

I. INTRODUCTION

Like the complaint that preceded it, the current indictment is manifestly flawed and, in the interest of justice, given the following argument, must be dismissed.

II. ARGUMENT

A) The communications in question neither constitute nor contain “true threats”.

In fact, the communications do not contain threats of *any* kind. Surely, one may rightly threaten, say, the filing of a lawsuit, or the filing of a complaint, actions of which are perfectly legal. For that matter, parents “threaten” kids every day with all manners of sanctions and punishment, as do the courts and “the law” with respect to citizens and their conduct, whether or not the threat is spoken, written, implied or inferred. However, Clemens does not make *any* threat much less a “true threat”. Clemens makes no statements of any kind saying that he in any way intends to kidnap or injure the alleged victims, Pfaff and Vinchesi, much less any “serious expression” of a supposed intent to act imminently in an injurious way. At most, Clemens may “hope” or “wish” for something but never does he say that he “intends” to do anything illegal [unless preparing and filing a “full briefing” is now considered illegal]. This is readily apparent from a simple reading of the communications in question and truly needs no further discussion.

If “hoping” and “wishing” are now the same as “intending” then we are all in trouble as it is perfectly normal, and legal, for a person to “feel” and to express “feelings” [it’s called the First Amendment] although Miss Manners may weigh in on occasion when there are social etiquette issues as perhaps now. *Wishing* a so-called “hurt” or “harm”, however construed or presented [say, for instance, the “hurt” associated with a lawyer being disbarred or one of his clients going to prison], if it exists anywhere in the Clemens email, is purely in the realm of wishful thinking of which people have an indisputable constitutional right to engage. Any attorney [say, Pfaff]

who is alleged to have suborned perjury directly causing someone's imprisonment [as Clemens clearly infers in the subject communication] must accept impassioned rhetoric as something to be expected of an adversary in litigation wherein an attorney chose to misconduct himself and cause "many days of incarceration" as the Clemens email clearly accuses Pfaff as having done.

In any case, when it comes to discipline or "just reward" for alleged misdeeds, there are numerous forms of "hurt" done to people, notwithstanding how it is stated, implied or conveyed [as in the Clemens email], that are perfectly legal, say, disbarment or being sent to prison. These actions "hurt" but are, of course, "legal". For communications to have any hope of being deemed "true threats", if referring at all to some event however immediate or far off in the future, and especially that which is non-specific or overly broad as to an actor or act, they must refer, in the minimum, to a "hurt" or "harm" that is unlawful. The subject email simply and clearly does not refer to Clemens taking any unlawful action whatsoever.

The courts are quite clear on what constitutes a "true threat" and what does not, such as, for instance, "statements expressing musings, considerations of what it would be like to [injure] someone, or desires to [injure] someone, however unsavory, are not constitutionally actionable under §875(c)." *U.S. v. Baker*, 890 F.Supp.1375, 1386 (1995) *Baker* further asserts [Note 16] and clarifies the constitutional standard found in *Kelner*, 534 F.2d 1020 (1976) [a statement charged under §875(c) shall contain, at the very least, some language construable as a serious expression of an intent imminently to carry out some injurious act] :

This test is not satisfied by the finding that the desires expressed are so deviant that the person making the statement must be unstable, and therefore likely to act in accordance with his or her desires at any moment. *Something in the statement itself must indicate some intention imminently to act. Otherwise, the statement may be unsettling or alarming, but is not a true threat for the purposes of the First Amendment.* [Ibid 1386] [emphasis added]

In other words, absent a statement indicating an intention to act within some reasonable period of time, the statements under scrutiny [though not cited in the indictment, for all practical purposes, the entire Clemens email was under scrutiny before the grand jury] may be unsettling or alarming but do not constitute a true threat. *Unsettling and alarming*. A person, yes, may be unsettled and alarmed by someone saying, “You’re going to get what you deserve” or “I really, truly and sincerely wish you were dead”, in fact, wholly alarmed, but so long as a person saying those words did not express any intent to harm the reader of them, there is no true threat by them. This is not only consistent with *Baker* but quite logical as well. *Hoping* and *wishing* [or, for that matter, forecasting some future event] are simply not the same as *intending*. Without satisfying either the statutory element of intent or that which may have come to be defined in case law, the indictment fails on the face. *See Exhibit in Support of Defendant Motion to Dismiss Indictment*

Tobin’s indictment, even assuming that everything Clemens said in his email to Pfaff is “true”, still does not state facts sufficient to charge Clemens. There simply is nothing for a jury to conclude about the email that is any different than which can be, and should be, decided as a matter of law. Where the factual proof of a “true threat” is “insufficient as a matter of law”, the indictment is properly dismissed before reaching the jury. *U.S. v. Baker*, 890 F.Supp. 1375, 1385 (1995) quoting *U.S. v. Carrier*, 672 F.2d 300, 306 (2nd Cir., 1982)

B) The communications in question fall under First Amendment “protected speech”.

