Federal Court Teachers' Institute
December 1, 2011

Sponsored by the United States District Court, Central District of California, and the Administrative Office of the U.S. Courts

This program is intended to provide high school teachers with a foundation for discussing with their students the increasing epidemic of cyberbullying and some of the factors the U.S. Attorney's Office considers in determining whether to prosecute such cases.

Welcoming Activities and Review of Materials

7:30 a.m. - 8:15 a.m. Registration outside Conference Room 1001 and continental breakfast in GSA Conference Room 1012, down the hall. After breakfast, return to Conference Room 1001.

8:30 a.m. - 8:40 a.m. Welcome by the Honorable Consuelo B. Marshall, host judge and moderator. Self-introductions by panelists and teachers.

Presentations by Panelists

8:40 a.m. - 9:00 a.m. Judge Marshall introduces the theme of the program – *Cyberbullying: It Can End in Court* – and discusses the Central District of California case *U.S.A. v. Lori Drew*. **Attachment A**.

9:00 a.m. - 9:25 a.m. Jay L. Lichtman. Criminal Justice Act Panel Attorney, reviews the fictional scenario. **Attachment B.**

9:25 a.m. - 9:50 a.m.	George S. Cardona, Chief Assistant U.S. Attorney, discusses the role of the U.S. Attorney; federal grounds for prosecution under 18 U.S.C. § 875(c); First Amendment considerations; and finding a "true threat" under *U.S. v. Morales.* **Attachment C.**
9:50 a.m. - 10:15 a.m.	Keri Curtis Axel, Assistant U.S. Attorney, quizzes the teachers and discusses the standard of proof for indictment versus conviction, the federal grand jury, and considerations when deciding whether to prosecute a case. **Attachment D.**
10:15 a.m. - 10:40 a.m.	Firdaus F. Dordi, Deputy Federal Public Defender, discusses other considerations, such as juvenile status, the interest of justice, consequences of felony convictions, public interest considerations, and other appropriate venues. **Attachment E.**

Discussions with Teachers

10:40 a.m. - 11:30 a.m.	Teachers move to their assigned group table as indicated on their name tag. Judge Marshall introduces the two teacher debate questions. **Attachment F.** Each group has been assigned one side of a debate. One panelist will facilitate the discussion for each group. At the conclusion of the discussion groups, there will be a group photo, followed by a catered lunch. After lunch, the teachers will debate the issue they discussed in their group.

Lunch

11:30 a.m. - 12:20 p.m.	Catered lunch in GSA Conference Room 1012. After lunch, return to Conference Room 1001.

Debates

12:30 p.m. - 1:10 p.m.	Two teacher debates (20 minutes each), moderated by Judge Marshall.
(12:30 p.m.-12:50 p.m.)	**Debate #1**: Looking at the scenario, was Kevin's post about breaking the noses of the field hockey team members a true threat or not a true threat?
(12:50 p.m.-1:10 p.m.)	**Debate #2**: Looking at the scenario, what factors are present that would have one conclude that Kevin should, or should not, be charged?

Closing Remarks, Teacher Recognition, and Completion of Evaluation Forms

1:10 p.m. - 1:30 p.m.	Judge Marshall concludes the program. Distribution of certificates and gift. The teachers complete the blue evaluation form and hand it in upon leaving.

ATTACHMENT A

Judge Marshall

Introduction to the Problem

Today's teens use technology more than ever. Besides using their computers to access the Internet to send e-mails and instant messages, create websites or blogs, share photos and videos, and maintain personal profiles on social networking sites, most have cell phones for text-messaging. Because this technology enables information to be transmitted immediately and on a widespread basis, 24 hours a day, 7 days a week, and even under the cloak of relative anonymity or a fake persona, it also provides a means for bullies to inflict injury on their prey on a much larger and more persistent scale.

Cyberbullying is using the Internet, cell phones, or other digital or interactive technology to send or post text or images intended to hurt, torment, harass, humiliate, embarrass, threaten, or otherwise target another person. There are a variety of ways in which cyberbullies victimize other teens:

- Nearly 20% of teens reported having a cyberbully pretend to be someone else in order to trick them online, getting them to reveal personal information.

- 17% of teens were victimized by someone lying about them online.

- 13% of teens learned that a cyberbully was pretending to be them while communicating with someone else.

- 10% of teens were victimized by someone posting unflattering pictures of them online, without their permission.

