[ing], or interfer[ing]" officers to establish the § 111 violation" are the same alleged actions in "obstructing, impeding or interfering" to establish the § 231 violation. In other words, the argument is essentially that Mr. Miller impeded and interfered in order to

impede and interfere.

It bears noting that the crime of Civil Disorder itself does not require that the defendant intend to commit a civil disorder. To prove the commission of Civil Disorder under 18 U.S.C. § 231(a)(3), the government must prove that a defendant “committed, or attempted to commit, an act with the intent to obstruct, impede, or interfere with law enforcement officers who were lawfully carrying out their official duties incident to a civil disorder.” The crux of the civil disorder offense is thus interference with an officer *during* a civil disorder, not *intent to commit* a civil disorder.

It should be noted that Judge Berman Jackson recently dealt with this issue in *United States v. Thomas Hamner*, 21-cr-00689-ABJ, albeit in the sentencing context. Judge Berman Jackson determined that a violation of § 111 could not be used as the “other felony” to a § 231 conviction in order to cross reference U.S.S.G. §2A2.4 (Obstructing or Impeding Officers), which would ordinarily apply to a § 231 violation to the enhanced penalties in U.S.S.G. § 2A2.2(Aggravated Assault). *See* Transcript (pages 13-24), Minute Entry June 16, 2022.

At sentencing in *Hammer*, the government took the position that the aggravated assault guideline should apply to the § 231 conviction because the civil disorder was committed with the intent to commit an assault on an officer based on the same

underlying conduct. *Hamner*, [ECF 28] (Government's Sentencing Memorandum, at 21). Judge Berman Jackson rejected that argument. Her reasoning and explanation are equally applicable to this case.

But there's no reason to believe that this is meant to be based on just the hypertechnical alignment of elements. Because when the guideline, at least in the gun context, tells you, well, you'd use the guideline for that offense instead of the firearms offense, it seems clear that it means something other than another gun possession offense. And it seems that the government's approach strips the provision of any meaning.

It strikes me that if the Commission is asking: Did you commit the assault with the intent to commit some other offense? It didn't mean with the intent to commit that exact same assault, just charged differently. They could have easily defined "another offense" as any offense with any different elements that's a different offense, but they didn't.

Its also important to note that the cross reference says that you go to aggravated assault if the assault on the police officer involved the intent to commit another felony, not the same intent needed to satisfy the elements of another felony, not that it was committed during the commission of another felony. This suggests that the guideline is meant to cover just the situation in the cases that you cited, where the assault on the police officer is intended to facilitate or further or advance or succeed in the commission of or evasion of apprehension for a second, different crime.

Hamner, Transcript for September 23, 2022 Sentencing, pp. 20-21.

As an example of the circularity of using the § 231 violation set forth in Count 2 to enhance the penalty for the § 111 violation set forth in Count 4, the government has also taken the position in *this* case that, for guideline calculation purposes, the §

111 violation set forth in Count 4 can be used to enhance the penalty for the § 231 violation set forth in Count 2. *See* [Doc. 96] at 7.² The argument that each offense enhances the other reveals it as circular in that these “other felony” enhancements (one statutory and one guideline driven) are based on the same conduct, and, as Judge Berman Jackson, noted this “strips the [‘other felony’] provision of any meaning.” *Hamner*, *supra*, Transcript at 20.

In sum, in this case the Court should use the “fork in the road” test and/or the “fresh impulse test” discussed by some courts.³ Using that test, a court looks at whether “there was an appreciable interval—albeit quite brief—between the two criminal episodes which showed that the defendant had reached a ‘fork in the road’ or had acted in response to a ‘fresh impulse.’” *Richardson*, 167 F.3d. at 628, *quoting*, *Spain v. United States*, 665 A.2d 658, 660 (D.C.1995). Stated another way, the tests look at whether “a defendant has an opportunity to reconsider his action before proceeding onward.” *Holt*, 893 F. Supp 2d. at 200, *quoting*, *Stevenson v. United States*, 760 A.2d 1034, 1038 (D.C.2000). In any event, to the extent Mr. Miller committed the § 231 offense alleged in Count 2, he, at or about the identical time,

²The government calculates the Sentencing Guidelines for a § 231 conviction using U.S.S.G. § 2A2.2, but, in order to do that, it would have to be enhanced for the conduct having also “constituted aggravated assault” *See* U.S.S.G. § 2A2.4(c)(1).