Although Argument A above touches upon the First Amendment issue, the subject deserves a separate discussion. We may first draw our attention to *Watts v. United States*, 394 U.S. 705 (1969) wherein the court, although not addressing § 875(c) directly, but rather a similar statute [§ 871(a) Threats to the President], recognized that: “[a] statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First

Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.” [at 707] Because § 875 (c) is a general intent crime, intent must be proved by “objectively looking at the defendant’s behavior in the totality of the circumstances,” rather than by probing defendant’s subjective state of mind. *U.S. v. Baker*, 890 F. Supp. 1375, 1380 (1995) quoting *United States v. DeAndino*, 958 F.2d 146, 149 (6th Cir., (1992)

And what are the “totality of circumstances” surrounding Clemens and the subject email? Issues, *serious* issues of attorney misconduct [by Pfaff], perjury [by Pfaff’s client, O’Hara], a Goyette deposition with O’Hara present, a sudden trial [by Moynahan] on a disorderly conduct charge leading to a six month jail term for Clemens, disqualification issues [Stearns, Young], the movie Rain Man [credited to a man who went to law school with Young] and a Rule 12 motion [by Pfaff] drawing on a misbegotten trial conviction [on state appeal] and Stearns Order. All of these “circumstances” are clearly referred to in the subject email and is no mystery and furthermore require reference to absolutely nothing beyond the email itself. Clemens, at this time, does not require this court to raise or lower any lawful “general intent” threshold but to recognize that one exists because indeed, his email falls considerably below *any* threshold

Whether or not a prosecution under § 875 (c) encroaches on constitutionally protected speech is a question appropriately decided by the Court as a threshold matter. [The Supreme Court] has held that “when facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law” requiring a judicial determination”. *Dennis v. United States*, 341 U.S. 494 (1951) And if there is any doubt as to the intent behind the Clemens email, the answer lies but in the email itself [last paragraph]: “Here’s to law and order. And, yes, you [Pfaff] can expect a full briefing from me in the coming days addressing your [motion]” [emphasis added] It seems that Clemens was really just saying that

Pfaff can expect a “full briefing” as for an opposition to his Rule 12 motion. Add a little tough talk, and what does one have? One has a little constitutionally protected tough talk and, at that, talk that does not meet the *Kelner* requirement, that an expression of a threat be “unequivocal, unconditional, immediate and specific [as to] convey a gravity of purpose and imminent prospect of execution.” *Kelner*, 543 F.2d at 1027

C) The indictment is fatally defective; “criminal forfeiture allegations” are entirely unfounded and highly prejudicial.

Notwithstanding Arguments A and B above, the indictment on its very heading refers to a clear, indisputable and hugely prejudicial error. Following the very first reference to the offense charged [18 U.S.C. § 875(c)], Tobin [as in U.S. Attorney David Tobin, who signed the Clemens indictment and, coincidentally, is a former law school classmate [Suffolk 1988] of noted “victim”, Stephen Pfaff] immediately cites 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c) and so-called “Criminal Forfeiture Allegations”. To any uninformed reader, for all practical purposes, this so-called forfeiture notice immediately says, “Clemens did something bad and he gained something from it in the way of money or property *and* because he gained something illegally *he* must necessarily have committed the offense charged.” Nothing can be farther from the truth, as can be verified by simply reading the subject email as there is absolutely nothing in such email that either suggests or eludes in the slightest way to actual or anticipated financial gain of any kind. Nothing.

First of all, Tobin does not even allege an extortionate threat [that would be 18 U.S.C. 875(d)] much less anything remotely resembling a wire or mail fraud or drug offense as are the typical offenses for which forfeitures pertain. In any case, 18 U.S.C. § 981(a)(1)(C) itself clearly lists those offenses for which forfeiture may be relevant and said offense list clearly does *not* cite 18 U.S.C. § 875(c). Where does Tobin even get the remotest cause to make an allegation for a

criminal forfeiture? The answer is *nowhere*. Tobin's forfeiture notice is highly suspect. Can the notice be mere accident or harmless error when the notice itself is fully *one half of the indictment*? No, it cannot. The error was intended to prejudice the reader and, certainly, to prejudice the grand jury who, for its signature on a true bill as well as the insertion of a forfeiture notice on the subject indictment, was presented, by Tobin, with either an absolute fabrication or a deceptive argument.

All things considered, by attaching a forfeiture notice, Tobin is playing a rather dubious game of Blindman's Bluff as the reader, blind to Tobin's intents, is left to fumble through his or her own imagination to guess as to "where, what and how" Clemens acquired money or property. What, by sending an email simply citing information and issues albeit with a dash of rhetoric?

As for a future trial or evidentiary period, what is there for U.S. Attorney Tobin to present as substantiation for the forfeiture notice? There is not even the slightest hint in the indictment that indicates there is anything supporting a forfeiture notice much less an actual invocation of the referred statutes. The notice is a purposeful attempt to make believable an otherwise insufficient indictment. This is inappropriate conduct, fundamentally wrong and requires immediate remedy.

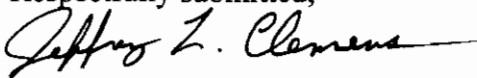
III. CONCLUSION

Given the above argument, the indictment in question is without merit, is fatally defective on the face and is otherwise made invalid by degree to which error has entered these proceedings.

IV. REMEDY SOUGHT

Given the above conclusion, the court is asked to dismiss the current indictment and direct that Clemens be released from pre-trial home confinement and other restrictions on his liberty.

Respectfully submitted,



Jeffrey L. Clemens

Dated this 19th day of April 2010

DECLARATION OF MAILING

I am a citizen of the United States and a resident of the State of Ohio. I am over the age of eighteen. My address is:

412 Dockway Drive Huron, OH 44839

On April 19, 2010 I served the within document:

DEFENDANT MOTION TO DISMISS INDICTMENT

on the defendants in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon prepaid for FIRST CLASS in the United States mail, Huron, Ohio addressed as follows:

Kenneth G. Shine
United States Attorney's Office
1 Courthouse Way
Boston, MA 02210

Lead Attorney
United States

I declare under penalty of perjury that the foregoing is true and correct.

Signature: Donald J. Clemens
Donald Clemens

Date: 4-19-10

Action Verb ANALYSIS of Clemens Email to Stephen Pfaff Dated March 8, 2010

For Your Information

Verbs in Subject Line: None. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Dearest Mr. Pfaff:

Verbs in Salutation: None. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None

The judge to whom you just motioned, William G. Young, by the way [perhaps you knew this already] graduated Harvard Law with Alan Alexander, long and dear friend and associate to Ronald Bass, credited author of the movie Rain Man which you took it upon yourself to refer to in your recent motion before him [Young]. Only thing is, Mr. Bass went to Harvard Law School, too, and graduated but one year before Mr. Young.

Verbs in Paragraph 1: motioned; knew; graduated; took upon; went. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Gee, do you suppose they knew each other? Exchanged notes? Took Civil Procedure together?

Verbs in Paragraph 2: suppose; knew; exchanged; took [class]. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

If you want to file crap like your Rule 12 motion, fine. Apparently, the truth means nothing to either you or the police [obviously, you motioned to avoid discovery]. Given the recent Stearns disqualification [which you failed to mention in your motion], I believe you are playing a dangerous game, a very dangerous game. I have every hunch someone is going to get hurt. At this point [years of police/court bullshit, and your crap], I'm rather hoping someone will [deserving of it, of course].

Verbs in Paragraph 3: want; means [nothing]; motioned; failed [to mention]; believe; have [every hunch]; hoping; deserving. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Have you ever been punched in the face? Well, I was, at PCCH, thanks to O'Hara and Moynahan

and now, frankly, I rather hope you experience the same thrill someday, figuratively or otherwise, maybe even see one of your “clients” go to prison, you get disbarred, “taken to a chop shop on Staten Island”, whatever.

Verbs in Paragraph 4: have; was; hope; see (one go to prison); (one get disbarred); (one taken to chop shop). Does verb’s action result in injury? No.

References to Actual or Anticipated Money or Property? None.

There was never any “argument” between O’Hara and I on May 12, 2005. He is one lying son-of-a-bitch and you knew it on September 17, 2008 when you invited him to sit in on the Goyette deposition. And you knew O’Hara was going to lie at the September 18, 2008 “trial”. And you now expect to let your misconduct be a basis for a Rule 12 motion? What, I plead to “sufficient facts”? Bullshit. There was never any sufficient facts to begin with much less plea to. You and your people systematically BUTTFUCKED me and knew it, too.

Verbs in Paragraph 5: was, is [lying]; knew; going [to lie]; expect; plead; was; buttfuck; knew. Does verb’s action result in injury? No.

References to Actual or Anticipated Money or Property? None.

I will say it now, once. I, at this point, will not ever allow the SPD and HDC to get away with what they have done. They’re an affront to all that is [pretended to be] American Democracy and Justice, as are you. One way or another, I will have my day in court or the back alley [hint, hint, veiled threat potential here].

Verbs in Paragraph 6: will say; will not [allow]; have done; are [an affront]; are; will have [day in court or the back alley]. Does verb’s action result in injury? No.

References to Actual or Anticipated Money or Property? None.

You do be careful now, you hear? And by all means, run to your FBI friends. I would encourage it. After all, perjury is a federal offense too, especially when the victim is from out-of-state. Besides, it [you running to the feds] will give me a chance to make *my* case. Yeah, go ahead and call the FBI and say something like “Oh, Mr. Clemens “threatened me” in an email last night”. Yeah, right. Five years, and this ain’t over. And do you know why? I mean, really, why is this whole thing not over? Because of people like you, who crossed the line [in September 2008], and O’Hara and Moynahan, who crossed certain lines, too. You, at this point, I assure you, will get what you deserve. Pow! Bang! Splat! I really, truly and sincerely wish you were dead.

Verbs in Paragraph 7: do [be careful]; run; would encourage; is; will give; go [ahead]; call; say; ain’t; know; is; crossed [line]; assure; will get; (sounds); wish.. Does verb’s action result in injury? No.

References to Actual or Anticipated Money or Property? None.

I am very much looking forward to putting you in your place, Mr. Pfaff. You disgust me. You are absolute filth [proof positive that a suit and tie ultimately doesn't make a person "good" or "respectable"]. Yeah, remember Stearns and the whole Laveroni default? Sure you do. And surely, you will pay the price some day for the many days of incarceration I had to endure BECAUSE OF YOU Mr. Hired in 2007 Over A Year Before The September 2008 Trial That Gave You Summary Judgment Pfaff.

Verbs in Paragraph 8: looking [forward]; disgust; are [filth]; is; remember; do; will [pay the price]; had [to endure]. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Oh, how I wish a 10-ton I-beam would fall on you, O'Hara, Rooney and Shelly right now. Splat! Boy, would I love to see that!

Verbs in Paragraph 9: wish; would fall; love [to see]. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Perhaps someday I will [or, at last, an equivalent experience]. As far as I am concerned, neither you nor your partners in crime deserve your freedom right now.

Verbs in Paragraph 10: will [see]; deserve. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

From now on, be sure and watch your backside, Mr. Pfaff. God may step up to the plate at any moment. I dunno, I got this feeling someone's going to get hurt REAL BAD. And it ain't gonna be me.

Verbs in Paragraph 11: be [sure]; watch; may [step up]; got [feeling]; is going; ain't [going to be]. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

Here's to Law and Order. And yes, you can expect a full briefing from me in the coming days addressing your truth-twisting truth-burying masterpiece of a motion. Rationalize all you want but come Judgment Day you've had it.

Verbs in Paragraph 12: [here] is; expect [briefing]; rationalize; [you] have had [it]. Does verb's action result in injury? No. References to Money or Property? None.

Jeffrey Clemens

Verbs in Name: None. Result in injury? No. References to Money or Property? None.

Action Verb ANALYSIS,of Clemens Email to Patricia Vinchesi Dated March 8, 2010

You all might be digging yourselves a grave.

Verbs in Message: [might be] digging. Does verb's action result in injury? No.

References to Actual or Anticipated Money or Property? None.

TOTAL VERBS whose actions result in injury contained in the March 8, 2010 communications recited above: Zero.

TOTAL REFERENCES to Actual or Anticipated Money or Property in the March 8, 2010 communications recited above: Zero.

Observation: No action verbs whatsoever in any form or tense exist in the email that refer to or imply bodily harm or injury such as "strike", "hit", "bruise", "cut", "maim", "clobber" or, for that matter, the word "injure" itself.

Verb Clarification: Seeing, feeling, wishing and hoping, in and by themselves, do not injure or harm nor is the person who is "seeing, feeling, wishing, and hoping" themselves doing or implying to do any injury or harm to anyone.

CONCLUSION

As none of the actions carried out by the verbs in the emails result in injury nor do the emails themselves refer to any actual or anticipated receipt or delivery of any money or property, the email communications, contrary to what is stated in the indictment, do not contain a threat to injure either Stephen Pfaff or Patricia Vinchesi nor do the email communications contain any cause whatsoever to suspect that any money or property was acquired illegally in sending of the email communications i.e. in the supposed commission of the offenses alleged in the indictment,

JAC/04-18-10

DECLARATION OF MAILING

I am a citizen of the United States and a resident of the State of Ohio. I am over the age of eighteen. My address is:

412 Dockway Drive Huron, OH 44839

On April 19, 2010 I served the within document:

EXHIBIT IN SUPPORT
OF DEFENDANT MOTION
TO DISMISS INDICTMENT

on the defendants in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon prepaid for FIRST CLASS in the United States mail, Huron, Ohio addressed as follows:

Kenneth G. Shine
United States Attorney's Office
1 Courthouse Way
Boston, MA 02210

Lead Attorney
United States

I declare under penalty of perjury that the foregoing is true and correct.

Signature: 
Donald Clemens

Date: 4-19-10