Unfortunately, there are more extreme ways in which cyberbullies can prey on their victims, such as sending hurtful or threatening e-mails, text messages, or instant messages; setting up websites or using social networks to embarrass or make fun of someone; or forwarding or posting private or embarrassing messages, pictures or videos. Cyberbullies can use these methods to harrass, or incite others to harrass, their victim, or to ruin their victim's reputation by posting lies or unflattering information or photos on the Internet for all to see. Such instances can have devastating effects on teens, and can even lead to suicide.

U.S.A. v. Lori Drew

A few years ago, a cyberbullying case that was before our court received nation-wide attention. In that case, a 13-year-old girl committed suicide after the mother of a former friend created a profile on MySpace for a fictitious 16-year-old boy to learn what the girl was saying about her

daughter. Posing as the boy, the mother started communicating steadily and flirting with the girl online, then turned on the girl by telling her that he no longer liked her and that "the world would be a better place without her in it." Later that day, the girl hanged herself.

In that case, although the girl and the mother lived in Missouri, the U.S. Attorney's Office in our district pursued the case because MySpace's servers were based here. The U.S. Attorney's Office claimed that by creating the fake profile, the mother intentionally violated MySpace's terms of service, and that she did so in furtherance of a tortious act, in this case the intentional infliction of emotional distress. (A tort is a civil, as opposed to a criminal, wrong, other than a breach of contract. Torts involve a negligent or intentional injury against a person or property.) By doing so, the prosecutors claimed that she violated a federal statute, the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030.

The jury found the mother not guilty of felony CFAA counts, but did find her guilty of misdemeanor CFAA violations. The judge (Judge Wu), however, acquitted the mother, finding that the vague wording of the statute would allow any conscious breach of a website's terms of service to be sufficient to constitute a violation of the statute, and that the statute would then afford too much discretion to the police and too little notice to citizens who wish to use the Internet.

Today's Program

In today's program, we'll look at a fictional scenario and use it to discuss some of the factors the U.S. Attorney might consider in deciding whether or not to prosecute an alleged cyberbully. In doing so, we'll also discuss the role of the U.S. Attorney, some of the First Amendment issues involved, the standard of proof for indictments versus convictions, other venues that might be more appropriate in dealing with cyberbullying incidents, and other factors the U.S. Attorney might consider.

ATTACHMENT B

Fictional Scenario

Gaby Sullivan was a junior and a star of the girls' field hockey team at Canfield High School in Kansas City, Kansas. Even though she was only a junior, several colleges were already considering her for an athletic scholarship. During a fierce game at the regional tournament, Gaby's nose was broken. The injury sidelined her for the rest of the season and she had to have reconstructive surgery. The procedure slightly altered the appearance of her nose, but Gaby was relieved to know that she could play during her senior year when colleges would send scouts and recruiters to watch her play.

Kevin Reynolds was a senior at Canfield High. On weekends and after school, he and his friends met at his house and for meetings of their FaceLook group called *The Dog Pile*, in honor of Canfield's mascot, Buster the Bulldog. *The Dog Pile* featured discussion forums about events at Canfield as well as a monthly student survey to choose the school's most "uncool" student. The highest vote getter was crowned "The Underdog."

When Gaby returned to classes after her surgery, no one asked about her procedure or said anything about her appearance. But Kevin noticed the difference, and he listed Gaby as a candidate for The Underdog title. He even went so far as to superimpose a picture of a Pug's nose on Gaby's nomination picture that he posted on FaceLook. When the votes came in, Gaby had been voted The Underdog.

Gaby was shocked and hurt when she saw her picture on the Internet. Kevin's postings went even further, urging everyone to write the funniest review of Gaby's "nose job." Students critiqued Gaby's nose in an avalanche of tweets, text messages, FaceLook postings, and even YouTube videos. Students surreptitiously used their camera phones in classes to take pictures of Gaby. They transmitted them with cruel captions to the girls' field hockey teams at other schools.

Just before the critical game with the Bulldogs' arch rival, a posting suggested that Gaby should be elected team captain because now she looked just like the school's mascot. Kevin replied by posting that it might be a "good idea" for him "to improve the odds of the Canfield girls' field hockey team by breaking the nose of every player." He said it would be a show of Bulldog spirit to make the girls look like the "fiercest dogs" in the playoffs. After Kevin's post, many of the players stopped coming to school and practice. Those who did come to classes were subjected to harassment. One afternoon, half the team missed several classes to meet with the school guidance counselor.

