APPENDIX

APPENDIX A: *United States v. Leveke*, 4:20-cr-00011-001, (S.D. Iowa) (criminal proceedings) Order entered September 28, 2020 1

APPENDIX B: *United States v. Leveke*, 4:20-cr-00011-001, (S.D. Iowa) (criminal proceedings) selected pages from Trial Transcript Volume 1 of 2 7

APPENDIX C: *United States v. Leveke*, 4:20-cr-00011-001, (S.D. Iowa) (criminal proceedings) selected pages from Preliminary Instructions to the Jury filed September 29, 2020 12

APPENDIX D: *United States v. Leveke*, 4:20-cr-00011-001, (S.D. Iowa) (criminal proceedings) selected pages from Trial Transcript Volume 2 of 2 16

APPENDIX E: *United States v. Leveke*, 4:20-cr-00011-001, (S.D. Iowa) (criminal proceedings) Judgment of the United States District Court for the Northern District of Iowa entered January 29, 2021..... 19

APPENDIX F: *United States v. Leveke*, 21-1335 (8th Cir.) (direct criminal appeal), opinion and judgment entered June 21, 2022 26

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CODY RAY LEVEKE, Defendant.	No. 4:20cr0011-JAJ **ORDER**

This matter comes before the court pursuant to pro se motions to dismiss filed by the defendant [Dkt. Nos. 34, 48, 66, 67 and 68], his pro se motions to suppress evidence [Dkt. Nos. 76, 124] his motions for release and dismissal based on Speedy Trial Act violations [Dkt. Nos. 91, 104, 148, 167 and 196] and other miscellaneous motions. [Dkt. Nos. 83, 85, 86, 87, 123]

It must be noted at the outset that the status of these motions is confusing, at best. Along the way, the defendant filed a motion to withdraw all of his pretrial motions. [Dkt. 152] He withdrew that motion [Dkt. 161]. He has accused the court of being unfair for not ruling on his motions. And he again filed a motion to withdraw all of his motions. [Dkt. 176] The defendant has demanded a bench trial on several occasions but refused to make an oral voluntary and knowing waiver of his right to a jury trial when this issue was addressed at a hearing.

The defendant's pro se motion to dismiss for lack of lack of jurisdiction [Dkt. 34] is denied. The district court unquestionably has jurisdiction over this offense. 18 U.S.C. § 3231. The indictment, returned by a legally constituted grand jury, is sufficient on its face and enough to call for trial on the merits.

The defendant's pro se motion to dismiss for lack of an indictment within thirty days of arrest [Dkt. 48] is denied. The motion is predicated on the defendant's belief that his arrest on a related state court offense started the thirty day clock for purposes of indictment in federal court. The government's response [Dkt. 50] demonstrates that the premise of

the motion is erroneous.

The defendant's pro se motion to dismiss for multiplicity [Dkt. 66] is denied. A multiplicitous indictment is one that charges a single offense in multiple counts. *United States v. Webber*, 255 F.3d 523, 527 (8th Cir. 2001). Here, although the indictment charges two similar offenses on the same day, the counts are based on separate communications, sent at separate times. This is not multiplicitous.

The defendant's motion to dismiss based on an unconstitutional statute [Dkt. 67] appears to argue the factual merits of the defendant's defense. Whether the communications at issue qualify as "true threats" is a factual issue for the jury to determine. As noted above, the indictment is sufficient on its face, alleging each of the essential elements of these offenses. A motion to dismiss such as that filed herein is not a vehicle to challenge the sufficiency of the government's evidence.

The defendant's motion to dismiss for malicious prosecution [Dkt. 68] is denied. No allegation in this motion supports any claim of misconduct in the return of an indictment against the defendant.

The defendant filed identical motions to suppress evidence. [Dkt. Nos. 76 and 124] In these motions, the defendants contend that the government did not need to secure search warrants for his Google accounts because he had already admitted to authorities that he had sent the communications at issue in this case. However, this "the government didn't need it" allegation is not cognizable under the Fourth Amendment.

