

**JUDICIAL COUNCIL
OF
THE UNITED STATES ELEVENTH JUDICIAL CIRCUIT**

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On 30 January 2015, the Judicial Council approved revised and new instructions for the 2010 Eleventh Circuit Pattern Jury Instructions, Criminal Cases. On 10 June 2015, the Judicial Council approved a second set of changes. On 4 September 2015, the Judicial Council approved a third set of changes. On 2 February 2016, the Judicial Council approved a fourth set of changes that follow:

Offense Instructions

- 29 Threats Against the President
- 30.2 Interstate Transmission of an Extortionate Threat of Kidnap or Injure
- 30.3 Interstate Transmission of Threat to Kidnap or Injure
- 30.4 Interstate Transmission of an Extortionate Communication
- 31.2 Mailing Threatening Communications
- 31.3 Mailing Threatening Communications
- 31.4 Mailing Threatening Communications

All other instructions in the 2010 Pattern Jury Instructions for Criminal Cases; the revisions to instructions 4, 21, 34.1, 35.2, 35.3, 35.4, 35.9, 35.10, 41.2, 50.2, 50.3, 50.4, 53, 74.5, and 92.2 approved by the Judicial Council on 30 January 2015 and announced in a memorandum on 30 March 2015; the revisions to instructions 1.1, 1.2, 35.5, 35.6, 35.7, 35.8, 40.3, 52, 93.2, and T5 approved on 10 June 2015 and announced in a memorandum on 28 July 2015; and the revisions to instructions 4.1, 4.2, T1.1, T1.2, 24.1, 24.2, 50.2, 50.3, and 50.4 approved on 4 September 2015 and announced in a memorandum on 10 September 2015 remain in effect. The June 2010

resolution of the Judicial Council of the Eleventh Circuit applies limitations and conditions upon the use and approval of the 2010 pattern jury instructions. Those limitations and conditions also apply to the instructions listed above.

The Pattern Jury Instruction Builder found on the public website for the Eleventh Circuit Court of Appeals at <http://pji.ca11.uscourts.gov> has been updated to reflect these changes.

FOR THE JUDICIAL COUNCIL:



James P. Gerstenlauer
Secretary to the Judicial Council

O29
Threats Against the President
18 U.S.C. § 871

It's a Federal crime to knowingly and willfully make a threat to [kill] [kidnap] [inflict bodily harm upon] the President of the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant [mailed] [wrote] [said] the words alleged to be the threat against the President;
- (2) the Defendant understood and meant the words as a true threat; and
- (3) the Defendant knowingly and willfully [mailed] [wrote] [said] the words.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

A "threat" is a statement expressing an intention to [kill] [kidnap] [inflict bodily harm upon] the President.

A "true threat" is 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 [kill] [kidnap] [inflict bodily harm upon] the President.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 871(a) provides:

Whoever knowingly and willfully deposits for conveyance in the mail . . . any letter . . . or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States . . . or knowingly and willfully otherwise makes any such threat against the President [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and \$250,000 fine.

This instruction is unaltered by the Supreme Court’s decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of “true threat,” this instruction requires that the defendant’s subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined “true threat” have now been overruled in light of *Elonis* for the failure to consider the defendant’s subjective mental state, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

The committee believes that the general definition of “willfully” in Basic Instruction 9.1A would usually apply to this crime.

O30.2
Interstate Transmission of an Extortionate Threat
to Kidnap or Injure
18 U.S.C. § 875(b)

It's a Federal crime to knowingly send in [interstate] [foreign] commerce an extortionate communication.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (4) the Defendant knowingly sent a message in [interstate] [foreign] commerce containing a true threat to [kidnap any person] [injure the person of another]; and
- (5) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a

reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

To act with “intent to extort” means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A “thing of value” is anything that has value to the Defendant, whether it’s tangible or not.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 875(b) provides that:

Whoever, with intent to extort from any person . . . 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 guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

This instruction is unaltered by the Supreme Court’s decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of “true threat,” this instruction requires that the defendant’s subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined “true threat” have now been overruled in light of *Elonis* for the failure to consider the defendant’s subjective mental state, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the “threat to injure” language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), “thing of value” is a clearly defined term that includes both tangibles and intangibles.

O30.3
Interstate Transmission of Threat to Kidnap or Injure
18 U.S.C. § 875(c)

It's a Federal crime to knowingly send in [interstate] [foreign] commerce a true threat to [kidnap] [injure] any person.