The Dog Pile took on a life of its own and the cyber-harassment continued for weeks as more students posted comments. At school, students laughed and barked loudly when they saw the players in the halls. Faculty members didn't acknowledge or address the behavior. They later said that they didn't know what was going on. When Gaby's parents brought the issue to the school's attention, the administrators said that this was typical high school behavior in the digital age and there was nothing they could do about it. They said the parents should monitor their children's activities at home.

The only thing they knew was that Kevin put up notices on the school bulletin board introducing himself as the Alpha Hound of the Dog Pile and inviting new members to post comments and photos on the club's "forum for critical thinking." When the custodian removed the notice, as instructed by the vice principal, Kevin threatened to slash his tires.

Shocked by the school's indifference, Gaby's parents and some other parents of players contacted their county's prosecuting attorney to see if anything could be done to stop the harassment. He told them that there weren't any state laws against what Kevin was doing. However, the county attorney decided to call the local U.S. Attorney to see if there were any federal laws that might apply in this case.

The U.S. Attorney has discretion in deciding which cases to prosecute. The U.S. Attorney took a special interest in the case because a number of social networking sites, including FaceLook, had headquarters in her district. After doing some research, she determined that schools and state law enforcement officers were not effectively addressing the cyberbullying problem. Just last month, a middle school girl committed suicide after months of being bullied on line. The local high school principal contacted the U.S. Attorney's Office staff to make them aware that the problem was becoming an epidemic.

She asked her staff to research whether charges could be brought against Kevin. After consideration and analysis, they discovered that Kevin might have committed a computer crime.

ATTACHMENT C

Panelist #2

Role of the U.S. Attorney

The U.S. Attorney is a lawyer appointed by the President in each judicial district to prosecute and defend cases for the federal government. The U.S. Attorney employs a staff of Assistant U.S. Attorneys who appear as the government's attorneys in individual cases. The U.S. Attorney's Office, which is part of the executive branch of the U.S. government, represents the United States in most court proceedings, including all criminal prosecutions for violations of federal law, civil lawsuits by and against the government, and actions to collect judgments and restitution on behalf of victims and taxpayers. Here in the Central District of California – which covers all of Los Angeles County, Orange County, Riverside County, San Bernardino County, Ventura County, Santa Barbara County, and San Luis Obispo County – the U.S. Attorney is André Birotte Jr.

The Department of Justice is very serious about its obligations to protect vulnerable groups, including children. Cyberbullying is an epidemic with serious consequences – even suicides – and as such is a national enforcement priority for the Department of Justice.

Federal Grounds for Action - 18 U.S.C. § 875(c)

For the U.S. Attorney to prosecute, there must be a violation of a federal law. Here, when Kevin posted a message about breaking the nose of Gaby and each of her teammates, he may have violated 18 U.S.C. § 875(c), which makes it a felony to transmit "in interstate commerce or foreign commerce any communication containing . . . any threat to injure the person of another." (A copy of 18 U.S.C. § 875 is in your materials.) If Kevin were convicted, the statute provides that he could face a prison term of up to five years and a possible fine.

The U.S. Attorney will then research the law to see if there were any prosecutions under the statute with facts similar to Kevin's conduct. Although there aren't any cases with a similar fact pattern to this situation, there is a case where the statute was used successfully to prosecute an 18-year-old who used an Internet chat room to threaten to kill students at his high school. [1] (A copy of the opinion in this case, *United States v. Morales*, is in your materials.)

First Amendment Considerations

The Supreme Court has recognized that when a statute criminalizes pure speech, like this statute does, the statute must be interpreted with the commands of the First Amendment clearly in mind. (The First Amendment protects freedom of speech.) The government, then,

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[1] *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001)

needs to prove that the speaker made a 'true threat,' as distinguished from what is constitutionally protected speech.[2]

Case law tells us that freedom of speech does not include the right:

- To incite actions that would harm others. *Schenk v. United States*, 249 U.S. 47 (1919)
- To make or distribute obscene materials. *Roth v. United States*, 354 U.S. 476 (1957)
- To permit students to print articles in a school newspaper over the objections of the school administration. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1983)
- Of students to make an obscene speech at a school sponsored event. *Bethel School District #43 v. Fraser*, 478 U.S. 675 (1986)
- Of students to advocate illegal drug use at a school-sponsored event. *Morse v. Frederick*, 531 U.S. 393 (2007)

Finding a "True Threat" under *U.S. v. Morales*

For purposes of 18 U.S.C. § 875(c), a communication is a threat if, in its context, the communication would have a reasonable tendency to create apprehension that its originator will act according to its tenor. This means that the prosecutor must prove that Kevin's post created a reasonable apprehension that he would act on his threat, rather than that he was merely joking around or exaggerating.[3]

U.S. v. Morales also tells us that:

(1) Prosecution under 18 U.S.C. § 875(c) does not require proving that the defendant intended the message to be a threat; rather, it only requires proof that the statement was made knowingly and intentionally.
(2) The question of whether the message was a "true threat" is for the jury to decide.
(3) The fact that the message was sent to a third party rather than to the target of the threat did not preclude prosecution, since the statute does not require the threat to be made to the intended target directly.