The defendant has filed a number of motions pertaining to speedy trial. [Dkt. Nos. 91, 104, 148, 167 and 196] Upon return of the indictment in this case, the matter was set for trial within seventy days as required by the Speedy Trial Act. However, in March 2020 the COVID-19 virus caused courts across the United States to suspend jury trials. Congress passed the CARES Act permitting the court to conduct critical criminal hearings by video conference but only with the consent of the parties.[1] This court, after

1 The defendant refused to consent to the first status conference scheduled by the court in this

consultation with all of the colleagues of this court and all of the chief district judges of the Eighth Circuit, concluded that because of the virus, in-person hearings could not be safely conducted in this court. The court suspended jury trials until July 6, 2020. With weekly consultation with the chief judges noted above and daily monitoring of new COVID-19 case in each of the divisions and counties of the Southern District of Iowa, the court extended its moratorium on conducting jury trials until August 10, 2020.

On August 10, 2020, the numbers of new COVID-19 virus cases in the eastern division and the western division of the Southern District of Iowa had subsided. That was not true for the central division of Iowa and the court has continued the moratorium on criminal jury trials until October 13, 2020. Adding to this problem is the fact that at one point there were 126 inmates in the Polk County jail with the COVID-19 virus. The Polk County jail is where the vast majority of central division detainees are held. As of the filing of this order, there are still a handful of detainees in the Polk County jail with the COVID-19 virus. That fact alone seriously jeopardizes the safety of the public and court employees upon movement of Polk County jail detainees.

The defendant has demanded that his trial be conducted in another division of this court. For that reason, the matter is moved to Davenport, Iowa with trial commencing on September 28, 2020.

Each of these delays resulting from a continuance granted by the court on its own motion was made because the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. The court has entered administrative orders suspending jury trials between March 2020 and October 12, 2020. These administrative orders serve as the findings that the ends of justice served by granting such continuances outweigh the best interests of the public and the defendant in a speedy trial.

The defendant filed a pro se motion for "admonishment" of the investigating officer

---

matter.

in this case. [Dkt. 123] In support of search warrants for the defendant's Google accounts, the defendant contends that the investigator falsely claimed that the defendant was on the Arizona Sex Offender Registry and had been convicted of Third Degree Sexual Abuse in Iowa. The defendant contends that his conviction is for incest and that an order of the district court for Iowa removing the defendant from the Iowa Sex Offender Registry requirements also means that it was a false statement for the investigator to contend that the defendant was on the Arizona Sex Offender Registry.

In order to prevail on a challenge to a warrant affidavit pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), the challenger must show (1) that a false statement knowingly and intentionally or with reckless disregard for the truth, was included in the affidavit and (2) that the affidavit's remaining content is insufficient to establish probable cause. *United States v. Gladney*, 48 F.3d 309, 313 (8th Cir. 1995).

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks v. Delaware, supra, at 171.

Further, in order to mandate a hearing, the challenged statements in the affidavit must be necessary to a finding of probable cause. *United States v. Flagg*, 919 F.2d 499 (8th Cir. 1990). *United States v. Streeter*, 907 F.2d 781, 788 (8th Cir. 1990) (contested material must be "vital" to probable cause). It must also be remembered that although the affidavit must contain statements that are truthful,

> This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct. For

> probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks v. Delaware, *supra*, at 165.

Omissions of facts are not misrepresentations unless they cast doubt on the existence of probable cause. *United States v. Parker*, 836 F.2d 1080, 1083 (8th Cir. 1987). The same analytical process used to determine whether an affidavit contains a material falsehood is used to determine whether an omission will vitiate a warrant affidavit under *Franks*. *United States v. Lueth*, 807 F.2d 719, 726 (8th Cir. 1986). The defendant must show that (1) the police omitted facts with the intent to make, or in reckless disregard of whether they thereby made, the affidavit misleading, and (2) that the affidavit, if supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. With respect to the second element, suppression is warranted only if the affidavit as supplemented by the omitted material could not have supported the existence of probable cause. *Lueth, supra*, at 726.

The defendant has failed to allege facts sufficient to generate the need for a hearing pursuant to *Franks*. The defendant has not demonstrated the falsity of the statement concerning his status under the Arizona sex offender registry laws. Whether his conviction was for sexual abuse or incest is inconsequential to a finding of probable cause for the warrants. The defendant contends that any error in the affidavit is sufficient to invalidate the warrant. However, the defendant must demonstrate both falsity and intentional or reckless making of a false statement. He has failed to do so.

