

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA)	
)	CRIMINAL ACTION NO.
v.)	
)	1:11-CR-487-CAP-AJB
JACQUELYN BARNETTE)	
_____)	

MOTION TO DISMISS INDICTMENT

Comes now, JACQUELYN BARNETTE, by and through undersigned counsel, and hereby files this motion to dismiss the indictment. In support thereof, Ms. Barnette shows the Court as follows:

STATEMENT OF FACTS

Jacquelyn Barnette is charged in a two-count indictment. (Doc. 1) Count One charges that on April 12, 2011, Jacquelyn Barnette “mailed a hoax device to a person in the State of New York, containing threatening messages and a vial of an unknown liquid, labeled ‘Ziklon B,’” in violation of 18 U.S.C. § 1038. Count Two charges that on April 12, 2011 Ms. Barnette “knowingly deposited in the United States mail, to be sent and delivered by the Postal Service, a communication addressed to another person containing a threat to injure the person of the addressee or of another,” in violation of 18 U.S.C. § 876(c). The communication referred to in count two of the

indictment is a letter to Senator Greg Ball and is attached as exhibit (A).¹

For purposes of this motion, the defense will assume without conceding that the evidence provided in the discovery is true and correct. According to the discovery, Ms. Barnette mailed a package to the office of New York State Senator Greg Ball. The package contained a letter (Exhibit 1) as well as a stuffed Curious George toy. The Curious George toy had a blue star of David attached to its forehead. The doll also had a sign taped to its red shirt that read: “Final Destination: 0223666 Auschwitz.” There was also a yellow star of David on the sign. At the bottom of the box was a small vial with perfume. The vial was wrapped in paper with the writing “Ziklon B.”

As will be shown below, this indictment should be dismissed at the pretrial stage. Legal argument in support of this motion follows. The arguments related to Count Two will be addressed first, followed by the arguments related to Count One.

ARGUMENT AND CITATION TO AUTHORITY

A. **The conduct alleged in Count Two is protected speech under the First Amendment.**

Count Two of the indictment states as follows:

¹ The Defense is attaching the best copy it has of this letter although the copy provided to the Defense in discovery is of poor quality.

On or about April 12, 2011 in the Northern District of Georgia, the defendant, JACQUELYN BARNETTE, a/k/a Jameela Barnette, knowingly deposited in the United States mail, to be sent and delivered by the Postal Service, a communication addressed to another person containing a threat to injure the person of the addressee or of another, in violation of Title 18, United States Code, Section 876 (c).

Count Two of the indictment charges a violation of 18 U.S.C. § 876(c). This statute criminalizes the following conduct:

“Whoever knowingly so deposits or causes to be delivered . . . any communication with or without a name ..., addressed to any other person and containing any threat to . . . injure the person of the addressee or of another”

To be convicted under this subsection the government must establish beyond a reasonable doubt that the “Defendant knowingly used the United States mail to send a true threat to [injure] a person.” Eleventh Circuit Pattern Jury Instruction 31.3 (2010). Thus, in order to be guilty of violating this subsection, the communication must include a “true threat.”

The First Amendment to the United States Constitution provides as follows:

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

First Amendment to the U.S. Constitution.

The protections afforded by the First Amendment are not absolute, and the government “may regulate certain categories of expression consistent with the Constitution.” U.S. v. Villanueva, 2009 WL 455127 at *2 (11th Cir. 2009), quoting Virginia v. Black, 538 U.S. 343, 358 (2003) (addressing whether cross-burnings are constitutionally protected speech or true threats).

“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.” Connick v. Myers, 461 U.S. 138, 145 (1983) (internal citations omitted).

Speech deals with matters of public concern when it can be fairly considered as relating to a matter of political, social, or other concern to the community, Connick, 461 U.S. at 146, or when it “is a subject of general interest and of value and concern to the public. San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

A statute “which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.” Watts v. United States, 394 U.S. 705, 707 (1969). “It is well-established that the First Amendment protects speech that others might find offensive or even frightening.” Fogel v. Collins, 531 F.3d 824, 829 (9th Cir. 2008). “Courts have long recognized that speech may need to be abrasive or upsetting in order to draw attention to the speaker’s cause.” Id. (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886,

928 (1982). Speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger.” Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949).