³*See United States v. Richardson*, 167 F.3d 621 (D.C. Cir.), *cert. denied*, 528 U.S. 895 (1999) and *Jones v. Holt*, 893 F. Supp.2d 185 (D.D.C. 2012) .

would have also committed the § 111 offense alleged in Count 4. At the end of the day, the argument that Mr. Miller had the intent to interfere in order to have the intent to interfere is both circular and an absurdity.

II. COUNT 5

A. Objections

Mr. Miller objects to the Court's failure to charge itself in accordance with *United States v. Kelner*, 534 F.2d 1020 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976) in defining a "true threat."

[T]he threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution,

Id. ("The purpose and effect of the *Watts* [394 U.S. 705 (1969)] constitutionally limited definition of the term "threat" is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished only such threats.").

He further objects to the extent the Court's charge to itself does not distinguish between threats and advocacy as discussed below.

B. Trial Brief

On January 6, 2021, Congresswoman Alexandria Ocasio-Cortez made what is clearly a political tweet advocating for the impeachment of then-President Donald J.

Trump: “Impeach [Trump].” One Twitter user then advocated for the arrest and detention of “any MAGA supporter in dc,” apparently without regard to whether that “MAGA supporter” committed any crime. Mr. Miller then advocated for the assassination of Congresswoman Alexandria Ocasio-Cortez by posting “Assassinate AOC” in one of the responses to her political post advocating for the impeachment of a President he supported.⁴

Although the line between threats and advocacy “may be difficult to draw in some instances,”⁵ there are different tests to determine what is a “true threat” proscribed by 18 U.S.C. § 875(c) and what is advocacy protected by the First Amendment to the United States Constitution. Indeed, as discussed in detail below, the test for determining whether a threat is a “true threat” is governed by how the threat is perceived by an objective observer and what the maker believed he was conveying, whereas the test for determining whether advocacy is constitutionally permitted is determined by whether such advocacy is “directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.”

⁴It should be noted that the government did not obtain the 36,000 responses to Congresswoman Ocasio-Cortez’s “impeach” tweet and social media platforms will not release another person’s social media accounts to defendants even with subpoenas. Therefore, it is not at all clear whether it was Mr. Miller who initially advocated for assassination or whether he was simply agreeing with another responder who brought up the topic in an earlier tweet responding to the Congresswoman’s “impeach” tweet.

⁵*United States v. Howell*, 719 F.2d 1258, 1260 (5th Cir.1983), *cert. denied*, 467 U.S. 1228 (1984)

Brandenburg v. Ohio, 395 U.S. 444 (1969) (emphasis added). In analyzing Mr. Miller’s guilt under Count 5, it is important to recognize this distinction between a threat and advocacy as 18 U.S.C. § 875(c) only proscribes threats of violence and not the incitement of violence. *United States v. Bagdasarian*, 652 F.3d. 1113, 1119 n. 18 (9th Cir.) (9th Cir. 2011) (“No other circuit [except the Fourth Circuit] has concluded that incitement can be punished under a threat statute.”). Put another way, whether a statement is a “threat” precedes the question of whether it is a “true threat.” It makes no sense to apply the “true threats” test to a statement unless it is at least a “threat” -- the former cannot exist without the latter

In recognizing the doctrinal distinction of analyzing a threat as compared to advocacy, it is clear that Mr. Miller’s tweet is one of advocacy (if even that), no matter how reprehensible the advocacy. Indeed, just as Congresswoman Alexandria Ocasio-Cortez advocated the impeachment of then-President Trump, Mr. Miller appears to have advocated (or wished for) the assassination of the Congresswoman in retribution for her tweet. On the other hand, to “threaten” someone is “to declare (usually conditionally) one’s intention of inflicting injury upon” that person. *Elonis v. United States*, 575 U.S. 723, 732-33 (2015) (quoting 11 *Oxford English Dictionary* 353 (1933)). A “threat” is “a communicated intent to inflict harm or loss on another.” *Id.* at 733 (quoting *Black’s Law Dictionary* 1519 (8th ed. 2004)).