The defendant's motion in limine [Dkt. 83] is denied. The defendant that contends that because the offense of making a threat is complete when the threat is sent, it is irrelevant that it is received and is irrelevant where it is received. He cites no authority for this proposition. It is the government's obligation to prove venue and both of these challenged

pieces of evidence are relevant to venue.

The defendant's motion for a pretrial conference [Dkt. 85] is granted. This will be held following jury selection on September 28, 2020.

The defendant's motion to produce evidence [Dkt. 86] is denied. He acknowledges receipt of discovery materials but contends that the government should produce something showing how the communications at issue could be viewed as a threat to injure the person of another. The documents produced will speak for themselves in this regard.

Finally, the defendant's motion for an *ex parte* hearing for him to plead additional issues [Dkt. 87] is denied. The court held an *ex parte* hearing to determine whether to subpoena witnesses requested by him. At that hearing, the court learned of his defenses and the relevance of his requested witnesses. Those issues were resolved in an *ex parte* order filed under seal herein. [Dkt. 212]

IT IS SO ORDERED.

DATED this 28th day of September, 2020.

JOHN A. JARVEY, Chief Judge
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - - - - - - - - - - - X
UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
vs. : Case No. 4:20-cr-11
:
CODY RAY LEVEKE a/k/a CODY: TRIAL TRANSCRIPT
MEYER a/k/a CODY MEYERS, : Volume 1 of 2
:
Defendant. :
- - - - - - - - - - - - - - X

Courtroom 242, Second Floor
U.S. Courthouse
131 East Fourth Street
Davenport, Iowa
Monday, September 28, 2020
8:58 a.m.

BEFORE: THE HONORABLE JOHN A. JARVEY, Chief Judge

APPEARANCES:
For the Plaintiff: JASON T. GRIESS, ESQ.
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-5053

MACKENZIE BENSON TUBBS, ESQ.
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-5053

For the Defendant: CODY RAY LEVEKE, pro se

JOSEPH D. HERROLD, ESQ.
Federal Public Defender's Office
Capital Square, Suite 340
400 Locust Street
Des Moines, Iowa 50309-2360

TONYA R. GERKE, CSR, RMR, CRR
United States Courthouse
123 East Walnut Street, Room 197
Des Moines, Iowa 50309

jurors that they are on the jury and have them report at 8:30 in the morning.

Okay. Then, finally, tomorrow for the beginning of the trial, the most important thing to get through first is the jury instructions. Those are the first things that have been read -- will be read.

Mr. Leveke, do you have a copy of the jury instructions handy? We'll get you another set if you need one.

MR. LEVEKE: No. It's right here.

THE COURT: On the front of it -- what is the date on the front of there?

MR. LEVEKE: September 25 draft.

THE COURT: All right. So in the jury instructions after hearing from both sides, there's a few things I've added from the original draft that was filed in this matter. I added a paragraph about the venue because I can tell from the defendant's filings that venue is an important issue, so I included a venue instruction in there. I included the paragraph on page 5 entitled Intent or Knowledge. Knowledge is an element of the offense, and so I've defined knowledge in the very standard way that we do that. At the Government's request some time ago I included the "on or about" paragraph. Are there other concerns the Government has?

MS. TUBBS: No, Your Honor. You have addressed our other concerns.

THE COURT: Mr. Leveke has asked for a definition of threat, and the model instruction doesn't include it nor do the -- nor does the commentary say you should or shouldn't. I haven't checked precisely his definition of threat. Do you object to the word threat being defined?

MS. TUBBS: I do, Your Honor. The cases, like you said, use the model instruction, which does not define threat or give a further definition of threat. It is defined and up to the jury to decide whether this communication was a threat using the factors set forth in the model instruction.

THE COURT: What is it about his definition of a threat that concerns you?

MS. TUBBS: I do not have his definition directly in front of me, but if I recall, it relies on one specific case's interpretation of threat.

THE COURT: Okay. Mr. Leveke, your concerns about the jury instructions?