The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt:

- (6) the Defendant knowingly sent a message in [interstate] [foreign] commerce containing a true threat to [kidnap any person] [injure the person of another]; and
- (7) the Defendant sent the message with the intent to communicate a true threat or with the knowledge that it would be viewed as a true threat.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

ANNOTATIONS AND COMMENTS

18 U.S.C. § 875(c) provides that:

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 [shall be guilty of an offense against the United States].

Maximum Penalty: Five (5) years imprisonment and applicable fine.

This instruction is based on *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015). In *Elonis*, the Supreme Court rejected a district court's instruction that failed to consider the defendant's subjective mental state. The Supreme Court held that an objective standard requiring that "liability turn on whether a 'reasonable person' regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence." *Id.* at 2011 (citation omitted). The Court specifically held that the mental state requirement of § 875(c) "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Id.* at 2012. The Court declined, however, to determine whether a finding of recklessness on the part of the defendant would be sufficient. *Id.* at 2012-13.

The Court noted that the defendant's conviction could not be "premised solely" on a reasonable person standard and that it was an error for the Government to "prove *only* that a reasonable person would regard [the defendant's] communications as threats." 135 S. Ct. at 2011-12 (emphasis added). The Court's opinion did not foreclose the possibility that both an objective and a subjective standard be used in determining whether the defendant knowingly sent a threat. *Id.* at 2012 ("Federal criminal liability generally does not turn *solely* on the results of an act *without considering* the defendant's mental state." (emphasis added)). Thus, although the Supreme Court has made clear that the defendant's subjective mental state must be taken into account, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. See e.g., *United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the "true threats" doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the “threat to injure” language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

This subsection, as distinguished from § 875(a) (implicitly), and § 875(b) and § 875(d) (explicitly), does not require an intent to extort.

O30.4
Interstate Transmission of an Extortionate Communication
18 U.S.C. § 875(d)

It's a Federal crime to knowingly send in [interstate] [foreign] commerce an extortionate communication.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (8) the Defendant knowingly sent a message in [interstate] [foreign] commerce containing a true threat to [damage the [reputation] [property] of another] [accuse another of a crime]; and
- (9) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

[To transmit something in "interstate commerce" means to send it from a place in one state to a place in another state.]

[To transmit something in "foreign commerce" means to send it from a place in the United States to anyplace outside the United States.]

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [damage to their [property] [reputation]] [damage to

another person's [property] [reputation]] [being accused of a crime] [another person being accused of a crime].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A "thing of value" is anything that has value to the Defendant, whether it's tangible or not.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 875(d) provides that:

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 guilty of an offense against the United States].

Maximum Penalty: Two (2) years imprisonment and applicable fine.

This instruction is unaltered by the Supreme Court's decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of "true threat," this instruction requires that the defendant's subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined "true threat" have now been overruled in light of *Elonis* for the failure to consider the defendant's subjective mental state, the objective person standard remains useful in the determination of whether the defendant's statement actually constitutes a "true threat," as that term has been defined in prior case law. See e.g., *United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, __

F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the “threat to injure” language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), “thing of value” is a clearly defined term that includes both tangibles and intangibles.

O31.2
Mailing Threatening Communications
18 U.S.C. § 876 (b)

It's a Federal crime to knowingly use the United States mail to send an extortionate communication.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant knowingly used the United States Mail to send a message containing a true threat to [kidnap any person] [injure the person of another]; and
- (2) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A “thing of value” is anything that has value to the Defendant, whether it’s tangible or not.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 876(b) provides:

Whoever, with intent to extort from any person any money or other thing of value, [knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States].

Maximum Penalty: Twenty (20) years imprisonment and applicable fine.

This instruction is unaltered by the Supreme Court’s decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of “true threat,” this instruction requires that the defendant’s subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined “true threat” have now been overruled in light of *Elonis* for the failure to consider the defendant’s subjective mental state, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

Present intent to actually do injury is not required. *United States v. DeShazo*, 565 F.2d 893 (5th Cir. 1978); *see also United States v. McMorrow*, 434 F.3d 1116 (8th Cir. 2006) (noting the “intent to carry through on a threat is not an element of [a crime under 18 U.S.C. § 876(b)]”).

The defendant in *United States v. Bly*, 510 F.3d 453 (4th Cir. 2007), sent threatening letters to various employees of the University of Virginia in violation

of § 876(b). The indictment charged that he sent the letters “knowingly, and with intent to extort from the University of Virginia a sum of money or other thing of value.” In an issue of first impression, the Fourth Circuit rejected the defendant’s argument that “any person” provided for in statute was limited to “living and breathing persons.” The university, therefore, was a “person” for purposes of the statute.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992) “thing of value” is a clearly defined term that includes both tangibles and intangibles.