Proving that Kevin's post was a 'true threat' could be problematic. It might be that, in the context of the other posts, Kevin's words could be interpreted as a joke rather than a threat. Reasonable people could, certainly, disagree. The prosecutor will have to spend some time collecting and analyzing evidence that shows Kevin's speech was a true threat. When you're split up into groups for the debates, some of you will review the scenario to do just that.

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[2] *Watts v. United States*, 394 U.S. 705 (1969)

[3] *United States v. Myers*, 104 F.3d 76 (5th Cir. 1997)

NB: This unofficial compilation of the U.S. Code is current as of Jan. 5, 2009 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART I - CRIMES
CHAPTER 41 - EXTORTION AND THREATS

§ 875. Interstate communications

(a) Whoever transmits in interstate or foreign commerce any communication containing any demand or request for a ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

(June 25, 1948, ch. 645, 62 Stat. 741; Pub. L. 99–646, § 63, Nov. 10, 1986, 100 Stat. 3614; Pub. L. 103–322, title XXXIII, § 330016(1)(G), (H), (K), Sept. 13, 1994, 108 Stat. 2147.)

Historical and Revision Notes

Based on title 18, U.S.C., 1940 ed., § 408d (May 18, 1934, ch. 300, 48 Stat. 781; May 15, 1939, ch. 133, § 2, 53 Stat. 743).

Provisions as to district of trial were omitted as covered by sections 3237 and 3239 of this title.

Definition of "interstate commerce" was omitted in conformity with definitive section 10 of this title.

Changes were made in phraseology and arrangement.

Amendments

1994—Subsecs. (a), (b). Pub. L. 103–322, § 330016(1)(K), substituted "fined under this title" for "fined not more than $5,000".

Subsec. (c). Pub. L. 103–322, § 330016(1)(H), substituted "fined under this title" for "fined not more than $1,000".

Subsec. (d). Pub. L. 103–322, § 330016(1)(G), substituted "fined under this title" for "fined not more than $500".

1986—Pub. L. 99–646 inserted "or foreign" after "interstate" wherever appearing.

UNITED STATES of America, Plaintiff–Appellee,

v.

Eduardo MORALES, Defendant–Appellant.

No. 00–20811.

United States Court of Appeals, Fifth Circuit.

Nov. 5, 2001.

Defendant high school student was convicted in the United States District Court for the Southern District of Texas, Ewing Werlein Jr., J., of making interstate threatening communication, based on Internet "chat room" conversation in which he threatened to kill fellow students. Defendant appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) general-intent requirement of governing statute was satisfied since defendant admitted to sending threat in order to see how recipient would react; (2) question of whether message was "true threat" as opposed to political hyperbole was for jury; (3) fact that message was sent to third party rather than to fellow students did not preclude prosecution; and (4) government did not have to prove that defendant intended message to be threat, only that statement was made knowingly and intentionally.

Affirmed.

1. Criminal Law ⚷1139, 1144.13(2.1)

Court of Appeals reviews de novo district court's denial of motion for judgment of acquittal; in evaluating sufficiency of evidence, Court considers evidence in light most favorable to verdict.

2. Extortion and Threats ⚷25.1

Communication is "threat," for purposes of federal statute governing interstate threatening communications, if in context communication would have reasonable tendency to create apprehension that its originator will act according to its tenor. 18 U.S.C.A. § 875(c).

See publication Words and Phrases for other judicial constructions and definitions.

3. Extortion and Threats ⚷25.1

Violation of federal statute governing interstate threatening communications is offense of general rather than specific intent; prosecution does not have to prove that defendant intended statement at issue to be threat, only that he made statement knowingly and intentionally. 18 U.S.C.A. § 875(c).

4. Extortion and Threats ⚷25.1

Conviction under federal statute governing interstate threatening communications requires "true threat" as opposed to political hyperbole, i.e. requires that recipient of in-context threat reasonably feared it would be carried out. 18 U.S.C.A. § 875(c).