MR. LEVEKE: Yeah, Judge. My biggest concern is that nowhere in the jury instructions does it define threat, and the case that you can look to see what the definition of a threat is -- it's the cross-burning case, *Virginia versus Black*, where the Supreme Court defines threat as a serious expression of intent to commit unlawful violence. And I -- I have no idea how we're going to have a trial and decide if something is a threat or not if we don't have a definition of what a threat is. We're

going to ask 12 people is this a threat without telling them what they're looking for, you know. I mean, I -- I can't -- just I don't know how they're -- I mean, that's what a threat is. You know, it's an expression of intent. The two phrases listed in the indictment don't express intent. My e-mails don't express intent. I mean, you have to have an expression of intent. The jury has to be instructed on what they're looking for, you know?

THE COURT: The element says it must contain a threat to injure another person and so the only other concept that your definition requests is the concept of seriousness?

MR. LEVEKE: It has to be serious. It has to be an expression of intent, and it has to express unlawful violence. I mean, those are the -- those are the --

THE COURT: Yeah. The third element specifically addresses element 4, the purpose of issuing a threat is with knowledge that it will be viewed as a threat. I'll consider that tonight.

Other concerns about the jury instructions, Mr. Leveke?

MR. LEVEKE: No. That was my concern is that they don't define threat.

THE COURT: Okay. If I don't include it in the preliminary set, I can always add it to the final set. Typically we don't have any of this kind of detail in the

preliminary set, but this is -- this is a short trial. I think it's helpful to define all of the terms ahead of time, and -- but we always have the final set in which to give further instructions.

I note there's a typographical error in the first element, a threat to "injury" another person. I'll correct that.

What else before we begin tomorrow morning? Anything from the Government?

MS. TUBBS: Your Honor, would you like us to make our *Frye* record about the prior plea offers that have been made to Mr. Leveke?

THE COURT: That's fine. Sure. I don't care, and a judge is not involved in plea negotiations. I will not become involved. I don't want to be involved. But they do this -- they do this on the record before a trial so that somebody doesn't come back later and say they never offered me anything.

MS. TUBBS: On May 21st, 2020, the Government offered a -- the defendant a plea to Count 2 in exchange for a dismissal of Count 1. The defendant responded by letter that he had received that offer on or about June 1st and rejected that offer.

On July 10th, the Government offered again a plea to Count 2, to dismiss Count 1, this time adding the provision under 11(c)(1)(B) that the parties would jointly recommend no

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. CODY RAY LEVEKE, *aka* CODY MEYER, *aka* CODY MEYERS, Defendant.	No. 4:20-cr-0011-JAJ **PRELIMINARY INSTRUCTIONS TO THE JURY**

PRELIMINARY INSTRUCTION NO. 2
ELEMENTS OF THE OFFENSES

In order to help you understand the evidence, I will now give you a brief summary of the elements of the crimes charged, each of which the government must prove beyond a reasonable doubt to make its case.

COUNT 1: INTERSTATE COMMUNICATION OF A THREAT

Count 1 of the Indictment charge that: On or about September 3, 2019 at approximately 7:37 a.m. in the Southern District of Iowa, the defendant, Cody Ray Leveke, did knowingly transmit in interstate commerce a communication containing language the defendant knew to be a threat, and knowing that the communication would be viewed as a threat to injure the person or persons of another, in that defendant sent an email to H.Q., an Iowa state senator, and stated in part: "I'm angry enough to pull a mass shooting down at the State House."

COUNT 2: INTERSTATE COMMUNICATION OF A THREAT

Count 2 of the Indictment charge that: On or about September 3, 2019 at approximately 6:34 p.m. in the Southern District of Iowa, the defendant, Cody Ray Leveke, did knowingly transmit in interstate commerce a communication containing language the defendant knew to be a threat, and knowing that the communication would be viewed as a threat to injure the person or persons of another, in that defendant sent an email to H.Q., an Iowa state senator, and stated in part: "The 2nd Amendment exisits [sic] so we can kill politicians when they dont [sic] act in accordance to law."