The protections afforded by the First Amendment, however, do not apply to “true threats.” Watts, 394 U.S. at 707. The Eleventh Circuit defines a “true threat” as “a serious threat -not idle talk, a careless remark , or something said jokingly- that is made under circumstances that would lead a reasonable person to believe that the Defendant intended to [injure] another person.” Eleventh Circuit Pattern Jury Instruction 31.3 (2010).

Under this standard, Ms. Barnette’s letter to New York State Senator Greg Ball is protected by the First Amendment. A reasonable person would not construe Ms. Barnette’s mailing to be a serious expression of an intent to injure. Rather, taken in context, the letter serves as a warning. The letter encourages Senator Ball to seek medical attention as the writer is a prophet predicting that Senator Ball will be diagnosed with cancer. A careful review of the letter shows that while most may consider the letter extremely offensive or even frightening, there are no threats contained in the letter, let alone “true threats.”

A review of other cases analyzing what constitutes a “true threat” is helpful. In Fogel v. Collins, for example, officers arrested Fogel whose parked van had painted

on its windows, “I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!” and “ALLAH PRAISE THE PATRIOT ACT . . .FUCKING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!”. Fogel v. Collins, 531 F.3d 824, 827 (9th Cir. 2008). Fogel was arrested for “willfully threaten[ing] to commit a crime which will result in death or great bodily injury to another person” in violation of California Penal Code § 422, for a “false report of secretion of explosive or facsimile bomb” in violation of Cal. Pen. Code § 148.1, and for the “use[] of offensive words in a public place which are inherently likely to provoke an immediate violent reaction” in violation of Cal. Pen. Code § 415. See Fogel at 828. After the local district attorney declined to prosecute, Fogel filed a § 1983 action against the police department and a number of individual officers.

On appeal, the Ninth Circuit found that the arresting officers had violated Fogel’s First Amendment rights because his speech does not fall within the “true threats” exception to the First Amendment protection of free speech. The Court dismissed law enforcement’s decision to treat Fogel’s statements as a bomb threat because it was not based on the entirety of the circumstances showing that the speech was not a serious expression of an intent to cause harm. 531 F.3d at 832. Even though Fogel explicitly referred to possessing weapons of mass destruction (“W.O.M.D. ON BOARD”), “[u]nderstood in its full context, no reasonable person would have

expected that viewers would interpret Fogel's political message as a true threat of serious harm." 531 F.3d at 832. The Court emphasized that "[i]t makes no difference that the speech taken literally, may have communicated a threat." 531 F.3d at 831 (citing Watts, 394 U.S. at 708). "[T]he 'textual context' of how the speech was communicated is key." *Id.* at 832. Similarly, in Ms. Barnette's case, in context, a reasonable person would see Ms. Barnette's letter as politically-motivated speech warning Senator Ball about his health and expressing her dissatisfaction with his role in what she terms the Muslim Radicalization/Culture of Jihad Hearings.

U.S. v. Baker, 890 F.Supp. 1375 (E.D. Mich. 1995), affirmed U.S. v. Alkabaz, 104 F.3d 1492 (6th Cir. 1997) provide a thorough discussion of the definition of "true threat" in the context of a violation of 18 U.S.C. § 875(c). This code section is very similar to § 876(c) in that both statutes criminalize communications containing any threat to injure a person.