5. Extortion and Threats ⚷25.1

General-intent requirement of federal statute governing interstate threatening communications was satisfied where defendant admitted to sending electronic message threatening to kill fellow high school students in order to see how recipient would react. 18 U.S.C.A. § 875(c).

6. Extortion and Threats ⚷33

Question of whether defendant high school student's electronic message threatening to kill fellow students was "true threat," rather than political hyperbole, was for jury, in prosecution under federal

ment on other grounds not addressed here or in our prior opinion.

statute governing interstate threatening communications; there was evidence that recipient of message was apprehensive that defendant would act on threat, defendant repeated threat several times and gave no indication that he was joking, and defendant referred to name of perpetrator of well-known high school shooting. 18 U.S.C.A. § 875(c).

7. Extortion and Threats ⚷25.1

Fact that defendant's threat to kill fellow high school students was communicated to third party rather than to fellow students did not preclude prosecution under federal statute governing interstate threatening communications; issue was whether threat in context tended to create apprehension that defendant would act on it. 18 U.S.C.A. § 875(c).

8. Criminal Law ⚷1152(1)

Court of Appeals reviews rejection of requested jury instruction for abuse of discretion.

9. Criminal Law ⚷1173.1

Refusal to accept requested instruction is reversible error only if requested instruction: (1) is substantively correct; (2) was not substantively covered in charge actually delivered to jury; and (3) concerns an important point in trial so that failure to give it seriously impaired defendant's ability to effectively present defense.

Kathlyn Giannaula Snyder (argued), Asst. U.S. Atty., James Lee Turner, Asst. U.S. Atty., Houston, TX, for Plaintiff–Appellee.

Roland E. Dahlin, II, Fed. Pub. Def., Marjorie A. Meyers, Asst. Fed. Pub. Def. (argued), Houston, TX, for Defendant–Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before KING, Chief Judge, and JOLLY and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Eduardo Morales was an 18–year–old student at Milby High School in Houston, Texas at the time of the internet communications at issue. He entered an internet chatroom and, in a conversation with a stranger in the state of Washington, threatened to shoot and kill students at Milby High. The stranger alerted the police, who ultimately traced the communications to Morales. He was indicted for knowingly and intentionally transmitting in interstate commerce a threat to injure another in violation of 18 U.S.C. § 875(c).[1] He was convicted by a jury and sentenced to twenty-four months probation. Based on this court's earlier decision in *United States v. Myers*, 104 F.3d 76, 79 (5th Cir. 1997), we affirm the conviction of Morales and the district court's holdings.

I

Morales's conviction stemmed from an internet conversation Morales had with Crystal Lees, a 26–year–old mother of two living in Puyallup, Washington, whom Morales did not know at the time. Both Morales and Lees were in a "Young Latinos" chat room when Morales, using the screen name "Fusion_2", sent an instant message directed to Lees, who was using

1. Section 875(c) reads:
Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

the screen name "Crystalita."[2] The following exchange via instant messages ensued:

Morales: I will kill

Lees: huh?—me
You will kill what—me

Morales: TEACHERS AND STUDENTS AT MILBY

Lees: Why do you want to do that
Where is Milby?

Morales: CAUSE AM TIRED.....HOUSTON

Lees: are you really going to go and kill people Who has made you mad
r u ok do you want to talk to me

Morales: YES F NE ONE STANDS N MY WAY WILL SHOT

Lees: r u ok

Morales: I HATE LIVE

Lees: I am here

Morales: YES MY NAME S ED HARRIS
SEE U N A COUPLE OF MONTHS

Lees alerted the police because she was concerned about the well-being of Milby High School students. Milby High School's principal was informed, and he increased security measures at the school.

That same day, police traced the screen name "Fusion_2" to a friend of Morales, who informed the police that Morales had been using his WebTV internet terminal device. Morales was arrested after admitting that he was the individual who had parlayed with Lees in the chat room. However, Morales insisted that he was only joking. He told police he was trying to joke that he was the ghost of Ed Harris, whom he mistakenly thought was the assailant at Columbine High School, who in fact was Eric Harris.

Morales filed a pretrial motion to dismiss the indictment on First Amendment grounds, arguing that his statements to a distant third party did not constitute a true threat under Supreme Court jurisprudence. That motion was denied. During the jury trial, Morales moved for a judgment of acquittal, asserting again that no true threat was made because the statements were made to a third party. He also argued that no evidence established that he made the statements with the intent to intimidate. Again, the motions were denied.

Morales then objected to the court's proposed jury instruction that the government was not required to prove that Morales subjectively intended to communicate a threat. The court rejected his proposed instructions that 1) the government must prove that the defendant has communicated the threat to the target or someone he intended would communicate the threat to the target, and 2) that the government must prove that the defendant intended to make a threat. The jury convicted Morales of the single § 875(c) count, charging him with knowingly and intentionally transmitting a threat to injure another. The court thereafter denied Morales's post-verdict motions for judgment of acquittal and a new trial.

On appeal, Morales challenges his conviction on three grounds. First, Morales argues that his communication was not a "true threat" given the context in which it was delivered. Second, Morales asserts that his statements were not actionable under § 875(c) because they were communicated to a third party. Third, Morales argues that the district court erred by not instructing the jury that the government must establish that Morales intended to communicate a threat.

2. Morales testified that he chose to communicate with Lees simply because her screen name was the first one on the chat room "whisper list."

II

[1] We review de novo the denials of Morales's motions for judgment of acquittal. *United States v. DeLeon,* 170 F.3d 494, 496 (5th Cir.1999). "In evaluating the sufficiency of the evidence, this court asks 'whether a reasonable trier of fact could have found that the evidence established the essential elements of the crime beyond a reasonable doubt.' We consider the evidence in the light most favorable to the verdict, drawing all reasonable inferences in favor of the verdict. 'It is well-settled that credibility determinations are the sole province of the jury.'" *United States v. Cathey,* 259 F.3d 365, 368 (5th Cir.2001) (citations omitted).

A

[2] We first address whether Morales's statements constituted a "true threat." 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. Myers,* 104 F.3d 76, 79 (5th Cir.1997), citing *United States v. Bozeman,* 495 F.2d 508, 510 (5th Cir.1974) (citations and internal quotations omitted). Prosecution under § 875(c) "requires proof that the threat was made knowingly and intentionally." *Myers,* 104 F.3d at 79. An act is performed "knowingly" when it is done voluntarily and intentionally, and not because of mistake or accident. *See id.* "A threat is knowingly made if the maker of it comprehends the meaning of the words uttered by him, and a threat is willfully made if in addition to comprehending his words, the maker voluntarily and intelligently utters the words as a declaration of an apparent determination to carry out the threat." *United States v. Pilkington,* 583 F.2d 746, 747 (5th Cir.1978) (citation omitted).

[3] However, "[b]ecause § 875(c) contains nothing suggesting a specific intent requirement, it defines only a general intent offense." *Myers,* 104 F.3d at 81. The Supreme Court has held 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." *Watts v. United States,* 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969).

[4] Before analyzing a defendant's willfulness or intention, the Supreme Court has noted that federal statutes prohibiting threats "initially require[ ] the Government to prove a true threat." *Id.* at 708, 89 S.Ct. 1399. The Court distinguished "political hyperbole" from a "true threat," and recognized the importance of examining statements "in context" to determine whether they are true threats punishable by law. *Id.* Thus, 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." 104 F.3d at 80, citing *Bozeman,* 495 F.2d at 510.

[5] Morales admitted making the statements. He admitted more, however: that he did it to see how Lees would react. Morales further testified that he could see why Lees "would get scared or why she reacted the way she did." Morales admitted that he was aware of a prior incident in which a student at Milby had made threats over the internet,[3] and that he knew it was wrong to do so. Under *Myers* all that is required is general intent. 104 F.3d at 81.

3. Morales gave conflicting testimony on whether he was aware that the other student had been charged with a crime as a result of his statements.

It is up to the jury to decide whether Morales made the statements knowingly and intentionally. *Id.* at 78. There was sufficient evidence to support the jury's finding that Morales acted with knowledge and intent.

[6] Additionally, however, the trier of fact must have found that the communication "in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Id.* at 79. The jury was presented with evidence that Lees felt apprehension that "Fusion_2" would act on his threat to kill. Morales repeated his threats to kill several times, and gave no indication that he was joking. Morales admitted that he attempted to refer to Eric Harris, one of the perpetrators of the Columbine High School killings. Thus, his statement in context cannot be divorced from the reality of that tragedy. We should also observe that the context of Morales's statement is different from that in *Watts.* Unlike *Watts,* Morales was not engaged in political speech as part of a public debate, in which the listeners laughed in response to Watts's comments. *See Watts,* 394 U.S. at 708, 89 S.Ct. 1399. Given these factors and the length of the communication between Morales and Lees, a reasonable juror could find all the facts necessary to make Morales's communication a "true threat."

B

[7] Morales contends, however, that his statements cannot, as a matter of law, constitute a true threat because they were made to a random third party who had no connection with Milby High School.

Our precedent does not allow for this distinction. For example, in *Myers,* the defendant was a Vietnam veteran with a history of mental illness. In two telephone conversations he directly threatened a member of his congressman's staff. In a third telephone conversation, Myers communicated a threat against the Veterans Administration and Congress to an employee of the Paralyzed Veterans of America ("PVA"). Myers was convicted on three separate counts of violations of § 875(c) for each individual phone call. This court affirmed Myers's conviction, drawing no distinction between the threat made to the PVA and two other threats communicated directly to their targets. *Myers,* 104 F.3d at 77–78. Again, the focus was on whether the threat "in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *Myers,* 104 F.3d at 78, quoting *Bozeman,* 495 F.2d at 510. It is this character and context of the threat that is the relevant test. As discussed in the previous section, the jury found a reasonable tendency to create such apprehension in this case, and there is no basis for us to disturb the jury's findings.

The government notes that it has never been required to show an intent to communicate the threat to the intended victim under § 875(c). The language of § 875(c) does not require that the threat be made directly to the intended target; it simply prohibits "any threat to injure the person of another" made in interstate commerce. Moreover, as we have pointed out, our precedent in *Myers* does not require that the threat be made directly to the victim. Based on *Myers* and the text of § 875(c), we hold that Morales's statements are actionable under the federal statute.

III

Morales also challenges the instructions given the jury at the close of his trial. The jury was instructed, in relevant part:

> The Government does not have to prove that the defendant subjectively intended

> for the recipient to understand the communication as a threat. The Government also does not have to prove that the defendant actually intended to carry out the threat.

Morales objected to this instruction, instead offering that the jury be instructed that it must find that Morales "understood and meant [his] words as a threat" and that Morales "sent the words knowingly and willfully, that is, intending them to be taken seriously." [4]

[8, 9] We review the rejection of a requested jury instruction for abuse of discretion, "affording the trial judge substantial latitude in tailoring [the] instructions." *United States v. Turner*, 960 F.2d 461, 464 (5th Cir.1992). The refusal to accept a requested instruction is reversible error only if the requested instruction "1) is substantively correct; 2) was not substantively covered in the charge actually delivered to the jury; and 3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a defense." *Id.* Morales's proposed instructions were not substantively covered in the actual jury instructions and did concern an important point in the trial; thus the question is whether prosecution under § 875(c) requires a showing that the defendant intended to make a threat.

Again, the *Myers* decision answers the question. There, we specifically rejected the defendant's claim that the district court erred by refusing a jury instruction requiring a finding that Myers intended his statements to be threats. Noting that "[a]s a straightforward matter of textual interpretation, we will not presume that a statutory crime requires specific intent in the absence of language to that effect," and recognizing that "§ 875(c) contains nothing suggesting a specific intent requirement," we held that the government was not required to prove that the defendant intended the statements to be threats. *Myers*, 104 F.3d at 80–81. The jury instructions rejected here were essentially the same. So we can only conclude that, given that § 875(c) requires only general intent, the district court's denial of Morales's requested jury instruction was not an abuse of discretion.

IV

For the reasons we have explained, the district court did not err in denying Morales's motions for judgment of acquittal, nor in denying Morales's requested jury instructions. The judgment of conviction is therefore

AFFIRMED.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

U.S.A. POLYMER CORP., Respondent.

No. 00-60173.

United States Court of Appeals, Fifth Circuit.

Nov. 6, 2001.

National Labor Relations Board (NLRB) applied for enforcement of NLRB

4. Morales also challenges the district court's refusal to include an instruction requiring the jury to find that Morales intended for Lees to communicate the threat to its target. This issue is disposed of by our addressing direct and third-party threats.

ATTACHMENT D

Quiz

1. True or false? A grand jury decides the guilt or innocence of defendants in criminal cases only.

2. Which of these offenses would not involve a federal grand jury indictment: (More than one answer may be correct.)
   a. Securities fraud.
   b. Speeding on a highway in a national park.
   c. Possession of illegal drugs.
   d. Bank robbery.
   e. Assault and battery in a public school.

3. True or false? In some criminal trials, the judge takes on the role of a jury.

Standard for Indictment Versus Conviction

So, a criminal felony case formally begins with an indictment, which is a formal charge issued by a grand jury stating that there is enough evidence that the defendant committed the crime to justify bringing him or her to trial. (Only prosecutors present evidence before the grand jury.) To get an indictment, the prosecutor must present sufficient evidence to convince a grand jury that there is probable cause to charge Kevin. That means that the prosecutor must convince the jurors that there is a reasonable likelihood that a crime has been committed, and that Kevin committed it. This is a relatively low standard of proof.

As we learned from the quiz, indictments are used primarily for felonies. Grand jury indictments are not usually necessary to prosecute less serious crimes, called misdemeanors, and are not necessary for all felonies. For these crimes, the U.S. Attorney would issue an information, which takes the place of an indictment. (An information may also be used when a defendant waives indictment by a grand jury.)

If the case goes to trial, in order to obtain a conviction, the prosecutor must prove that Kevin is guilty "beyond a reasonable doubt," a much higher standard than for an indictment. The burden of proof is on the government; defendants do not have to prove their innocence. This means that the government must present evidence that is so strong that there is no reasonable doubt that the defendant committed the crime.

In this instance, there probably wouldn't be much difficulty getting an indictment: the U.S. Attorney's Office has tied the communications to Kevin's computer, and it should be pretty easy to demonstrate the other elements of the crime. Whether we'll be able to secure a conviction is a more difficult question, because we'll still need to prove that Kevin's post was a true threat.

ATTACHMENT E

Panelist #4

Other Considerations

In addition to weighing the likelihood of getting an indictment from a grand jury and winning a conviction at trial, the U.S. Attorney's Office will consider other factors before deciding whether it should seek an indictment.

Juvenile status: Here, Kevin is a juvenile. Because he's a juvenile, the U.S. Attorney can only prosecute Kevin if 1) a state court doesn't have or won't assume jurisdiction over the case, which is the case in our scenario; or 2) if the state doesn't have adequate services for juveniles.[4] In our scenario, the county attorney already determined that there are are no state laws covering this situation.

Interest of justice: The U.S. Attorney also has to consider whether prosecution is in the interest of justice in light of the circumstances of the case. Here it might consider that the statutory maximum penalty is five years in prison, and even if Kevin doesn't go to prison, he'll have to live with a felony conviction for the rest of his life. Convicted felons:

- are subject to extended supervision (probation or parole) that limits their freedoms;
- lose the right to vote, although he or she can have this right restored;
- lose the right to hold public office, or run for office;
- lose the ability to own firearms;
- may find it more difficult to get a job; and
- will be barred from some careers.

Other consequences may attach depending on the type of felony that is involved.

These consequences and the stigma alone could put Kevin on a path to failure just because of a youthful lapse in judgment.

Public interest considerations: The U.S. Attorney has an obligation to ensure public safety, prevent and control crime and harm to others, and seek punishment for those guilty of unlawful behavior.

Other appropriate venues: The U.S. Attorney's Office will also consider whether there are other, more appropriate venues for dealing with Kevin's actions than the court system. For example, it might consider whether this situation is better dealt with by the school. School administrators should know that the Supreme Court has consistently held that schools can

[4] 18 U.S.C. § 5032.

punish even off-campus activities if they materially and substantially disrupt the work and discipline of the school.[5]

Discussion Questions

1. In our fictional scenario, the school administrators and faculty failed to take action. Should people who know about a cyberbullying situation but don't take any action to stop it receive consequences?

2. When it comes to cyberbullying, what actions can be taken to recognize it, prevent it, stop it, and give meaningful consequences?

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5 *Morse v. Frederick,* 531 U.S. 393 (2007); *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969).

ATTACHMENT F

Debate Question #1

Looking at the scenario, was Kevin's post about breaking the noses of the field hockey team members a true threat or not a true threat?

Group A: Yes, Kevin's post was a true threat.

- Looking at the scenario, what supports the theory that it was a true threat? In discussing this question, pay attention to what is based on facts and what is based on your feelings or speculations.

Group B: No, Kevin's post was not a true threat.

- Looking at the scenario, what evidence supports the theory that the posting was not a true threat? In discussing this question, pay attention to what is based on facts and what is based on your feelings and speculations.

ATTACHMENT F

Debate Question #2

Looking at the scenario, what factors are present that would have one conclude that Kevin should, or should not, be charged?

Group C: What factors are present that would have one conclude that Kevin should be charged?

- Looking at the scenario, what factors would you raise as reasons for charging Kevin?
- Why is this the most appropriate venue for addressing this matter?

Group D: What factors are present that would have one conclude that Kevin should not be charged?

- Looking at the scenario, what factors would you raise as reasons for not charging Kevin?
- Is there a more appropriate venue for addressing this matter?