The crime of interstate communication of a threat, as charged in Counts 1 and 2 of the Indictment, has three elements, which are:

First, that on or about September 3, 2019, the defendant knowingly sent a communication containing a threat to injure another person;

Second, the communication was sent in interstate commerce (the parties have stipulated or agreed that the communications at issue in this case were sent in interstate commerce); and

Third, the defendant sent the communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat.

In determining whether the defendant's communication was sent for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat, you may consider all the circumstances surrounding the making of the communication. For example, you may consider the language, specificity, and frequency of the threat; the context in which the threat was made; the relationship between the defendant and the threat recipient; the recipient's response; any previous threats made by the defendant; and, whether you believe the person making the statement was serious, as distinguished from mere idle or careless talk, exaggeration, or something said in a joking manner.

It is not necessary for the government to prove that the defendant intended to or had the ability to carry out the threat.

To send a communication in "interstate commerce" means to send it from a place in one state to a place in another state.

The communication containing the threat can be handwritten, typed, oral, telephonic, e-mail, text message, or any other form of electronic communication.

For you to find the defendant guilty of this crime, the government must prove all of these elements beyond a reasonable doubt. Otherwise you must find the defendant not guilty.

VENUE

The government must prove it is more likely true than not true that each offense was begun, continued or completed in the Southern District of Iowa. You decide these facts by considering all of the evidence and deciding what evidence is more believable. This is

a lower standard than proof beyond a reasonable doubt. The requirement of proof beyond a reasonable doubt applies to all other issues in the case. All of Story County and Polk County, Iowa are within the Southern District of Iowa.

INTENT OR KNOWLEDGE

Intent or knowledge may be proved like anything else. An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in determining the defendant's knowledge or intent. You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. The government is not required to prove that the defendant knew that his actions were unlawful.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

- - - - - - - - - - - - - - - X
UNITED STATES OF AMERICA, :
:
Plaintiff, :
:
vs. : Case No. 4:20-cr-11
:
CODY RAY LEVEKE a/k/a CODY: TRIAL TRANSCRIPT
MEYER a/k/a CODY MEYERS, : Volume 2 of 2
:
Defendant. :
- - - - - - - - - - - - - - - X

Courtroom 242, Second Floor
U.S. Courthouse
131 East Fourth Street
Davenport, Iowa
Tuesday, September 29, 2020
8:54 a.m.

BEFORE: THE HONORABLE JOHN A. JARVEY, Chief Judge

APPEARANCES:
For the Plaintiff: JASON T. GRIESS, ESQ.
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-5053

MACKENZIE BENSON TUBBS, ESQ.
United States Attorney's Office
U.S. Courthouse Annex
110 East Court Avenue, Suite 286
Des Moines, Iowa 50309-5053

For the Defendant: CODY RAY LEVEKE, pro se

JOSEPH D. HERROLD, ESQ.
Federal Public Defender's Office
Capital Square, Suite 340
400 Locust Street
Des Moines, Iowa 50309-2360

TONYA R. GERKE, CSR, RMR, CRR
United States Courthouse
123 East Walnut Street, Room 197
Des Moines, Iowa 50309

relevant.

THE COURT: Good.

MR. LEVEKE: Yeah. So no -- I don't have anything else to say.

THE COURT: Okay. Return to your chair then.

Mr. Leveke, do you have additional evidence you wish to present?

MR. LEVEKE: I rest, Your Honor.

THE COURT: The defense rests, meaning that Mr. Leveke has completed his presentation of the evidence.

Is there any rebuttal evidence, Mr. Griess?

MR. GRIESS: No, Your Honor.

THE COURT: So we've got two important parts left in the trial. We're going right to them. We have the closing arguments of the lawyers. I've got a couple pieces of -- further pieces of instruction. It turns out that the preliminary instructions I gave you were very exhaustive. It covers what I had hoped to cover before and after the trial, but a couple more pieces of instructions on the law. It made it very easy to determine when Mr. Leveke was presenting evidence and when he was not. When he sits at the counsel table, he is not -- the words coming out of his mouth are not evidence. When he was on the witness stand, that was evidence. And you were to judge the testimony of the defendant in the same way that you would judge the testimony of any other witness. Suggestions

were given to you -- a nonexhaustive list of suggestions were given to you on pages 6 and 7 of the preliminary instructions.