Significantly, Mr. Miller did not say that he was going to assassinate the Congresswoman, nor did he say that anybody else was going to assassinate the Congresswoman.

This is the exact issue that confronted the United States Court of Appeals for the Fourth Circuit in *United States v. White*. 670 F.3d 498 (4th Cir. 2012), *abrogated on other grounds*, *United States v. White*, 810 F.3d 212 (2016). There the defendant made the following post to a website:

Richard Warman, the sometimes Jewish, sometimes not, attorney behind the abuses of Canada's Human Rights Tribunal should be drug [sic] out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. It won't be hard to do, he can be found easily at his home, at [Warman's home address].

Id. at 506. “The post closed with an ‘irreconcilable fact: Richard Warman is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree: [Warman's home address].’ ” *Id.*⁶ The Fourth Circuit held that this type of advocacy, however distasteful did not violate 18 U.S.C. § 875(c). It first found that, while “[White’s] communications clearly called for someone to kill Richard Warman...neither communication actually provided a

⁶As 404(b) evidence, the government also introduced an internet blog entry posted a few months later entitled “Kill Richard Warman” that included Warman's home address and the statement: “I do everything I can to make sure everyone knows where to find this scum, particularly because it makes him so mad: Kill Richard Warman! [Warman's home address].” *White*, 670 F3d at 506. Moreover, White’s convictions for threats made to others were upheld by the Fourth Circuit, despite its finding that the threats regarding Warman could not stand.

threat from White that expressed an intent to kill Warman.” *Id.* at 513.

While a direction to others to kill Warman could have amounted to a threat if White had some control over those other persons or if White's violent commands in the past had predictably been carried out, none of that context exists in this case. In short, the communications that formed the basis of Count 6 were expressions not directed to Warman but to the public generally and did not communicate an intent to take any action whatsoever. In these circumstances, we agree with the district court that the communications fell short of being true threats.

Id. at 513. The Fourth Circuit then concluded its analysis of White’s “threats” against Warman by noting

While the two communications for which White was indicted, along with the context surrounding them, may have undoubtedly frightened Warman, those communications at most conveyed a *serious desire* that Warman be harmed by others but did not convey a *serious expression of intent* to do harm from the perspective of a reasonable recipient.

Id. at 514 (emphasis in original).⁷

Similarly, in *Bagdasarian*, the defendant was charged with a violation of 18 U.S.C. § 879(a)(3) which makes it a crime to “knowingly and willfully threaten[] to kill, kidnap, or inflict bodily harm upon ... a major candidate for the office of

⁷Mr. Warman was, indeed, frightened: “Warman read these internet postings and, as he testified, considered them to be “death threats.” He took numerous steps to ensure his safety and his family's safety. He moved to a new home, which he and his wife put in her maiden name to hide it from the defendant; he removed all of his contact information from public databases; he altered his personal routine and stopped meeting his wife for lunch near her office; he started receiving his mail at a post office box; he had his wife register as a single mother when she gave birth to their daughter; and he and his wife decided not to give his daughter the Warman surname in order to protect her.” *White*, 670F.3d at 506.

President or Vice President, or a member of the immediate family of such candidate.”

Bagdasarian had made two posts to a Yahoo message board about then-presidential candidate Barrack Obama in October 2008. The first stated:

Re: Obama fk the niggar, he will have a 50 cal in the head soon.

Bagdasarian, 652 at 1115. The second stated:

shoot the nig country fkd for another 4 years+, what nig has done ANYTHING right? ? ? ? long term? ? ? ? never in history, except sambos.

Id. The Ninth Circuit held that these were not “true threats” and, in reversing the defendant’s conviction, it wrote:

Neither statement constitutes a threat in the ordinary meaning of the word: “an expression of an intention to inflict ... injury ... on another.” *Webster’s Third New International Dictionary* 2382 (1976). The “Obama fk the niggar” statement is a prediction that Obama “will have a 50 cal in the head soon.” It conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama. Nor does the second statement impart a threat. “[S]hoot the nig” is ***instead an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration.*** The threat statute, however, does not criminalize predictions or exhortations to others to injure or kill the President. It is difficult to see how a rational trier of fact could reasonably have found that either statement, on its face or taken in context, expresses a threat against Obama by Bagdasarian.