In Baker the defendant was charged with violating 18 U.S.C. § 875(c) for emailing the graphic depiction of torturing, raping, and murdering women and young girls to another individual. Baker, 890 F.Supp. at 1379. The story had previously been posted to an online newsgroup, and the victim in the fictional story was named after Baker's classmate at the University of Michigan. *Id.* The government argued that the emails constituted "a firm plan of action." *Id.* at 1386. However, the court

found nothing to indicate imminent action on these “threats.” Id. (n. 16). Moreover, the court held that “[s]ection 875(c) ... does not address planning crimes, per se, but transmitting threats to injure or kidnap.” Id. Because the emails were not express threats, the exchange was protected by the First Amendment. As offensive as the court found these expressions, it concluded that they did not constitute “true threats”:

The only extended discussion of the constitutional dimension of the “true threat” requirement with regard to Sec. 875(c) is found in United States v. Kelner, 534 F. 2d 1020 (2d Cir.), cert. denied, 429 U. S. 1022, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976). In Kelner, the Second Circuit drew on Watts to illuminate the constitutional limits of a prosecution under § 875(c):

The purpose and effect of the Watts 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, in short, as are of the same nature as those threats which are ... “properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.” Watts, 402 F. 2d at 690.

* * *

So long as the 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, the statute may properly be applied. This clarification of the scope of 18 U.S.C. Sec. 875(c) is, we trust, consistent with a rational approach to First Amendment construction which provides for governmental authority in instances of inchoate conduct, where a

communication has become “so interlocked with violent conduct as to constitute for all practical purposes part of the [proscribed] action itself.” Kelner, 534 F. 2d at 1027 [quoting T. Emerson, The System of Freedom of Expression, 329 (1970)].”

Baker, 890 F. Supp. at 1381 - 1382.

The discussion of “true threat” in the Baker case reinforces the conclusion that Ms. Barnette’s letter contains no threats and no “true threats.” In the Baker case the district court found that the question of whether a prosecution under 875(c) encroaches on constitutionally protected speech is a matter to be decided by the Court as a threshold matter. Baker, 890 F.Supp.at 1385. As the speech in Baker did not constitute a true threat, it was protected by the First Amendment. As a result, the district court granted Mr. Baker’s motion to dismiss the indictment. Id. at 1390. Similarly, as Ms. Barnette’s letter is protected speech under the First Amendment to the United States Constitution, this Court should dismiss Count Two of the indictment on constitutional grounds.

B. 18 U.S.C. § 1038 is unconstitutionally overbroad and void for vagueness

Count one of the indictment charges as follows:

On or about April 12, 2011, in the Northern District of Georgia, the defendant, JACQUELYN BARNETTE, a/k/a Jameela Barnette, knowingly engaged in conduct with the intent to convey false and misleading information, under circumstances in which such information

may reasonably be believed, and where such information indicates that an activity has taken, is taking or will take place, that would constitute a violation of Title 18, United States Code, Section 175 (Transferring a biological agent or toxin), in that the defendant mailed a hoax device to a person in the State of New York, containing threatening messages and a vial of an unknown liquid, labeled “Zyklon B,” all in violation of title 18, United States Code, Section 1038.

The indictment charges a violation of 18 U.S.C. 1038. This statute states as follows:

(a)(1) Whoever engages in any conduct with intent to convey false or misleading information under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation of [several statutes including 18 U.S.C. § 175] shall be fined. . . .²

This statute, entitled “False information and hoaxes” is a relatively new statute passed in 2004. U.S. v. Evans, 478 F.3d 1332, 1344 (11th Cir. 2007). As a result there is very little case law analyzing this statute. As will be shown below, the statute is overbroad and void for vagueness.

The United States Supreme Court has held that “. . . a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . .” Giaccio v. Pennsylvania, 382 U.S. 399 (1966). A statute will be deemed unconstitutionally vague if it fails to

² Although the indictment charges a violation of 18 U.S.C. § 1038, it appears only § 1038(a)(1) could possibly apply in this case.

provide adequate notice that enables ordinary people to understand what conduct it prohibits and if it authorizes and encourages arbitrary, discriminatory enforcement. Kolender v. Lawson, 461 U.S. 352 (1983). The High Court has explained that no person “. . . may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” Lanzetta v. New Jersey, 306 U.S. 451 (1939).

Where the challenged statute involves an area of freedom of expression, the standard for judging permissible vagueness is much stricter. In the case of freedom of expression, the “objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.” NAACP v. Button, 371 U.S. 415, 432 (1963).