There was some discussion about the First Amendment. You need not concern yourself with the First Amendment. If the Government proves beyond a reasonable doubt that the defendant committed the crimes in Count 1 or 2, then -- that kind of speech is not protected by our First Amendment, so if the Government proves its case, the First Amendment doesn't come into play because it's not protected -- that kind of speech is not protected by the First Amendment. If the Government doesn't prove its case, then you don't have to consider the First Amendment in that situation either.

I haven't let the Government defend the actions of the Tempe Police Department because, as I told you earlier, testimony about what happened in other places like Tempe, Arizona, was only relevant for him to be able to explain the context in which he made the statements. So -- so we're not going to have a discussion here, we're not going to call in witnesses for the Government now about what happened in Tempe and whether it was exactly true or not true or any of that. It was admitted so that he could tell you the context in which he made the statements.

Similarly, there's nothing I need to instruct you about about the Second Amendment to the United States Constitution.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
v1 Sheet 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.

Cody Ray Leveke
a/k/a Cody Meyer
a/k/a Cody Meyers

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:20-cr-00011-001

USM Number: 19440-030

Cody Ray Leveke (Pro Se) and Joseph D. Herrold
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) after a plea of not guilty. One and Two of the Indictment filed on January 21, 2020.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 875(c)	Interstate Communication of a Threat	9/3/2019	One
18 U.S.C. § 875(c)	Interstate Communication of a Threat	9/3/2019	Two

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

January 29, 2021
Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, Chief U.S. District Judge
Name of Judge Title of Judge

January 29, 2021
Date

DEFENDANT: Cody Ray Leveke a/k/a Cody Meyer a/k/a Cody Meyers
CASE NUMBER: 4:20-cr-00011-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

60 months as to each of Counts One and Two of the Indictment filed on January 21, 2020, to be served concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant is remanded to the custody of the United States Marshal for surrender to the ICE detainer.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Cody Ray Leveke a/k/a Cody Meyer a/k/a Cody Meyers
CASE NUMBER: 4:20-cr-00011-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three years as to each of Counts One and Two of the Indictment filed on January 21, 2020, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Cody Ray Leveke a/k/a Cody Meyer a/k/a Cody Meyers
CASE NUMBER: 4:20-cr-00011-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You must submit to a mental health evaluation. If treatment is recommended, you must participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must submit to a gambling assessment and participate in any recommended treatment. You must abide by all supplemental conditions of treatment and contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not participate in gambling or frequent residences or establishments where gambling is ongoing.

You must participate in an approved treatment program for anger control. Participation may include inpatient/outpatient treatment. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

You must submit to a gambling assessment and participate in any recommended treatment. You must abide by all supplemental conditions of treatment and contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not participate in gambling or frequent residences or establishments where gambling is ongoing.

You must not contact the victim(s), nor the victim's family without prior permission from the U.S. Probation Officer.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Cody Ray Leveke a/k/a Cody Meyer a/k/a Cody Meyers
CASE NUMBER: 4:20-cr-00011-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 200.00	$0.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
TOTALS		$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Cody Ray Leveke a/k/a Cody Meyer a/k/a Cody Meyers
CASE NUMBER: 4:20-cr-00011-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 200.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 21-1335

United States of America

Plaintiff - Appellee

v.

Cody Ray Leveke, also known as Cody Meyer, also known as Cody Ray Meyers

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Central

Submitted: January 14, 2022
Filed: June 21, 2022

Before SMITH, Chief Judge, WOLLMAN and ERICKSON, Circuit Judges.

ERICKSON, Circuit Judge.

Following a series of trial delays due to the COVID-19 pandemic, a jury convicted Cody Leveke of two counts of interstate communication of a threat, in

violation of 18 U.S.C. § 875(c). The district court[1] sentenced him to a term of 60 months in prison. Leveke appeals and we affirm.

I. BACKGROUND

Leveke, a registered sex offender, spent the better part of a decade trying to be removed from the Iowa sex offender registry. In 2009, Iowa State Senator Herman Quirmbach agreed to try and help Leveke, who was then residing in Arizona. Senator Quirmbach repeatedly introduced bills to amend the law to allow out-of-state offenders the same opportunity as in-state offenders to petition for removal from the Iowa registry; however, his efforts were unsuccessful.

On September 3, 2019, Leveke sent Senator Quirmbach two emails with the subject line, "Mass Shooting of the Iowa Legislature," and left a voicemail on the senator's home phone. In his first email, Leveke complained about law enforcement unfairly targeting him and an invalid law being "still on the books." He wrote, "I'm angry enough to pull a mass shooting down at the State House." Leveke asserted the legislature was in violation of the Constitution and requested an explanation for the "illegal behavior" as well as the names of those responsible for "holding the bill up." He told Senator Quirmbach that those responsible "should live in fear."

About an hour later, Senator Quirmbach received an angry voicemail on his home phone from Leveke. Among other things, Leveke told Quirmbach that the senator could not violate the Constitution and get away with it. Concerned by the email and voicemail, Senator Quirmbach immediately notified law enforcement and the senate minority leader's office. Legislative administrative staff member, Debbie Kattenhorn, then informed the entire Iowa Legislature and capitol security about Leveke's messages.

[1]The Honorable John A. Jarvey, then Chief Judge, United States District Court for the Southern District of Iowa, now retired.

That evening, Senator Quirmbach received a second email from Leveke under the same subject line of "Mass Shooting of the Iowa Legislature." This time, Leveke "order[ed]" the "Iowa Legislature to stand down with any attempts to violate the civil rights of anyone" and demanded that the existing law be taken off the books. He wrote that he believed the Second Amendment exists "so we can kill politicians" for not acting in accordance with the law. Leveke further stated that "the legislature deserves a violent response at this point." He also attached an article about a mass shooting in Texas that had been reported just hours before.

Leveke was indicted with two counts of interstate communication of a threat, in violation of 18 U.S.C. § 875(c). The course of the prosecution was impacted by the COVID-19 pandemic. Leveke's trial, originally set for March 30, 2020, in the Central Division of the Southern District of Iowa, was cancelled on March 16, 2020, when the court issued an administrative order postponing all jury trials in the Southern District of Iowa from March 16, 2020, until May 4, 2020, on ends of justice grounds related to the pandemic and attendant health risks. See U.S. Dist. Court for the S. Dist. of Iowa, Pub. Admin. Order No. 20-AO-3-P (Mar. 16, 2020) (citing 18 U.S.C. § 3161(h)(7)(A)).

While Leveke made a number of *pro se* requests to have his case proceed to trial, the relief he was seeking was not entirely plain. At one point, he moved for a bench trial while reserving his right to a jury trial. During a status conference, Leveke demanded a jury trial. Subsequently, he consented to a bench trial but conditioned his consent upon certain circumstances and simultaneously insisted on preserving his right to a jury trial. A couple months later, Leveke indicated he wanted a bench trial but refused to waive his right to a jury trial. Leveke requested his case be moved to another division that was conducting jury trials. Ultimately, the district court transferred Leveke's case to the Eastern Division and ordered a jury trial to commence on September 29, 2020.

Leveke's jury trial took place on September 29, 2020. Pursuant to a series of administrative orders, no jury trials were allowed in the Central Division—where

Leveke's case was originally set to take place—until October 12, 2020. See, e.g., U.S. Dist. Court for the S. Dist. of Iowa, Pub. Admin. Order No. 20-AO-19-P (Sept. 3, 2020). The court, after consulting with the United States Attorney, Federal Public Defender, and others, agreed the delay was proper given that "the number of new cases of COVID-19 in the Central Division ha[d] risen to the highest levels to date." Id. Each time the court delayed Leveke's jury trial, it found the time was excludable under the Speedy Trial Act.

The jury found Leveke guilty, and he was sentenced to a term of 60 months' imprisonment. Leveke appealed and the clerk appointed counsel to represent him.

II. DISCUSSION

1. Sufficiency of the Evidence

At trial, Senator Quirmbach and Kattenhorn testified that they believed Leveke's messages posed a real and imminent threat. Leveke also testified, claiming his statements were hyperbole and he had no intention of killing anyone. He told the jury that his messages were meant to get the attention of the Iowa Legislature. On appeal, Leveke contends the government did not have sufficient evidence to prove he made "true threats" because his statements were ambiguous and/or political hyperbole.

