UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff, v. ANGEL DILLARD, Defendant.	: : : : : : : : :	CIVIL ACTION No. 6:11-cv-1098-JTM-KGG

UNITED STATES' MOTION *IN LIMINE* TO LIMIT
THE SCOPE OF SEAN FITZGERALD'S TESTIMONY

The United States respectfully moves this Court for an Order precluding FBI Special Agent Sean Fitzgerald from testifying about whether Defendant Angel Dillard intended to carry out any threatened use of force, and in support of this motion, states as follows:

BACKGROUND

The United States brought this action pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), because Defendant mailed a letter that constituted a threat of force to Dr. Mila Means in order to intimidate her from her professed goal of performing abortions in Wichita. When Dr. Means received the letter, she notified the FBI and provided the letter to Special Agent Fitzgerald. Special Agent Fitzgerald then interviewed Defendant about what she had written.

Defendant seeks to have Special Agent Fitzgerald testify regarding whether Defendant would commit any actual acts of violence against Dr. Means. However, as the Tenth Circuit has

already determined in this case, whether Defendant would engage in actual violence is irrelevant to determining whether she threatened the use of force. *U.S. v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015). The testimony must therefore be excluded.

ARGUMENT

Evidence is relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. If evidence is not relevant, it must not be admitted. Fed. R. Evid. 402. The Court has broad discretion to exclude irrelevant evidence from trial. *United States v. Jordan*, 485 F.3d 1214, 1218 (10th Cir. 2007).

Any testimony from Special Agent Fitzgerald regarding his post-interview conclusion that the Defendant did not intend to commit an act of violence against Dr. Means is irrelevant and should be excluded. Special Agent Fitzgerald interviewed Defendant shortly after she sent the letter to Dr. Means. Defendant has characterized Agent Fitzgerald's anticipated testimony as concluding that, after meeting with Defendant Dillard, she "posed no threat" to Dr. Mila Means. (Dkt. 218, Defs. Second Motion to Dismiss at 2, Jan. 29, 2016), and that he did not believe that Defendant Dillard would actually "commit an act of violence." (Appellee's Response and Principal Brief on Cross-Appeal at 9, *United States v. Dillard*, 795 F.3d 1191 (10th Cir. 2015) (Nos. 13–3253, 13–3266), 2015 WL 4747924).

Whether Defendant posed a future threat of harm to Dr. Means that may have required law enforcement intervention, however, is irrelevant to the issue of whether she violated FACE when she mailed the letter. By the time that Agent Fitzgerald interviewed Defendant Dillard – after she sent the letter – the harm had already been done.

A writing constitutes a "true threat" actionable under FACE if it conveys a serious expression of an intent to commit an act of unlawful violence against a particular individual, which under the circumstances would cause apprehension in a reasonable person. *Dillard*, 795 F.3d at 1199 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)); *U.S. v. Magleby*, 241 F.3d 1306, 1311 (10th Cir.2001); *Nielander v. Bd. of Comm'rs*, 582 F.3d 1155, 1167–68 (10th Cir. 2009).

The writer is not required to also have the actual intent to engage in the threatened violence. *U.S. v. Dillard*, 795 F.3d 1191, 1199 (10th Cir. 2015)(quoting *U.S. v. Viefhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999)). When Defendant sent a letter threatening force against Dr. Means to intimidate her so that she would not provide reproductive health services, she violated FACE. That act alone – the very act of sending that letter - violated FACE, regardless of anything she planned to do – or not to do -- after she sent the letter. The law of the case is clear:

> It is not necessary to show that defendant intended to carry out the threat, nor is it necessary to prove he had the apparent ability to carry out the threat. *The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.* It is the making of the threat and not the intention to carry out the threat that violates the law.

Dillard, 795 F.3d at 1199 (quoting *U.S. v. Viefhaus*, 168 F.3d 392, 395-96 (10th Cir. 1999)).

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court preclude FBI Special Agent Sean Fitzgerald from testifying regarding whether Defendant Angel Dillard was likely to carry out any threatened use of force.

Dated: April 6, 2016

Respectfully submitted,

BARRY R. GRISSOM
United States Attorney
District of Kansas

By: Emily Metzger
Assistant United States Attorney
1200 Epic Center
301 N. Main St.
Wichita, KS 67202
Kansas Bar No. 10750
(316) 269-6481
(316) 269-6484 (fax)

VANITA GUPTA
Principal Deputy Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Special Litigation Section

JULIE K. ABBATE
Deputy Chief
Special Litigation Section

/s/ Richard Goemann
RICHARD GOEMANN
Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 353-1313
(202) 514-6903 (fax)
richard.goemann@usdoj.go

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
ANGEL DILLARD,	:	No. 6:11-cv-1098-JTM
	:	
Defendant.	:	

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

/s/ Richard Goemann
RICHARD GOEMANN
Trial Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 353-1313
(202) 514-6903 (fax)
richard.goemann@usdoj.gov