The statute at issue here is impermissibly vague. The statute, for example, refers to information that may “reasonably be believed” but does not identify who it refers to as the “reasonable believer.” Is the “reasonable believer” all American citizens, or government personnel or persons that share Ms. Barnette’s religious and political beliefs? The statute also infringes upon creative fiction writing. What if a writer publishes a short story about a fictional nuclear attack, not intending anyone to believe it is real yet noting that it is a work of “non-fiction”? The famous 1930's

Orson Welles broadcast of “War of the Worlds” could possibly fall within the ambit of conduct criminalized by this statute as it involves a Martian invasion with ray guns.

In Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) the Supreme Court explained that the “overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” A statute may be unconstitutionally overbroad if it directly limits speech itself, or if it regulates expressive conduct. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). A statute is unconstitutional when it chills a substantial amount of protected speech, unless the government can show that the statute is narrowly tailored to protect a compelling state interest. Ashcroft, 535 U.S. at 255. Speech which may be considered provocative or challenging is nevertheless protected against punishment, unless it is likely to produce a “clear and present danger” of a serious nature that constitutes more than simply an inconvenience to the public. Terminiello v. Chicago, 337 U.S. 1 (1949).

The Supreme Court, in invalidating a state statute which prohibited interference with a police officer in the performance of her duties, reminded the litigants that it has “repeatedly invalidated laws that provide the police with unfettered discretion to arrest individuals for words or conduct that annoy or offend them.” See City of

Houston, Texas v. Hill, 482 U.S. 451 (1987), where the Court found that statute authorizing police to arrest individual for shouting at him while he was arresting another person was unconstitutionally broad. Ms. Barnette submits that the same threat to freedom of expression results from enforcement of this statute. Because it is vague and overbroad, this Court should find that the Due Process Clause justifies a finding that it is unconstitutional.³

For these reasons, this Count One of the indictment should be dismissed as well.

WHEREFORE, the Defendant, Ms. Jacqueline Barnette, respectfully requests that this Court dismiss the pending indictment against her.

Dated: This 9th day of December, 2011.

Respectfully submitted,

s/ Vionnette Johnson

Vionnette Johnson

State Bar of Georgia No. 601290

ATTORNEY FOR JACQUELYN BARNETTE

³ In U.S. v. Brahm, 520 F. Supp.2d 619 (D. New Jersey 2007) a district court judge rejected arguments similar to the arguments raised in this motion relating to § 1038. This case is not binding in this district and relies heavily on case law from the Third Circuit.

Federal Defender Program, Inc.
Suite 1500, Centennial Tower
101 Marietta Street, NW
Atlanta, Georgia 30303
(404) 688-7530; FAX (404) 688-0768

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO DISMISS INDICTMENT has been formatted in Times New Roman 14 pt., in accordance with Local Rule 5.1B, and was electronically filed this day with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following counsel of record:

Katherine Hoffer, Esq.
Assistant United States Attorney
Suite 600, Richard B. Russell Building
75 Spring Street, S. W.
Atlanta, Georgia 30303

Dated: This 9th day of December, 2011.

s/ Vionnette Johnson
VIONNETTE JOHNSON
Attorney for JACQUELYN BARNETTE

Attachment (A)

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Jameela Burnette
318 Penny Lane, SE
Marietta, GA 30067-8298

11 April 2011

Senator Greg Ball
817 Legislative Office Building Empire State Plaza
Albany, NY 12247

APR 12 2011

Asa Lumu Luikun Dead Man Walking,

Sinclair Lewis predicted: "...if *Fascism* ever came to America; it would be wrapped in a flag, carrying a cross..." and it is apparent that you are the proud, dirty-white, goose-stepping, cross bearing, flag-draped, Muslim-hating, Christian ghoul marching to your own destruction. Instead of bashing the intellectually superior Muslims, shouldn't a handsome, cannibalized, crazy, Christian, crucker like yourself be in church chomping on Jew-god corpse and washing it down with Jew-god blood under the pretense of "Holy" Communion? Let it be known! We Muslims decline to dine on the flesh of Jesus Christ your human sacrifice, under any guise. As such, there will be no mass conversions from Islam to Christianity, a few Muslims will convert, but only those predestined to burn in the Hell-fire with the evil likes of you. Your participation in the 4/8/11 Declaration of War against Muslims under the guise of "Muslim Radicalization/Culture of Jihad Hearings" displayed a complete lack of Political Correctness on your part and because of your lack of "PC", your Lord, Allah has cursed you with PC, prostate cancer. It will be very difficult for you to goose-step when your testicles swell to the size of soccer balls and your junk is flopping about your knees and your hubris and avarice are replaced with humility and exquisite pain.