O31.3
Mailing Threatening Communications
18 U.S.C. § 876(c)

It's a Federal crime to knowingly use the United States mail to send a true threat to [kidnap] [injure] any person.

The Defendant can be found guilty of this crime only if the following facts are proved beyond a reasonable doubt:

- (10) the Defendant knowingly used the United States mail to send a true threat to [kidnap any person] [injure the person of another]; and
- (11) the Defendant sent the message with the intent to communicate a true threat or with the knowledge that it would be viewed as a true threat.

The Government doesn't have to prove that the Defendant intended to carry out the threat.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [being [kidnapped] [injured]] [another person being [kidnapped] [injured]].

ANNOTATIONS AND COMMENTS

18 U.S.C. § 876(c) provides:

Whoever knowingly [deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication with or

without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another [shall be guilty of an offense against the United States].

Maximum Penalty: Up to ten (10) years imprisonment (if the addressee is a United States judge or federal officer/official) and applicable fine.

This instruction is based on *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015).

In *Elonis*, the Supreme Court rejected a district court’s instruction under 18 U.S.C § 875(c) (which deals with the transmission of threatening communications in interstate or foreign commerce) that failed to consider the defendant’s subjective mental state. The Supreme Court held that an objective standard requiring that “liability turn on whether a ‘reasonable person’ regards the communication as a threat—regardless of what the defendant thinks—reduces culpability on the all-important element of the crime to negligence.” *Id.* at 2011 (citation omitted). The Court specifically held that the mental state requirement of § 875(c) “is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.” *Id.* at 2012. The Court declined, however, to determine whether a finding of recklessness on the part of the defendant would be sufficient. *Id.* at 2012-13.

The Court noted that the defendant’s conviction could not be “premised solely” on a reasonable person standard and that it was an error for the Government to “prove *only* that a reasonable person would regard [the defendant’s] communications as threats.” 135 S. Ct. at 2011-12 (emphasis added). The Court’s opinion did not foreclose the possibility that both an objective and a subjective standard be used in determining whether the defendant knowingly sent a threat. *Id.* at 2012 (“Federal criminal liability generally does not turn *solely* on the results of an act *without considering* the defendant’s mental state.” (emphasis added)). Thus, although the Supreme Court has made clear that the defendant’s subjective mental state must be taken into account, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the “threat to injure” language contained in § 876(c) included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

This subsection, like its counterpart § 875(c), does not require an intent to extort.

O31.4
Mailing Threatening Communications
18 U.S.C. § 876(d)

It's a Federal crime to knowingly use the United States mail to send an extortionate communication.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (12) the Defendant knowingly used the United States mail to send a message containing a true threat to [damage the [reputation] [property] of another] [accuse another of a crime]; and
- (13) the Defendant did so with the intent to extort money or something else of value to the Defendant.

The Government doesn't have to prove that the Defendant intended to carry out the threat or succeeded in obtaining the money or any other thing of value.

A "true threat" is a serious threat – not idle talk, a careless remark, or something said jokingly – that is made under circumstances that would place a reasonable person in fear of [damage to their [property] [reputation]] [damage to another person's [property] [reputation]] [being accused of a crime] [another person being accused of a crime].

To act with "intent to extort" means to act with the purpose of obtaining money or something of value from someone who consents because of the true threat.

A “thing of value” is anything that has value to the Defendant, whether it’s tangible or not.

ANNOTATIONS AND COMMENTS

18 U.S.C. § 876(d) provides that:

Whoever, with intent to extort from any person any money or other thing of value, knowingly [deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and 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 guilty of an offense against the United States].

Maximum Penalty: Up to ten (10) years imprisonment (if the addressee is a United States judge or federal officer/official) and applicable fine.

This instruction is unaltered by the Supreme Court’s decision in *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015), because in addition to the objective standard contained in the definition of “true threat,” this instruction requires that the defendant’s subjective mental state be considered.

Although certain prior Eleventh Circuit cases that defined “true threat” have now been overruled in light of *Elonis* for the failure to consider the defendant’s subjective mental state, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., United States v. Martinez*, 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*, ___ F.3d ___, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. United States*, 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

In *United States v. Evans*, 478 F.3d 1332 (11th Cir. 2007), the Court of Appeals considered and rejected the argument that the “threat to injure” language contained in 18 U.S.C. § 876(c) (which deals with mailing threatening communications)

included only future threats. The Eleventh Circuit joined the Second, Third, and Fifth Circuits in holding that a future threat is not necessary and that the statute also applied to immediate threats of harm.

Under *United States v. Nilsen*, 967 F.2d 539, 543 (11th Cir. 1992), “thing of value” is a clearly defined term that includes both tangibles and intangibles.