There is no disputing that neither of Bagdasarian's statements was conditional and that both were alarming and dangerous. The first statement, which referred to Obama as a “niggar” who “will have a 50 cal in the head soon,” coupled a racial slur with an assassination forecast during a highly controversial campaign that would ultimately make Obama the country's first black president. No less troubling is the

defendant's second statement imploring others to “shoot the nig,” lest the “country [be] fkd for another 4 years+” because “never in history” has a black person “done ANYTHING right.” There are many unstable individuals in this nation to whom assault weapons and other firearms are readily available, some of whom might believe that they were doing the nation a service were they to follow Bagdasarian's commandment. There is nevertheless insufficient evidence that either statement constituted a threat or would be construed by a reasonable person as a genuine threat by Bagdasarian against Obama.

Id. at 1119-20 (emphasis added).

In *New York ex. rel. Spitzer*, 273 F.3d 184, 196 (2d Cir. 2015) a pro-life defendant told an abortion doctor “that killing babies is no different than killing doctors.” The Second Circuit held that this could not be categorized as a “true threat.”

Given the context, it is understandable that the clinic doctor feared for her safety, and that Melfi's protest and strong rhetoric reinforced that fear. But excessive reliance on the reaction of recipients would endanger First Amendment values, in large part by potentially misconstruing the ultimate source of the fear. Melfi's expression went to the core of her protest message, and the statement (even in context) did not suggest that Melfi was engaged in a plan to harm the clinic doctor.

Id. at 196-97.

Here, Mr. Miller's tweet in response to the political advocacy of Congresswoman Ocasio-Cortez was itself advocacy and went to the core of his disdain for the Congresswoman's political advocacy of impeachment of then-President Trump and, as such, does not fall under the proscription of 18 U.S.C. §

875(c). Moreover, even assuming *arguendo* that “advocacy,” as distinguished from threats, was punishable under 875(c) in the first instance, Mr. Miller’s advocacy would have First Amendment protection under the Supreme Court’s ruling in *Brandenburg*.

The Court in *Brandenburg* made clear that the First Amendment to the United States Constitution protects advocacy of violence and the use of force “except where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.” *Id.* at 447 (emphasis added). *See, also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (“This Court has made clear that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.”)

Again, Mr. Miller submits that 875(c) does not proscribe advocacy, however repugnant. Nevertheless, even if it did, there is certainly no evidence that the one word-tweet (not including “AOC”) of a person hiding behind the internet was likely to produce imminent lawless action resulting in the assassination of Congresswoman Ocasio-Cortez any more than the tweet from Congressman Paul Gosar of an anime fantasy video showing him *actually* killing the Congresswoman.⁸ That is likely why a jury recently acquitted a defendant who posted on a newspaper’s Facebook page:

⁸<https://www.cnn.com/2021/11/09/politics/gosar-anime-video-violence-ocasio-cortez-biden/index.html>

Trump, we want actual revenge on democrats. Meaning, we want you to hold a public execution of pelosi aoc schumer etc. And if you don't do it, the citizenry will. We're not voting in another rigged election. Start up the firing squads, mow down these commies, and lets take america back!

United States v. Hunt, 573 F. Supp.3d 779, 783-84 (E.D.N.Y. 2021).⁹

Respectfully submitted,

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⁹It is also worth noting that it is anticipated that the government will introduce caustic and inappropriate *private* chats between Mr. Miller and others, pursuant to Fed. R. Evid. 404(b) on the question of whether his tweet response was a threat and a “true threat.” Nevertheless, when determining whether a “reasonable observer” would view his tweet as a threat and a “true threat,” such *private* chats serve no purpose because the “reasonable observer” would have been unaware of these chats.

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on December 7, 2022, I caused the foregoing document to be served by the electronic case filing system (ECF) on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden