IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 10-30701

UNITED STATES OF AMERICA

VS.

ASHTON R. O'DWYER, JR.

BRIEF FOR APPELLEE, ASHTON R. O'DWYER, JR.

Respectfully submitted,

ASHTON O'DWYER
APPELLEE
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CERTIFICATE OF INTERESTED PERSONS

In compliance with Fifth Circuit Local Rule 28.2.1, Appellee certifies that he believes the following persons may have an interest in the outcome of this case:

Ashton O'Dwyer, Appellee

Virginia Schlueter, Federal Public Defender

Cynthia Cimino, Assistant Federal Public Defender

Claire M. Sathe, Federal Public Defender Research and Writing Specialist

Jim Letten, U.S. Attorney, Eastern District of Louisiana

Jan Maselli Mann, First Assistant U.S. Attorney

Assistant U.S. Attorneys:

Michael Magner
Gregory Kennedy
Stephen Higginson
Diane Hollenshead Copes

David Welker of the FBI

Christopher DiMenna of the FBI

Genevieve "Genny" May of the U.S. Marshall's Service
(formerly Assistant Superintendent of the Louisiana State Police)

Brian Fair of the U.S. Marshall's Service

Trey Bobo of the U.S. Marshall's Service

STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully submits that he should be afforded the opportunity to explain to the Court at oral argument his "political prisoner" status, just as he did before U.S. Magistrate Judge Karen L. Hayes on March 4, 2010, the day Appellee was conditionally released from 34 days of involuntary solitary confinement in a penal institution, prior to the dismissal of the indictment in this case. See R. Vol. 8, pp. 1352-1357 and 1364-1365. Since August 29, 2005, Appellee also has been the target of a series of "reprisals" directed at Appellee by the Federal Government, with Appellee's continued "persecution" by the Government being directly related to the (1) criminal abduction, brutalization, torture and false imprisonment of Appellee at Camp Amtrak on September 20, 2005, events in which employees of the Federal Government, including Assistant U.S. Attorneys who are directly involved in this case,[1] were complicit, and (2) Appellee's litigation positions in the "Victims of KATRINA" litigation, which the Federal Government, through the U.S. Department of Justice, has participated in corrupting. As Voltaire said: "It is dangerous to be right when the government is wrong." Appellee respectfully submits that he should be entitled to expand on these and other points at oral argument.

[1] And they're all still "covering" for each other.

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STATEMENT OF JURISDICTION

This is an appeal from a final judgment in a criminal proceeding. The District Court had jurisdiction pursuant to 18 U.S.C. §3231. This Court has appellate jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether the Learned District Judge has discretion to dismiss the indictment, because the indictment failed, as a matter of law, to state a violation of 18 U.S.C. § 875(c)?

2) Whether the language in Appellee's e-mail even rose to the level of a "threat," much less a "true threat"?

3) Whether the Government, or anyone else for that matter, can identify one person who Appellee allegedly "threatened," since the alleged "victims" identified[2] by the Government are both "nameless" and "unidentifiable"?

4) Whether, when read in context with Appellee's other e-mails on January 29, 2010, the e-mail transmitted at 1222 hours contained anything "criminal"?

5) Why is the Government still trying to prosecute Appellee for allegedly making a "threat," when actual crimes of physical violence against Appellee, in violation of his civil rights, have gone unprosecuted and uninvestigated by the Government?

6) Has the Federal Government "targeted" Appellee for "selective persecution," in furtherance of a "vendetta," while other blatant crimes go unprosecuted?

7) Whether the Government has wrongfully withheld exculpatory materials?

8) Whether this Court even has jurisdiction over this case, since the allegedly criminal e-mail was not transmitted in interstate commerce, but solely in intra-state commerce?

[2] "Made up out of thin air" by the Government.

STATEMENT OF THE CASE

a) Course of Proceedings Below

Appellee has rarely, if ever, found himself agreeing with the Federal Government about ANYTHING since August 29, 2005. However, Appellee has no serious disagreement with the Government's recitation[3] (in the Government's brief) of the "Course of Proceedings Below," except in four (4) respects:

1) Perhaps the Government summarized the findings in other ways, with different words, but Appellee believes the Government deliberately omitted the following findings from the Memorandum Ruling of Judge Donald E. Walter of June 24, 2010 (Record Document No. 72, pp. 4-5):

> "The Court finds that Defendant's statements are insufficient to warrant submission to a jury to determine if they are a true threat. This Court has read all of the e-mails which the Government intends to submit as evidence of other acts pursuant to Federal Rule of Evidence 404(b). [Doc. #60][4] and the Defendant has attached to his Motions to Dismiss. These e-mails place the allegedly offending e-mail in context. At no point did the Defendant threaten anyone. His e-mails, while filled with coarse language, did not threaten bodily harm. Phrases taken out of context could suggest a threat, but reading the sentences as a whole, no threat as a matter of law was made. While Defendant's language may be inappropriate, this Court does not find the plain language of the allegedly threatening e-mail even rises to that of a threat let alone a true threat." (Emphasis added.)

2) Contrary to the Government's bold assertion, Appellee most definitely declared the contents of his pre-trial motions, etc., to be true and correct under penalty of perjury pursuant to 28 U.S.C. § 1746. R. Vol. 1, pp. 1004-1005.

[3] Appellee also denies that his e-mail was transmitted in interstate commerce. See infra.
[4] R. Vol. 1, pp. 918-997 in this Court.

3) Appellee was "arrested" at his home at approximately 9:45 P.M. on Friday evening, January 29, 2010, approximately 9-1/2 hours AFTER he had sent the allegedly criminal e-mail from his laptop in uptown New Orleans to the Bankruptcy Court on Poydras Street. Thereafter, while Appellee was incarcerated, the Government obtained a Grand Jury Indictment, the Government says "on February 5, 2010." Although Appellee was not a party to those proceedings Appellee avers, upon information and belief, that one of the "presenters" or "prosecutors" to the Grand Jury was Assistant U.S. Attorney Michael Magner, who was personally complicit in Appellee's abduction, brutalization, torture and false imprisonment on September 20, 2005. Appellee avers that this is called PROSECUTORIAL MISCONDUCT (among other things) and should have resulted in the disqualification of the Eastern District U.S. Attorney's Office from this case. More particularly, Appellee avers that Magner[5] is "covering his own hide" to avoid criminal liability by vindictively pursuing Appellee for alleged criminal conduct, which he knows is a LIE.

4) Appellee has repeatedly stated that, even if the words in his e-mail to the Bankruptcy Court at 12:22 P.M. on Friday, January 29, 2010 could be construed as a "threat" (which is denied), then the "Victims" of that threat were both NAMELESS and UNIDENTIFIABLE. Nevertheless, in the Grand Jury Indictment which the Government obtained (Record Document No. 13), the language of Appellee's allegedly criminal e-mail to the Bankruptcy Court was greatly expanded to falsely state that Appellee's e-mail "…contained a threat to injure the Court Personnel for both the District Court for the Eastern District of

[5] And others.

Louisiana and the Bankruptcy Court for the Eastern District of Louisiana, and the parties and counsel associated with Ashton R. O'Dwyer, Jr.'s bankruptcy proceedings." The Government knew that Appellee's e-mail contained no such language, and Appellee avers that by presenting that factually erroneous and willfully dishonest language to the Grand Jury, the Government prosecutor(s) committed prosecutorial misconduct warranting disqualification and sanctions.

b) Statement of Facts

Appellee does not disagree with the very brief "Statement of the Facts" by the Government in its Brief[6] except to restate that Appellee's e-mail to the Bankruptcy Court DID NOT contain "…a threat to injure the Court Personnel of both the District Court for the Eastern District of Louisiana and the Bankruptcy Court for the Eastern District of Louisiana, and the parties and counsel associated with [O'Dwyer's] bankruptcy proceedings…" which the Government knows to be a LIE. No such words were contained in Appellee's e-mail, no such persons were identified in Appellee's e-mail.

SUMMARY OF THE ARGUMENT

Federal "law enforcement" are wrongfully "persecuting" this case, because a fairly large number of so-called "Federal law enforcement" officials, including some directly involved in this case, were complicit in inflicting physical injuries upon Appellee on September 20, 2005, in the aftermath of KATRINA, and in violating Appellee's civil rights. Since then, these DEGENERATE BASTARD Federal Law Enforcement officials, including particularly, among others, Assistant U.S. Attorney Michael Magner, have improvidently used the power of their offices to embarrass, humiliate and disparage Appellee, so that his "message" about the

[6] Although Appellee will allude to other facts, ignored and intentionally omitted by the Government, infra.

corruption of the "Victims of KATRINA" litigation would not be listened to. More recently, with Appellee's arrest and indictment in this case, these Federal miscreants have "ramped things up a notch" by abusing their power to wrongfully prosecute Appellee for a "crime," i.e., making a "threat," which they know did not exist and was not committed. More particularly, the Government knows that the indictment in this case was ALWAYS subject to pre-trial dismissal, because Appellee's language did not constitute a "threat," much less a "true threat" as a matter of law, and the Government's appeal of the dismissal of the Indictment constituted an abuse of process and prosecutorial misconduct. Appellee incorporates herein by reference thereto his "Statement of the Issues Presented for Review," which enumerates ACTUAL CRIMINAL CONDUCT by the U.S. Department of Justice, by the FBI and by the U.S. Attorney's Office in this case, which conduct remains unprosecuted and unpunished. Lastly, Appellee avers that there is no Federal jurisdiction over this case, since Appellee's allegedly criminal e-mail was not transmitted in interstate commerce.

ARGUMENT

Standard of Review

This Court reviews *de novo* the denial of a motion to dismiss an indictment for failure to state an offense. *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). A district court's dismissal may be affirmed on any grounds raised below and supported by the record. See *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007).

I. THE LEARNED DISTRICT JUDGE HAD DISCRETION TO DISMISS THE INDICTMENT BECAUSE THE INDICTMENT FAILED, AS A MATTER OF LAW, TO STATE A VIOLATION OF 18 U.S.C. § 875 (c).

Contrary to the government's contention, pretrial dismissal of a federal indictment is by no means an "exceptional" measure. Federal Rule of Criminal Procedure 12(b)(3) expressly allows a district court to hear, before trial, any "motion alleging a defect in the indictment or information." "In this circuit, the propriety of granting a motion to dismiss an indictment under Fed. R. Crim. P. 12 by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact." *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005). When "a question of law is involved" in a defendant's pretrial challenge to the sufficiency of the indictment, consideration of the motion is proper. Id.

Mr. O'Dwyer has never challenged the essential facts material to the determination of his case. He does not contest that, on or about January 29, 2010, he sent an e-mail to an employee of the Bankruptcy Court for the Eastern District of Louisiana. Nor does he dispute the content of that e-mail, quoted in the indictment. He claims only that this e-mail contains protected speech under the First Amendment rather than a "true threat" punishable under §875(c). See *Watts v. United States*, 394 U.S. 705, 707 (1969). This type of constitutional inquiry does not involve any factual issues. The Government implicitly conceded in its brief the legal nature of Mr. O'Dwyer's challenge to the indictment, in explaining the applicable standard of review: "[W]hether a written communication is protected speech or an unprotected true threat will be reviewed de novo." Government Brief at 9. *De novo* review typically applies to questions of law, while factual determinations are reviewed on appeal for clear error.

The government's contention that the distinction between "true threat" and constitutionally protected speech is a factual issue for the jury is belied by the case law. The

Supreme Court itself, in *Watts v. United States*, held that the district court should have granted a judgment of acquittal when the defendant's alleged "threat" against the President of the United States was a mere "political hyperbole" that could not be interpreted as a "true threat." 394 U.S. at 708. Following *Watts* and its progeny, discussed below, it is clear that, under certain circumstances, a district court may rule as a matter of law that certain statements are not punishable "true threats."

As the government acknowledges, the Sixth Circuit has affirmed the dismissal of a § 875(c) indictment for failure to allege a "true threat." See *United States v. Alkhabaz*, 104 F.3d 1492, 1496 (6th Cir. 1997). In a more recent case, it also reversed the denial of a motion to dismiss criminal charges when "the indictment failed, as a matter of law, to allege a violation of § 875(c) "because the statements at issue did not qualify as "threats." *United States v. Landham*, 251 F.3d 1072, 1082-83 (6th Cir. 2001). Other appellate courts have similarly recognized "that the question of whether a defendant's communication is a true threat rather than speech protected by the First Amendment [is] a threshold question of law for the court." *United States v. Francis*, 164 F.3d 120, 123 n.4 (2d Cir. 1999); see also *United States v. Hanna*, 293 F.3d 1080, 1087 (9th Cir. 2002) (in a § 871(a) prosecution for making threats against the President of the United States, noting that "[i]f it were clear, as a matter of law, that the speech in question was protected, we would be obligated to remand not for a new trial, but for a judgment of acquittal"). Thus, "[i]f there is no question that a defendant's speech is protected by the First Amendment, the court may dismiss the charge as a matter of law." *United States v. Viefhaus*, 168 F.3d 392, 397 (10th Cir. 1999).

The district court was therefore entitled to dismiss the indictment against Mr. O'Dwyer for failure to allege a "true threat" excluded from the ambit of the First Amendment. As another

district court previously noted, "[w]hether or not a prosecution under § 875(c) encroaches on constitutionally protected speech is a question appropriately decided by the Court as a threshold matter." *United States v. Baker*, 890 F. Supp. 1375, 1385 (E.D. Mich. 1995). As explained below, in Mr. O'Dwyer's case, as in *Baker*, the indictment "falls short of the constitutional 'true threat' requirement" and was properly dismissed. Id. at 1388.

According to the government's brief, the district court erred in focusing on the "subjective intent" of Mr. O'Dwyer in making the statements at issue. See Government Brief at 17. The government claims that the Fifth Circuit and most other appellate courts have repeatedly "held that whether a communication is a true threat . . . is not to be determined by probing the maker's subjective purpose." Government Brief at 18. However, the Government misconstrues the district court's opinion, which expressly notes that "[t]he speaker does not have to actually intend to carry out threat" for his statement to qualify as a "true threat."[7] The district court did not base its dismissal of the indictment on Mr. O'Dwyer's state of mind. Rather, it found that the language of the e-mail sent by Mr. O'Dwyer, in contrast to the "explicit threats" at issue in *Morales*, *Murillo*, and *Myers*, did not "rise to that of a threat let alone a true threat."[8]

Only "true threats," defined by the Supreme Court as "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," fall outside the protections of the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003). A true threat thus "convey[s] a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic . . . unpleasantly sharp attacks on government and public officials." *Nielander v. Bd. of County Comm'rs*, 582 F.3d 1155, 1168 (10th Cir. 2009) (quotation omitted);

[7] Record Document No. 72, p. 4
[8] Record Document No. 72, p. 5.

United States v. Kelner, 534 F.2d 1020, 1026 (2d Cir. 1976) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Consistent with this analysis, the Supreme Court in *Watts* expressly excluded constitutionally-protected "political hyperboles" from the ambit of "true threats." *Watts*, 394 U.S. at 708. As explained by the Second Circuit, this limitation was designed to ensure that "only unequivocal, unconditional and specific expressions of intention immediately to inflict injury" would be punished under the various threat statutes. *Kelner*, 534 F.2d at 1027; see also *Baker*, 890 F. Supp. at1390.

Mr. O'Dwyer's statement, as quoted in the indictment, did not rise to the level of a "true threat" under the above definitions. His admittedly strident language is also clearly hyperbolic and intended to illustrate how desperately he wished for the Bankruptcy Court to authorize him to use part of his Social Security check to pay for a prescription refill prior to the weekend. Finally, the alleged "threat" is purely conditional. While even a statement phrased in conditional terms can be punishable under § 875(c), see *United States v. Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974), the "expressly conditional nature of the statement" is nevertheless a key factor in determining whether it is a "true threat." *Watts*, 394 U.S. at 708; see also *United States v. Sutcliffe*, 505 F.3d 944, 961 (9th Cir. 2007).

"In this circuit, a communication is a threat under § 875(c) if in its context it would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *United States v. Morales*, 272 F.3d 284, 287 (5th Cir. 2001) (quotation and alterations omitted). In addition, the maker of the threat must "utter[] the words as a declaration of an apparent determination to carry out the threat" to satisfy the statutory element that the threat be made "willfully." Id. Mr. O'Dwyer's vague, hyperbolic, and conditional statements fall well short of those standards. The district court properly distinguished them from the explicit threats at issue

in other Fifth Circuit cases. See *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001); *United States v. Murillo*, No. 99-40375, 2000 WL 1568160 (5th Cir. Sept. 12, 2000) (unpublished); *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997). It correctly determined that Mr. O'Dwyer's e-mail did not constitute a "true threat" and was therefore protected speech under the First Amendment.

The Government appears to suggest that this Court should reverse the district court's dismissal of the indictment because Mr. O'Dwyer will be able to argue before a jury that his vague hyperbolic statements did not constitute a "true threat." This argument is unavailing. As discussed, supra, whether a statement constitutes constitutionally protected free speech is a question of law properly resolved by the district court.

In addition, this Court has explained that its approach to Rule 12 motions to dismiss indictments, which allows district courts to resolve cases presenting exclusively legal issues, "avoids the waste of judicial resources that results from 'legally meritless cases being sent to trial.'" *Flores*, 404 F.3d at 325-26. The Government's suggestion that an issue that can be properly resolved by the district court should nevertheless be submitted to the jury clearly runs afoul of the Court's interest in judicial economy.

II. THE LANGUAGE IN APPELLEE'S E-MAIL DID NOT EVEN RISE TO THE LEVEL OF A "THREAT," MUCH LESS A "TRUE THREAT."

The few little words which got Appellee in so much "trouble" are the following, which were "buried" inside a longer e-mail (actually a series of e-mails) which Appellee exchanged with U.S. Bankruptcy Court employee Sean McGinn on Friday, January 29, 2010, this one at 12:22 hours, were:

> "Maybe my creditors would benefit from my suicide, but suppose I become 'homicidal'? Given the recent 'security breach' at 500 Poydras Street,[9] a number of scoundrels might be at risk if I DO become homicidal. Please ask his Honor to consider allowing me to refill my prescription at Walgreen's, and allowing me to pay them, which is a condition for my obtaining a refill."

Appellee maintains that the quoted language does not violate 18 U.S.C. §875 or contain "a threat to injure the person of another,"[10] for in the Fifth Circuit, "a threat imparts '[a] communicated intent to inflict physical or other harm' and is distinguished from words uttered as mere…idle talk or jest'." United States v. White, 258 F.3d 374 (5th Cir. 2001).

Appellee also maintains that in those few words,

1. He actually threatened NO ONE, because that would have been against the law;
2. He never intended to threaten anyone, because he knew that was against the law;
3. He identified NO potential "victim" by name or position, particularly any of the inhabitants of 500 Poydras Street, no matter how "crooked" or "corrupt" they were and are;
4. He identified NO weapon which might be used;
5. He identified no body part to be "targeted";
6. He identified no method to get past the Court Security Officers and screening devices inside 500 Poydras Street, given the "heightened" security following the security breach the prior Monday (not involving Appellee in any way); and
7. Indeed by Order of the Court in Civil Action No. 08-5170 on September 4, 2009, Appellee was DENIED ACCESS to 500 Poydras Street. See attached "ORDER BARRING ACCESS TO FEDERAL COURT BUILDING" (Exhibit No. 1), so

[9] There had been a "security breach" at 500 Poydras Street on Monday, January 25, 2010, when certain youthful imposters posing as repairmen, illegally gained access to the building and actually entered Senator Landrieu's offices under false pretenses. To say that this incident resulted in "heightened security awareness by the U.S. Marshall's Service and Court Security Personnel" would be an understatement.

[10] Or constitute a "true threat." See infra.

how was Appellee to gain access to the building if his "targets" worked at 500 Poydras Street?

In short, no one's personal safety was ever in jeopardy from Appellee.

Appellee also asks rhetorically: "If the Government, whether the U.S. Marshall's Service, the FBI or the U.S. Attorney's Office, or some other agency within the U.S. Department of Justice, really believed that Appellee constituted a 'threat' or danger to anyone's safety, why did it take 9-1/2 hours after transmission of the allegedly criminal e-mail for Appellee to be arrested?"

Appellee avers that, when read in context with Appellee's prior e-mails to a number of people on January 29, 2010, addressing the CORRUPTION of the "Victims of KATRINA" litigation and the failure of "Federal Law Enforcement" (the same "bunch" who arrested Appellee) to do anything whatsoever about the public corruption on the part of Federal Officials and others which Appellee had reported to them, the following will be apparent:

1) The above-quoted, allegedly "criminal" language, although admittedly "strident," was used solely to get Bankruptcy Judge Jerry Brown's (or Mr. McGinn's) "attention" on a Friday afternoon (transmission at 12:22 P.M.; Court closes at 4:30 P.M.), so that Judge Brown would sign an Order he had been sitting on for days, to allow Appellee to purchase anti-depressant medication (which defendant had been without for days, because he had no money) from his Social Security check,[11] so that Appellee would have his medication for the weekend.

2) The language which the Government labels "criminal" is not criminal at all, but simply "the way Appellee speaks," to those who know him, and at worst should be viewed as hyperbole (and "conditional"[12] hyperbole at that) rather than a "criminal threat."

[11] As it turned out, Appellee needn't have bothered, because Brown left the office before noon (as per transcript of recent Bankruptcy Court hearing) and didn't sign the referred-to Order before leaving for the weekend.

[12] "…but suppose I become homicidal" means that Appellee was NOT THEN homicidal. The world "SUPPOSE" meant that Appellee might not EVER become homicidal (TRUE). "…scoundrels might be at risk" means WHAT? At risk for what? A slip and fall? A fight with a spouse? And "…if I do become homicidal" is again couched in conditional terms not then occurring, and maybe NEVER occurring (TRUE). "[S]coundrels" are not named or identified, and Appellee reiterates that no one is identified by name or position as being threatened and that no object or target of the "threat" (which is denied) is even identifiable.

3) Appellee respectfully submits that the most accurate way to describe the allegedly "criminal" e-mail, in context, is as "a cry for help," so that Appellee could pay for his medication with his Social Security check proceeds before the weekend.

Appellee and incorporates by reference the Rule 16 "production" by the Government in this case, (R. Vol. 1, pp. 486-563), which the Government maintains must say "something" about Appellee in a criminal context.[13] Appellee respectfully submits that, when read in context with the other e-mails authored by Appellee while fighting a "CORRUPT FEDERAL COURT AND JUDICIAL SYSTEM" on a number of fronts, since August 29, 2005, an objective reader will find NOTHING CRIMINAL about the two allegedly incriminating sentences in the e-mail to Mr. McGinn at 1222 hours on January 29, 2010.[14]

Appellee respectfully submits that the "lead case" for the proposition that a "conditional threat" is not the kind of statement that is proscribed by 18 U.S.C. §875(c) is *Watts vs. United States*, 394 U.S. 705, 89 S.Ct. 1399 (1969). There, the defendant was prosecuted for making the following statement at a political gathering:

> "If they ever make me carry a rifle the first man I want to get is my sights in L.B.J."

In reversing the defendant's conviction for threatening the then-President, Lyndon Baines Johnson, including reference to the "conditional nature" of the Defendant's language, and the fact that it was made at a political gathering, the Supreme Court stated:

> "But whatever the 'willfulness' requirement implies, the statute [prohibiting threats against the President] initially requires the government to prove the true 'threat.' We do not believe that the kind of political hyperbole indulged in by

[13] Appellee maintains that the substantive contents of the Rule 16 "production" demonstrates the incompetence of Government , its "double-dealing," its criminal conduct, and its failure to act in the face of public corruption which it (the Government) is aiding and abetting in the "Victims of KATRINA" litigation.

[14] The "suicidal vs. homicidal" hyperbole had been used previously with a friend (R. Vol. 1, p. 552), with co-counsel in the "Barge Case" (R. Vol. 1, p. 555)and with Journalists with the *Times-Picayune* (R. Vol. 1, p. 994), and obviously was meant "tongue-in-cheek."

> petitioner fits within that statutory term. For we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be inhibited, robust and wide-open, and that it may well include vehement caustic, and sometimes unpleasantly sharp attacks on government and public officials. (Citations.) The language of the political arena, like the language used in labor disputes, (citations) is often vituperative, abusive and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President. Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise," 89 S.Ct. at pp. 1401-1402.

Appellee respectfully submits that, taken in context (or not), the "conditional language" in his allegedly "criminal" e-mail which Appellee calls "hyperbole," "tongue-in-check," and a "cry for help," so he could obtain medication for the weekend, doesn't even come "close' to Mr. Watts' statement about putting President Johnson in his sights "if they ever make me carry a rifle."[15]

Appellee avers that *Watts v. United States*, supra, strongly supports the argument that the dismissal of the indictment in this case should be affirmed.

The two (2) cases from the Fifth Circuit in a 18 U.S.C. §875(c) context, namely *United States v. Myers*, 104 F.3d 76 (5th Cir. 1977) and *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001), both support the argument that the indictment in this case should have been dismissed since there is a clear disparity i.e., "no true threat," in the hyperbolic and conditional language used by Appellee, and the actually threatening language used by defendants Meyers and Morales.

In *United States v. Myers*, supra, the Court affirmed convictions on three counts based on the following language with a U.S. Congressman's staff member:

> The defendant "would take matter into his own hands," warning the staff member that he "should be sure to have plenty of body bags around."

[15] Appellee avers that the Government's argument that Watts is distinguishable from Appellee's case, because reportedly some members in the audience "laughed" when Watts made his statement, is absurd.

> "And I'm still talking about body bags because if YOU do nothing what do you expect."
>
> "I am going to get retribution for me and my family's suffering. You can take that to the bank.
>
> "What it means, I'll do what, ah, like we said in Nam, whatever it takes."
>
> The defendant in Myers also said he had a friend in Seattle who had TOW missiles and spoke of "coming up there to die."
>
> The defendant claimed to be "head of the militia in this area" and made reference to "AK-47 rifles being shoved into the faces of congressmen."

Again, Appellee argues that there exists a clear disparity between the contents of Appellee's allegedly "criminal" e-mail to Sean McGinn, and what the defendant in Myers told the Congressman's staff member. More to the point, Appellee avers that his allegedly criminal language doesn't come "close" to the direct threats made by the defendant in Meyers.

In *United States v. Morales*, supra, the Fifth Circuit affirmed the conviction of an 18-year-old high school student who used internet communications across state lines to communicate the following to a female friend:

> "I will kill."
>
> "Teachers and students at Milky."
>
> "Cause I am tired HOUSTON."
>
> "Yes F NE STANDS N MY WAY WILL SHOT."
>
> "I HATE LIVE."
>
> "YES MY NAME IS ED HARRIS."

Appellee respectfully submits that there is NO COMPARISON between his transmission to Sean McGinn and what Morales chatted about in interstate commerce with his female friend friend, described supra, which included direct threats.

Two (2) more cases illustrate the "no true threat" nature of Appellee's "criminal threat" namely:

1) *U.S. v. Stewart*, 420 F.3d 1007 (9th Cir. 2005), in which a conviction for threatening to murder a Federal Judge was upheld where the defendant had stated he wanted to target a judge and "string the mother fucker up and cut her throat, his throat, and make it look like a copy-cat so that people would do the same thing." 4020 F.3d at p. 1015.

2) *U.S. v. Alaboud*, 347 F.3d 1293 (11th Cir. 2003), a conviction for violation of 18 U.S.C. §875(c) was affirmed where the defendant:

> Had made 89 calls to his former lawyer, 29 in a single day.
>
> Warned the lawyer to "look at Montserrat (an island destroyed by a volcanic eruption), take an aerial photograph of Montserrat and then you will be looking at your company…in the next few weeks."
>
> "If justice is not given to me, the population of the area from Key West to Tallahassee will be driven from their homes, what happened to Montserrat will happen to them, and they will lose their homes.
>
> "You (the lawyer's receptionist) and all the Jewish women and children would be burned."

Appellee avers that there simply is no comparison between his conditional hyperbole and the direct threats made in *Stewart* and *Alaboud*, *supra*. Appellee also avers that his language did not constitute a "threat" much less a "true threat" necessary for liability under 18 U.S. C. § 875(c), just as found by the Learned District Judge Donald E. Walter, who concluded: "while the Defendant's language may be inappropriate, this Court does not find the plain language of the allegedly threatening e-mail even rise to that of a threat let alone a true threat." (Record Document No. 72, p. 5).

III. JUST WHO IS APPELLEE ACCUSED OF THREATENING?

Appellee believes the case of *United States v. Bozeman*, 495 F.2d 508 (5th Cir. 1974), to be the ORIGIN of the rule within the Fifth Circuit that in identifying "A TRUE THREAT," the Court must (or should) take into account the SUBJECTIVE Opinion of the RECIPIENT of the alleged threat.

Appellee avers that "the rule of *Bozeman*" could be problematic, because Appellee's alleged "threat" was not directed at any particularly-identified individual, or even at a particular category of persons. Accordingly, Appellee suggests that not only are his alleged "VICTIMS" unidentified, they are UNIDENTIFIABLE. It is, no doubt, for those reasons that the Government failed to produce a witness, an affidavit, a statement, or ANYTHING else of an evidentiary nature, to the effect that anyone ever filed "threatened" by Appellee at any time, much less between 1222 hours on January 29, 2010 and Appellee's arrest some 9-1/2 hours later. The actual language of the *Bozeman* "rule" requires analysis by "a Philadelphia lawyer":

> "i.e., [this] communication 'in its context' would 'have a reasonable tendency to create apprehension that its originator will not act according to its tenor'." *Bozeman*, supra, 495 F.2d at p. 501

Appellee submits that the "lack of clarity" of "the Bozeman rule" is an under-statement. Additionally, the "rule" has "morphed' so that:

1) In *U.S. v. Myers*, 104 F.3d 76 (5th Cir. 1977), the Court said: "In this circuit, a communication is a threat under §875(c) if 'in its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor'." 104 F.3d at p. 79 and authorities cited therein. Apprehension in whom, and acting according to what tenor?

2) In *U.S. v. Morales*, 272 F.3d 284 (5th Cir. 2001), quoting *Meyers*, supra, the Court stated, "…in *Myers* we determined that '[i]n order to convict, a fact finder must determine that the recipient of the in-context threat reasonably feared it would be carried out.' (Citation)." Clearly Appellee did not "threaten" Sean McGinn. To whom was the allegedly threatening

> e-mail delivered, when, by whom, why, and what reasonable basis did any recipient have that an unspecified "threat" would, much less could, be carried out?

Appellee reiterates that the *Bozeman* "rule" is problematic for the Government in this case, because Appellee has always maintained that the so-called "victims" of his "criminal threat" (yes, the "hyperbolic," conditional, allegedly criminal threat, which was neither a "threat" nor not a "true threat") are both (1) NAMELESS and (2) COMPLETELY UNIDENTIFIABLE.

The Government lawyers and/or the FBI gratuitously added the following words to the Indictment, words that appeared neither in Appellee's e-mail or in the "sworn-to-under-oath" Criminal Complaint of the FBI Agent[16] which resulted in Appellee's arrest: "…a threat to injure one Court Personnel both the District Court for the Eastern District of Louisiana and the Bankruptcy Court for the Eastern District of Louisiana, and the parties and counsel associated with Ashton R. O'Dwyer, Jr.'s bankruptcy proceedings." Appellee avers that the above-quoted words are LIES, were not included in Appellee's e-mail to Sean McGinn, and constitute proof of "creative drafting" by the Government, and more particularly, "complete FABRICATION," and "making things up out of thin air," when they DON'T EXIST, and have never existed.

Appellee's attempts through his Bill of Particulars (Record Document Nos. 55 and 56) to learn who was contacted after Sean McGinn received Appellee's e-mail (McGinn was no "target," and Defendant again invites the Government to identify Appellee's "target"). Lastly, since this case involves a VAST FEDERAL SYSTEM OF PUBLIC CORRUPTION on an unimaginable scale, and since the Government controls all Federal witnesses, who will the Government identify to Appellee on the evening before trial as having been "fearful for his or her personal safety and well-being upon being shown defendant's e-mail prior to defendant's

[16] Appellee avers here, just as he did in his Pre-Trial Motions, that this FBI Agent Christopher DiMenna has a serious problem with the truth.

arrest at approximately 2145 hours on January 29, 2010" if this case is reversed? Appellee will answer that question for the Government: "NO ONE WE HAVE BEEN ABLE TO IDENTIFY."

IV. WHEN READ IN CONTEXT WITH APPELLEE'S OTHER E-MAILS, THERE IS NOTHING "CRIMINAL" IN THE E-MAIL TRANSMITTED TO THE BANKRUPTCY COURT AT 1222 HOURS ON JANUARY 29, 2010

Appellee avers that, when read in context with other communications with the Bankruptcy Court, on January 29, 2010, the allegedly "criminal" e-mail of January 29, 2010 @ 1222 hours shows an honest man working within the legal system, with "criminal" design or intent being the furthest thing from his mind.

Following his suspension from the practice of law, and later disbarment (see Case No. 08-46 c/w 09-12 on the docket of this Court), Appellee was not only wrongly deprived of his livelihood, but of his ABILITY to earn a living. Until January 2010, Appellee received a very modest weekly allowance from his 83-year-old mother, but with the receipt of his first Social Security check in the magnamous amount of $1,725 in December or January 2010, that allowance was terminated by Appellee's Family. Accordingly, by mid-January or thereabouts, Appellee was "OUT" of money and by Monday, January 25, 2010, Appellee also was "OUT" of his anti-depressant medication. At the time, Appellee believed that his Social Security check was under the supervision of the Bankruptcy Court, so on Wednesday, January 27, 2010, Appellee filed a Motion in the Bankruptcy Court similar to one he had filed previously (which had been expeditiously granted), requesting permission from the Bankruptcy Court to refill his anti-depressant prescription and to pay for same with Social Security funds.[17] Unfortunately, this time, the Bankruptcy Court did not expeditiously act on Appellee's Motion.

[17] There also were "issues" about the posting of Appellee's "Plan" on the Bankruptcy Court web-site. See infra. However the overriding issues pending before the weekend were (1) refilling the prescription for anti-depressant medication, and (2) how to pay for it prior to the weekend.

Accordantly, around midday on Thursday, January 28, 2010, Appellee contacted[18] Sean McGinn of the Bankruptcy Court and sent McGinn the following e-mail at 1135 hours, shortly before lunch:

> "Mr. McGinn: Everyday that my Plan which I believe was file (SIC) about a week ago, is not available on PACER, the Public is deprived of knowledge in a Court of record. I cannot afford PACER anymore, and my former account is disabled. As will be apparent from a Motion I filed yesterday, I have been without any funds, (i.e., money) for the past few weeks. Accordingly, I could not afford for a copy of my Plan to be made at KINKO's prior to filing. PLEASE contact Chambers, and e-mail me my filed Plan, conformed with the date of filing, without further delay. I have received media inquiries to my Bankruptcy filing which I need my Plan to intelligently respond to. I also need to send my Plan to the Local Office of the Federal Bureau of Investigation. Since I do not want to be unjustly and erroneously accused of ex parte communications with the Court, please get this e-mail entered on PACER so that creditors and/or their counsel will know what I have asked you to do. Thank you. (Emphasis added.)

Appellee respectfully submits that the quoted e-mail at 1135 hours on Thursday, January 28, 2010, hardly demonstrates any criminal conduct or any criminal intent whatsoever, and reflects that Appellee was attempting to act at all times within the Bankruptcy laws.

McGinn did not respond to Appellee until late Friday morning, January 29, 2010, not long before Appellee transmitted the allegedly "criminal" e-mail. Here's what McGinn reported back to Appellee:

> "Mr. O'Dwyer, your Plan was received by the Clerk's Office on January 20, 1010 and your Motion was received on January 27, 2010. Although received, your pleadings must be authorized by Judge Brown to be filed into the record. Judge Brown has your pleadings and will take appropriate action promptly. E-mails are not considered pleadings and therefore your e-mail to me will not be docketed into the record."

Appellee's reply to McGinn, which is the e-mail of 1222 hours on January 29, 2010, the one which got Appellee in "trouble" with the law, reads as follows.

[18] It is Appellee's recollection that he spoke to McGinn by telephone, explaining the "crisis" unfolding about how to pay for the medication before the weekend; however, Appellee is not sure whether the telephone conversation with McGinn was on Thursday the 28th or Friday the 29th.

> "Well, please convey to Judge Brown my belief that he can "try" to protect the CRIMINALS Duval, Lemelle and Dennis, but he can't protect them from themselves, and the "damage" is already done. As is the case with Judge Porteous, their impeachment is "just a matter of time." Also convey to Judge Brown a reminder that I have been totally without money since the weekend of January 8th, 9th, and 10th, and that I have been without my anti-depressant medication, for which I have sought leave to pay Walgreen's from my most recent Social Security check, since last weekend. I could not sleep last night, which I attribute to the effect of abruptly stopping my medication on Sunday, the 24th (my pills "ran out," and I have no money to purchase more). Maybe my creditors would benefit from my suicide, but suppose I become "homicidal"? Given the recent "security breach" at 500 Poydras Street, a number of scoundrels might be at risk if I DO become homicidal. Please ask His Honor to consider allowing me to refill my prescription at Walgreen's, and allowing me to pay them, which is a condition for my obtaining a refill. Please communicate this missive to creditors and their counsel. Thank you." (Emphasis added.)

At the risk of being redundant, Appellee reiterates that no "VICTIMS" are named or even identifiable in his e-mail. Appellee's language was clearly hyperbolic, and calculated only to get Judge Brown to legally approve Appellee's using part of his Social Security check to pay for a prescription refill. Defendant had no criminal intent in mind, even going so far as to request that McGinn share the contents of the e-mail with creditors and their counsel. Further, it cannot seriously be argued that Judge Duval, Lemelle or Dennis had been "targeted" for physical harm, because Appellee warned that their "impeachment," which clearly required that they be ALIVE, was "just a matter of time." And if that were not enough to persuade this Court, like Judge Walter was persuaded, that Appellee's language did not constitute "a threat let alone a true threat" (Record Document No. 72, p. 5), at 5:37 P.M. on January 29, 2010, Appellee transmitted the following, follow-up e-mail to Sean McGinn of the Bankruptcy Court:

> "Mr. McGinn: Please advise Judge Brown that I have not failed to notice that he did not grant me leave to deplete my available Social Security funds by the sum necessary for me to refill my prescription for antidepressant medication before the close of business today. This means that I will be without medication at least until Monday, the 1st. You can also tell him for me that, if he wants, I can add his name to the "hit list" which I already have furnished the United States Department of Justice, the FBI and the Fifth Circuit.

> No problem at all. Just tell him to let me know. Regardless of Judge Brown's response, please also advise him that I am hereby placing him on notice that he should preserve, and instruct his staff to preserve, all telephone, including cellular phone, computer (whether Government or personal) and lap-top or "blackberry" (or equivalent) hard drives and memories, and calendars, diaries and schedules, and notes or drafts in any way regarding me or Case No. 09-12627. Please be sure to communicate this e-mail to creditors and their counsel. Thank you."

Appellee avers that hardly could the about-quoted e-mail, transmitted to the Bankruptcy Court by Appellee just a few hours before Appellee's wrongful arrest, at 9:45 P.M., be construed to contain criminal language or even criminal intent. Indeed, it shows a man working (even with great difficulty) within the legal system, now and in the future to attempt to get the U.S. Department of Justice, the FBI and the Fifth Circuit (which has jurisdiction over complaints of Judicial Misconduct) to do the "right" thing, which they have not done to this day.

Appellee also appends hereto as Exhibit No. 2 e-mails exchanged with Professor Carl Benofsky of "Tulanelink.com" on the afternoon and evening of Friday January 29, 2010, namely:

A. Sent @ 1:24 P.M.

B. Received @ 4:14 P.M.

C. Sent @ 5:24 P.M.

C. Sent @ 7:32 P.M.

E. Sent @ 7:48 P.M.

Again, these e-mails reflect an honest, law-abiding citizen exchanging intellectual ideas with a former Tulane Professor about the corruption of the "Victims of KATRINA" litigation, corruption in which the U.S. Department of Justice was and is complicit, and what might be done

about that, rather than a man with criminal intent who was planning to cause bodily harm to his fellow man.

There are a few other e-mails, which Appellee wishes to bring to the Court's attention, which are marked Exhibit No. 3 (A-C):

A) An e-mail dated around 1130 hours on January 29, 2020, and authored by Appellee, addressed possible CRIMINAL CONDUCT by members of the Plaintiffs' Liaison Committee, and others, in connection with presenting a claim for reimbursement for some $250,000 to come out of the Levee Board Settlement. Appellee submits that it hardly would make sense to level charges of criminal wrongdoing against others, and then engage in criminal behavior involving something as stupid as a "threat."

B) An e-mail transmitted to one of Appellee's friends on January 15, 2010, which describes in some detail the corruption of Stanwood R. Duval, Jr. and his cronies, and the corruption and double-dealing of the Federal Government, for which Appellee has no respect and utter contempt for.

C) An e-mail from Appellee to a friend in which Appellee actually PREDICTED "another arrest on trumped-up criminal charges," which came true.

Lastly, Appellee finds it noteworthily ironic that on January 27, 2010, the same day on which Appellee filed his Motion to purchase his prescription refill with his Social Security check (which Judge Brown never signed), and two days before Appellee's arrest, Appellee filed a supplement in amplification of Complaints of Judicial Misconduct made by Appellee against

Judges Duval, Lemelle and Dennis. (R. Vol. 1, p. 655-674.). Appellee submits that a strong case can be made that his arrest two day's later was "payback."

V. WHAT ARE THE "MOTIVES" BEHIND THE GOVERNMENT'S PROSECUTION OF APPELLEE FOR ALLEGEDLY MAKING A "THREAT," WHEN ACTUAL CRIMES OF VIOLENCE AGAINST APPELLEE HAVE GONE UNPROSECUTED AND UNINVESTIGATED BY THE GOVERNMENT

This case allegedly involves a physical alleged "threat" of bodily harm (which is denied by Appellee) against unnamed and unidentifiable "victims." Attached as Exhibit No. 4 (A-C) are three (3) pages of color photographs of a white male's lower extremities (i.e., his legs). One might look at the photographs and ask, "Goodness! Were these taken in Iraq or Afghanistan? Or maybe even at Guantanamo?" The questioner would be WRONG on all counts, because the photographs show the battered and wounded legs of a U.S. citizen who lives right here in New Orleans. That citizen is APPELLEE ASHTON O'DWYER! At the risk of stating the obvious, the photographs do not provide proof of any "threat" of bodily harm, but of ACTUAL BODILY HARM. Yet no one has been prosecuted for the obvious Federal civil rights violations perpetrated against Appellee at Camp Amtrak during the early morning hours of September 20, 2005 by "law enforcement" who included Federal law enforcement personnel who are personally involved in prosecuting this case. The reason for this is quite simple, and was included in Appellee's Motion to Disqualify and/or to Recuse the U.S. Department of Justice, the Federal Bureau of Investigation, and the U.S. Attorney's Office from this case, a Motion which was summarily DENIED by this Court, without assigning any reasons therefore, on December 22, 2010. Notwithstanding that misplaced action, it cannot be denied that the following Federal employees (among others not yet identified) were at Camp Amtrak early on September 20, 2005,

when Appellee was pepper-sprayed 30 to 40 times and shot 12 times at point-blank range with a 12-gauage shotgun loaded with beanbag rounds, at that locale:

FBI Special Agents-in-Charge
Kenneth Kaiser
and
Michael Wolf

Assistant U.S. Attorneys[19] for the Eastern District of Louisiana
Michael Magner
Brian Marcelle
Stephen Higginson[20]

U.S. Immigration and Customs Enforcement
Director Michael Venacore

And Unnamed Individuals with
U.S. Department of Justice
Department of Homeland Security
FEMA
Bureau of Alcohol, Tobacco, Firearms and Explosives
U.S. Marshall's Service

None of these Federal employees lifted a finger to prevent Appellee's brutalization, torture and false imprisonment at Camp Amtrak on September 20, 2005, notwithstanding the fact that IT WOULD HAVE BEEN IMPOSSIBLE FOR PERSONS WITH NORMAL SENSIBILITIES NOT TO HAVE HEARD 10 SEPARATE DISCHARGES FROM A 12-GAUGE SHOTGUN INSIDE CAMP AMTRAK, AND 2 SEPARATE DISCHARGES OUTSIDE. Indeed, Appellee avers that the shooting (at him) would have "awakened the dead"!

Appellee avers that it is patently obvious that not only has his civil rights case not been prosecuted by the Federal Government, or even investigated, because Federal "law

[19] Both the current "Head" of the local FBI office, "Special Agent in Charge" David Welker, and the U.S. Attorney for the Eastern District, Jim Letten, issued Press Releases to the media on January 31, 2010, touting their offices' participation in Appellee's arrest on January 29, 2010. However, neither of these "stalwarts of Federal law enforcement" has even investigated, much less prosecuted, Appellee's abduction, brutalization, torture and false imprisonment on September 20, 2005, actual crimes of violence, not "threats," in which their own employees were complicit.

[20] Higgenson actually had the temerity to sign the Government's brief in this case.

enforcement," including the FBI and the U.S. Attorney's Office, were complicit, and are all "covering" for each other and trying to destroy Appellee's credibility and reputation in the process with a conviction in a "trumped-up" criminal case (i.e. this one!).

A reading of the "Criminal Complaint" in this case, a truly nefarious document which is replete with lies and false statements, will reveal that, although it is dated January 29, 2010, must have been "in the works" weeks, or even months, prior to that date. Also attached as Exhibit No. 5 is an FBI "Civil Rights Control File" document, again replete with lies and false information, which reflects that as early as July 11, 2007, Appellee was being monitored by the FBI, causing Appellee to ask, "For what?"

The Criminal Complaint and the contents of the Government's Rule 16 disclosures will reflect that defendant had been "hounding" the Government, unsuccessfully, for years, to address the following issues prior to Appellee's arrest on January 29, 2010:

1) The corruption of the "Victims of KATRINA" litigation over which Stanwood R. Duval, Jr. continues to preside;

2) Appellee's utter frustration over the fact that the U.S. Department of Justice has failed to take seriously Appellee's allegations of corruption in that litigation, and more importantly, failed to ACT, meaning that the corruption has been allowed to continue to flourish, unabated.

3) Appellee's frustration over the fact that the U.S. Department of Justice failed to act on Appellee's allegations in Civil Action No. 08-4728, which "laid out" the corruption in which Duval and his "close personal friend of long-standing," plaintiff's lawyer, Calvin C. Fayard, Jr., (and others), have engaged in, and continue to engage in.

4) Appellee also addressed his personal litigation over his abduction, brutalization, torture and false imprisonment on September 20, 2005, the summary dismissal of that litigation, and the fact that the FBI refused to investigate, much less prosecute.[21]

[21] And we now know why: Employees of the he FBI and the U.S. Department of Justice, among others, were complicit!

5) Appellee's suspension from the practice of law and later disbarment, and a Default Judgment entered against him by the same Judge who disbarred him, in violation of the Code of Conduct for United States Judges.

Surely this Court will not believe that the almighty Federal Government has directed its "interest" in Appellee during the past several years solely to protect the CRIMINAL Assistant U.S. Attorney Michael Magner, the FBI and their criminal miscreant Federal colleagues who were at Camp Amtrak on September 20, 2005, from charges of obstruction of justice, or worse.

So what "else" is at work here to have caused the Federal Government to turn a "blind eye" to the corruption of the "Victims of KATRINA" litigation? The "what else" is the "Victims of KATRINA" litigation itself, which arose out of the biggest civil engineering disaster in recorded history, and which involves "numbers," i.e., claims, damages, recoveries – take your pick – on a mind-numbing, astronomical scale. Appellee is going to use the figure of $200 billion, because that is the number which has been bandied about so often. Whatever the number may be may have to await individual evaluation of each individual claim, but Appellee predicts that it is a number NEVER BEFORE HEARD OF in the history of American jurisprudence, and probably never before heard of in the history of WORLD jurisprudence.

BOTTOM LINE:

The number is huge, huge enough to make men who are pre-disposed to all things BASE, dishonest men, who lack character and integrity, men who would sell their families for a buck, yes, men who would readily compromise their principles, because they don't have any, and DO AWFUL, DIRTY, ROTTEN things[22] on the backs of innocents, all for a buck. The corruption of the "Victims of KATRINA" litigation has occurred UNDER THE VERY NOSES of the lawyers

[22] So brazen are these people that they believe themselves to be IMMUNE from the reach of "Federal Law Enforcement." In the "Victims of KATRINA" litigation, unfortunately, their perception of immunity has proven to be entirely right, because the corruption continues unabated and unchecked by any agency of the Federal Government.!

from the CIVIL LITIGATION DIVISION in Washington, D.C., who represent the United States in the litigation, and under the very noses of and in the same building as the Eastern District U.S. Attorney's Office. Since Appellee has on numerous occasions brought the corruption to the attention of the Federal Government, in writing, it would be very embarrassing for them, at this late date, to act, when recovery already has been denied against the Federal Government to all of those persons who lived WEST of the Industrial Canal, and who include residents of the Upper Ninth Ward, the Central Business District, Lakeview, Canal Street and Canal Boulevard, Central City, Mid City, areas North of St. Charles Avenue, and Jefferson Parish.

Appellee avers, upon information and belief, that the USDOJ lawyers representing the Government have intentionally committed MALFEASANCE, which rises to the level of CRIMINAL CONDUCT, BECAUSE THEY DID NOTHING TO STOP THE CORRUPTION for so long. Also, the United States of America BENEFITED from the corruption of the presiding Judge, Stanwood R. Duval, Jr., in "The Outfall Canal" case, decided in January 2008, but only recently reduced to a final, appealable Judgment. In plain simple English, Duval DENIED monetary recovery, against the United States, and the USDOJ will do nothing about Duval's CORRUPTION, because they are "afraid" that if the case is tried to an honest, fair and impartial Judge, then their single client, the United States, might "lose" the next time.

In addition, for some of the same reasons, the U.S. Department of Justice sees "opportunity" in the more recent MRGO decision which was decided by Duval in November 2009. Not only do the Government lawyers believe they will prevail in the Court of Appeals (or in the Supreme Court) in that case, but even if they don't prevail on appeal, Duval allowed recovery against the Government only by two of the three involved "neighborhoods," allowing the Lower Ninth Ward and St. Bernard to recover, but denying recovery to New Orleans East

(which makes absolutely no common sense, and is another indicator of Duval's CORRUPTION). Since the Lower Ninth Ward and St. Bernard Parish were home to far fewer people than those who lived WEST of the Industrial Canal (about 100,000 versus 400,000 to 500,000), the Government lawyers appear more than willing to "take their lumps" in the MRGO case, in which the "bottom line" numbers will be "manageable" to the Federal Government, even if they "lose" at the end of the day.

Nonetheless, Appellee avers that for legal representatives of The People's Government, the United States of America, and to turn a BLIND EYE TO CORRUPTION, which has been pointed out to them time and time again by Appellee is SIMPLY REPREHENSIBLE. More to the point, Appellee remains liable to indictment for alleged criminal conduct, when other people, including at lease one Judge and several members of Federal "law enforcement," who should be under criminal indictment, continue their corrupt criminal enterprise.

VI. THE FEDERAL GOVERNMENT "TARGETED" APPELLEE FOR "SELECTIVE PERSECUTION" IN FURTHERANCE OF A "VENDETTA," WHILE OTHER MORE BLATANT CRIMES GO UNPROSECUTED.

In the Court below, Appellee argued that the indictment should be dismissed due to all or any of the following

Malicious prosecution
Prosecutorial misconduct
Prosecutorial vindictiveness
Selective persecution
Vindictive prosecution

Record Document No. 61, Record pages 576, 869, et seq.

But Appellee avers that his conduct, and the words uttered in the allegedly criminal e-mail of January 29, 2010, should be compared to the threatening vitriolic statements which have appeared on the Internet ("TWITTER") since the "Tuscon Massacre," wishing and encouraging

death to Sarah Palin, NONE OF WHICH HAS BEEN PROSECUTED BY THE FEDERAL GOVERNMENT: TO THIS DATE[23]

> I hope Sarah Palin dies an ugly death and takes her moronic hate with her.
>
> I hope Sarah Palin dies.
>
> I fucking hate Sarah Palin (sic) ugly ass. I just wanna punch her in the face then take her to Lens Crafters.
>
> So…will everyone be satisfied when Palin is assassinated? You know she's next Should Sarah Palin be shot?
>
> Sarah Palin should be shot for her encouragement of fanaticism against Democrats.
>
> People like Palin and Beck should be the ones shot at.
>
> I hope Sarah Palin dies a slow and painful death.
>
> Sadly its never warmongers like Palin and push that get shot.
>
> Palin should get shot.
>
> I think Sarah Palin should get shot instead of Gifford.
>
> Can somebody please shoot Sarah Palin?
>
> I know I'm wrong but I wish somebody shoot (sic) Sarah Palin *Kanyeshrey* Sorry!
>
> Somebody needs to shoot Sarah Palin.
>
> Can someone shoot Sarah Palin in the head instead?
>
> Can we get someone to shoot Sarah Palin??? I mean it only fair.
>
> Why didn't someone shoot Palin instead? Haha, I'm awful!
>
> Can someone please just shoot Sarah Palin already?
>
> Since ppl r in the mood to try n kill politics mshit how boot they take a shot at Sarah Palin…shoot her dumbass. White bitch

[23] With the exception of one of the shooting victims, J. Eric Fuller, A Democratic "operative", who told a "Tea-Partyer": YOUR'E DEAD!

> My hatred for Sarah Palin continues to grow. I think this woman should be assassinated. Sorry bout chya.
>
> See: http://www.abovetopsecret.com/forum/threads649547/pg1 (there actually are four pages)

Even President Obama and his former Chief of Staff Rahm Emmanuel have used "threatening" words, and conduct, for political purposes. At a fundraiser in 2008, Obama is reported to have "borrowed" a line from "The Untouchables" by saying to the crowd: "If they bring a knife to the fight, we bring a gun." Appellee asks rhetorically: Who were the "they" and how did Obama intend that guns should be used against them?

Emmanuel actually once sent a dead fish to a pollster who displeased him, but instead of being arrested, the pundits applauded Emmanuel for employing "a charming example of creative political enthusiasm," borrowed of course from "The Godfather," where the "message" of a dead fish meant "Luca Brasi sleeps with the fishes," i.e. he has been killed.

VII. THE GOVERNMENT HAS WRONGFULLY WITHHELD EXCULPATORY MATERIALS, AND THE U.S. MARSHALLS WHO ORCHESTRATED APPELLEE'S ARREST WERE PANDERING TO THEIR CURRENT "BOSS," WHO WAS COMPLICIT IN APPELLEE'S ABDUCTION, BRUTALIZATION, TORTURE AND FALSE IMPRISONMENT ON 09/2005, AND IN THE "COVER-UP."

At approximately 9:00 P.M. on Friday evening, January 29, 2010, Appellee received a telephone call from two (2) employees of the U.S. Marshall's Service[24] who were known to Appellee, because they had provided "escort" to him inside the Federal Courthouse Building, Appellee's access requiring "a Court Order" since September 2009. On one occasion, when

[24] At the time, Appellee was totally unaware that several still-unidentified Federal employees of the U.S. Marshall's Service had been present at Camp Amtrak during the early morning of September 20, 2005, when Appellee was brutalized, tortured and falsely imprisoned there with the complicity of employees of the Federal Government, or that the woman who was about to be confirmed as U.S. Marshall for the Eastern District (Genevieve May) was the Assistant Superintendent of the Louisiana State Police, whose "Tactical Squad" abducted Appellee from his home on September 20, 2005, presumably with May's (and other "rank's") knowledge and approval.

Appellee was being admittedly "loud" inside the Federal Courthouse Building, these employees of the U.S. Marshall's Service, Brian Fair and Trey Bobo, suggested that Appellee walk outside as an alternative to becoming liable to arrest for "causing a disturbance" in a Federal building.[25] Notwithstanding the fact that such an arrest would have been an illegal, false arrest, Appellee still believed that Fair and Bobo "did a favor" for Appellee, and on all subsequent trips to the Federal Courthouse, authorized by Court Order, Appellee refrained from engaging in any conduct which might put Fair and Bobo in a bad light with their superiors.

Appellee's confidence that Fair and Bobo were actually looking after Appellee's interests was entirely misplaced.

Appellee had four (4) separate telephone conversations with Fair and Bobo between approximately 9:00 P.M. on January 29, 2010, and Appellee's arrest[26] on the sidewalk in front of his house at 6034 St. Charles Avenue in uptown New Orleans at approximately 9:45 P.M. Appellee has repeatedly requested that the Government produce the recordings of those telephone conversations or, alternatively, the transcripts of the conversations, all to no avail. The reason for the Government's failure to produce the recordings or the transcripts is patently obvious: THE CONTENTS OF APPELLEE'S TELEPHONE CONVERSATIONS WITH FAIR AND BOBO <u>WERE ENTIRELY EXCULPATORY IN NATURE</u>

Appellee will now summarize what he believes to have been the substance of those telephone conversations, for comparison purposes, should the Government ever produce the actual recordings or the transcripts:[27]

[25] Which would have been "a cheap shot" if there ever was one.
[26] Yes, an arrest by 6 to 8 SWAT-CLOTHED FBI agents, plus Fair and Bobo - more "Peace Officers" than it took to apprehend John Dillinger, who was "Public Enemy No. 1."
[27] Appellee avers that these recordings or transcripts will <u>NEVER</u> be produced by the Government, because they both <u>EXCULPATE</u> Appellee and will prove to be extremely embarrassing to the Government.

1) Appellee conceded that he used "admittedly strident" language in his e-mail to Sean McGinn of the Bankruptcy Court on Friday, at 12:22 P.M. on January 29, 2010, in order to get the attention of the Court, so the Order which Appellee had filed on the 27th could be signed, so Appellee could procure a refill for his medication before the weekend.

2) Appellee stated unequivocally that he was neither suicidal nor homicidal, and that those words were used "for effect," i.e., to convey the urgency of Appellee's needing his medication for the weekend, and were in no way to be taken literally or seriously. More to the point, Appellee said that he made no threat, and that he had intended no threat whatsoever towards anyone.

3) Appellee stated unequivocally to Fair and Bobo that he was in full control of his faculties notwithstanding his having been without his medication since the prior Monday.

4) When Fair and Bobo assured Appellee that Bankruptcy Judge Brown had "signed the Order,"[28] Appellee assured them that on Saturday morning, January 30, 2010, Appellee and his daughter would drive to Walgreen's to pick up the medication, and that it was NOT necessary for Fair and Bobo to drive Appellee to Walgreen's to pick up the medicine that evening,[29] because Appellee was "fine," something which was repeated several times.

5) Appellee told Fair and Bobo several times that he never had any criminal intent, and that he had chosen his words "very carefully" in order to avoid getting cross-wise with "the law."

6) Appellee RANTED at length about the fact that NONE of the PUBLIC CORRUPTION in the "Victims of KATRINA" litigation, which Appellee had repeatedly reported to Fair and Bobo, among many others in "Federal law enforcement," had been acted upon in any way, shape or form, and STILL HASN'T BEEN ACTED ON!

Appellee avers that it is THAT CORRUPTION, which involves the Federal judiciary and Federal law enforcement, which is precisely why Appellee is being unjustly "persecuted" in this case and others. Concrete, and unrefutable examples, are the following:

> The "goons" who illegally abducted defendant from his house in the dark of the night on September 20, 2005, were Members of the Louisiana State Police.

[28] Which was one of many bold-faced LIES told to Appellee by Fair and Bobo that evening.

[29] Fair and Bobo's repeated representations that they would drive Appellee to Walgreen's were all LIES. They never had any intention of doing so, and Appellee was arrested by a law enforcement "horde" as soon as he reached the sidewalk when lured out of his house by lies told by Fair and Bobo. Additionally, the misrepresentation "drive you to Walgreen's" was "odd," because Appellee's daughter had the checkbook and she was not at home. Who would pay for the medication that evening? The Government? Not bloody likely!

> Today, the Chief U.S. Marshall for the Western District of Louisiana is Colonel Henry Whitehorn who, on September 20, 2005, was Superintendent of the Louisiana State Police. Today the U.S. Marshall for the Eastern District of Louisiana is Genevieve "Genny" May who, on September 20, 2005, was Assistant Superintendent of the Louisiana State Police. Fair and Bobo work directly for May and indirectly for Whitehorn, since all of them are employed by the U.S. Marshall's service.
>
> Further deponent sayeth not.

VIII. THE FEDERAL COURTS LACK JURISDICTION BECAUSE THE ALLEGEDLY CRIMINAL E-MAIL WAS NOT TRANSMITTED INTERSTATE COMMERCE

Among the pre-trial motions filed by the Appellee in this case was a Motion to Dismiss the indictment upon the grounds that the indictment falsely states that Appellee "knowingly and willfully did transmit in interstate commerce a communication…" The statute which Appellee is falsely accused of having violated, 18 U.S.C. §875(c), states:

> "Whoever transmits in interstate or foreign commerce…" Indeed, a wire fraud conviction REQUIRES proof of "…the use of interstate wire communications in furtherance of the scheme." *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989).

The electronic communication at issue, an e-mail to a Bankruptcy Court employee, was NEVER in "foreign commerce." Indeed, Appellee avers that the e-mail never entered "interstate commerce," either. Furthermore, Appellee avers that the e-mail was not transmitted "in interstate…commerce." And added to the foregoing was Appellee's DECLARATION UNDER PENALTY OF PERJURY PURSUANT TO 28 U.S.C. §1746 that he neither intended nor knew about transmission of the e-mail in interstate commerce, for to Appellee's knowledge the e-mail went from Appellee's laptop at his home at 6034 St. Charles Avenue, New Orleans, LA, 70118, to the Bankruptcy Court at 500 Poydras Street, New Orleans, LA, 70130, which should have been a purely "intrastate" transmission.

There is a 10th Circuit case, *United States v. Kammersell*, 196 F.3d 1137 (10th Cir. 1999), which is in no way binding on this Court, and which affirmed the conviction of a young man from Riverdale, Utah, who sent a "bomb threat" e-mail to his girlfriend in Ogden, Utah. Unfortunately for Kammersell, his conviction for violating 18 U.S.C. §875(c) was affirmed upon affirmative proof that, before the e-mail reached his girlfriend in Utah, Kammersell's Utah e-mail first went to AOL's main server in Virginia.

No similar "proof" was ever offered by the Government in this case.

Like Kammersell, Appellee also invokes for Federal appellate purposes *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995), and argues that Courts should apply the plain language of 18 U.S.C. §875(c) until the statute is amended by Congress, and not "rewrite" the statute to achieve what judges may believe Congress "meant." Appellee also argues that:

> "*Lopez* stands for the proposition that Congress may not limitlessly expand the federal criminal jurisdiction based on the commerce clause" and "after *Lopez* the constitutionality of assertions of federal jurisdiction over what are essentially local crimes must be closely scrutinized." 196 F.3d at p. 1140.

In light of that admonition from the Supreme Court, Appellee is at a loss to reasonably explain the logic of the 10th Circuit in Kammersell, upholding a Federal conviction in a "commerce clause" setting, but with a "purely local" factual scenario.

Appellee submits that there is another important point to be made, coming from a case which the Government – yes, the United States of America – the very same Government which is prosecuting in this case – is prosecuting in Mississippi. The case, *United States of America vs. David Zachary Scruggs*, Criminal Case No. 3:07 CR 192-b-a on the Northern District of Mississippi docket, involves, in part, a November 2, 2007 e-mail which was transmitted between Oxford, Mississippi, and New Albany, Mississippi. In that case, as pages 2, 3 and 5 of Scruggs'

Reply Memorandum,[30] attached as Exhibit No. 6, demonstrate, THE FEDERAL GOVERNMENT DID NOT CONTEST THE INTRASTATE NATURE OF THE OXFORD/ALBANY E-MAIL.

Appellee in this case avers that the same Federal Government as in *Scruggs* should be precluded from contesting the purely intrastate nature of the e-mail of January 29, 2010 from St. Charles Avenue to Poydras Street.

The indictment should have been dismissed, because the allegedly criminal e-mail was not transmitted in interstate commerce, and therefore the Federal Courts lack jurisdiction..

CONCLUSION

For the above and foregoing reasons, Appellee ASHTON R. O'DWYER, JR., respectfully submits that the District court's dismissal of the criminal indictment against him should be AFFIRMED.

Respectfully submitted,

ASHTON R. O'DWYER, Jr.
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[30] Scruggs is seeking to vacate his conviction/guilty plea.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served upon all counsel in these proceedings via the U.S. Mail, first class postage prepaid, this 21st day of January, 2011.