Former president Ronald Reagan stated: "...self-defense is not only our right, it is our duty..." and should the hostile Jew's succeed in whipping their Christian slaves into a Muslim-murdering, blood-thirsty frenzy, bent on the destruction of Islam, Homeland Security will come to know the real meaning of stealth. Muslims prefer peace; however the hostile jinn species are averse to peace and won't allow it. Self-defense is my right and my duty and I always fulfill my duty, Insha Allah I will neutralize legions. And where in the fuck are my Reparations? I am requesting that you hold hearings to determine if the Reparations promised to African-Americans by the U.S. Government for centuries of brutal slavery was spent financing the Pig Poachers of Palestine's brutal, satanic and sadistic enslavement of the Palestinians. Also, inform your colleagues that Allah will question you all about the Twilight Diet on the Day of Resurrection.

I have included a gift for you, your own stuffed miniature Jew that you can worship in the privacy of your own home. The following Verse of the Qur'an confirms that your AIPAC jinn masters are nothing more than a rubid and perfidious mob of barn and zoo animals perpetrating as human beings and the plush monkey/minature Jew I have gifted you with is an accurate representation of who the Jews are and what you stupid Christians worship. The Cannibal Cult of Christianity was not founded on facts nor faith, the Cannibal Cult of Christianity was founded on stupidity and conjecture and conjecture is no substitute for the truth. The Hell-fire will be brimming with the stupid aka Christians.

(Say [O Muhammad to the people of the Scripture]: "Shall I inform you of something worse than that, regarding the recompense from Allah? Those [Jews] who incurred the Curse of Allah and His Wrath, and those of whom [some] He transformed into monkeys and swines, and those who worshipped Taghut [false deities]; such are worse in rank [on the Day of Resurrection in the Hell-fire], and far more astray from the Right Path [in the life of this world]")

Read the Qur'an and you will learn that Allah, the Lord of all that exists, sent to the Children of Adam, an Arab Prophet aka Prophet Mohammed (pbuh) because Adam, the first man and father of all humanity (non-Jews) was an Arab, as Adam spoke Arabic. This means the world's entire population are of Arab descent, as we are all the Children of Adam, with the exception of the Jews, they are the Children of Israel aka Iblis aka Satan. Your dirty-white race is far removed from the racial purity of our Arab father Adam and by default, this makes your dirty-white race the morally and melanin depleted garbage race and not the master race, only master fools. Allah will dispose of your garbage race in the manner in which Allah Disposes of the garbage that He has created. Allah will burn your Jew-worshipping, dirty-white, garbage asses in the Hell-fire on the Day of Resurrection, the Day when true justice shall prevail and not the corrupt, Judeo-Christian swine shit masquerading as American Values around the globe which will soon come to a brutal and decisive end, along with the demise of the Pig Poachers of Palestine.

I advise you to wake up from the American Dream, go to a physician and get your dirty-white garbage ass examined and avoid Jew physicians, lest they harvest a kidney from you without your permission. I will be scanning the obituaries to read the end of your saga, which should read: AIPAC purchased, treasonous, scumbag politician and loyal ass-wipe to his Jew masters, succumbs to prostate cancer. Now report me to the authorities, the same authorities who utterly failed to prevent and even embraced the hostile takeover of America by the hostile jinn species aka AIPAC. Enjoy your brief and evil life of fairy tales and hokum your evil Jew masters created for you because the Hell-fire is your final destination and the final destination of all your colleagues.

Kind Regards,
Jameela
Jameela
Messenger of Allah
& Defender of Islam