"We review the sufficiency of the evidence *de novo*, viewing the evidence and credibility determinations in the light most favorable to the jury's verdict and reversing only if no reasonable jury could have found the defendant guilty." United States v. Ganter, 3 F.4th 1002, 1004 (8th Cir. 2021). "A conviction may be based on circumstantial as well as direct evidence. The evidence need not exclude every reasonable hypothesis except guilt." United States v. Seals, 915 F.3d 1203, 1205 (8th Cir. 2019) (quoting United States v. Tate, 633 F.3d 624, 628 (8th Cir. 2011)) (internal quotation marks omitted).

This Court has defined a "true threat" as "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (en banc). When determining whether a reasonable recipient would have found the communication conveyed an intent to cause harm or injury, the factfinder may consider:

> 1) the reaction of those who heard the alleged threat; 2) whether the threat was conditional; 3) whether the person who made the alleged threat communicated it directly to the object of the threat; 4) whether the speaker had a history of making threats against the person purportedly threatened; and 5) whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.

Id. at 623.

Our precedent establishes that the speaker does not have to intend to carry out the threat in order for the speech to fall outside of the First Amendment's protections. See United States v. Ivers, 967 F.3d 709, 720 (8th Cir. 2020) (noting whether the defendant had any intention of acting on the threat is irrelevant); United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) ("The government need not prove that Mabie had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats.").

Contrary to Leveke's argument that his statements were mere political hyperbole, a jury could have reasonably concluded that Leveke's messages constituted a true threat of present or future violence and that he intended to communicate a threat. Section 875(c) is violated if the government proves the defendant communicated a true threat and "transmitted [that] communication for the purpose of issuing a threat or with knowledge that the communication would be viewed as a threat." United States v. Dierks, 978 F.3d 585, 591 (8th Cir. 2020) (quoting Elonis v. United States, 575 U.S. 723, 740 (2015)) (cleaned up). Here, Leveke's statements were neither ambiguous nor ambivalent. Leveke explicitly

threatened to conduct a mass shooting of the Iowa Legislature for the lawmakers' alleged constitutional violation. He communicated his intent directly to Senator Quirmbach. Leveke expressed a belief that the Second Amendment was created so politicians (and perhaps others) may be killed for failing to act in accordance with the law. Both Senator Quirmbach and Kattenhorn testified that they found Leveke's statements to be threatening and frightening. Leveke testified that he wrote his emails to get the Senate's attention to provoke action. Leveke's statements were objectively threatening, and neither ambiguous nor political hyperbole. The evidence is sufficient to satisfy the elements required for convictions under § 875(c).

2. Jury Instructions

Leveke contends the jury instructions were erroneous because (1) they failed to define a "true threat" as a statement made by a defendant only when he subjectively intends to threaten the victim(s), (2) they did not require the jury to consider whether the statements were objectively "true threats," and (3) the court issued a *sua sponte* instruction regarding the First Amendment.

Before the district court, Leveke raised only one of these three challenges. Because Leveke challenged the subjective intent instruction below and on appeal, we review that argument for abuse of discretion. See United States v. Wilkins, 25 F.4th 596, 600 (8th Cir. 2022). We review Leveke's other arguments for plain error. See United States v. Spencer, 998 F.3d 813, 818 (8th Cir. 2021). We will reverse only if the error was not harmless. Dierks, 978 F.3d at 591.

At trial, Leveke argued that a statement constitutes a "true threat" only if the defendant actually intended to commit unlawful violence against the object of the threat. Leveke's argument misstates the law. See id. at 592 (stating § 875(c) requires a subjective finding of intent to send a threat or knowledge that the communication could be viewed as a threat plus an objective finding that the communication was threatening); see also Ivers, 967 F.3d at 720–21; Mabie, 663 F.3d at 333. Even assuming the district court erred by not making the objective

component of § 875(c) clearer in the instructions, any error is harmless because Leveke's statements were objectively threatening, and a rational jury would have found Leveke guilty beyond a reasonable doubt absent the purported error. See Dierks, 978 F.3d at 592.

As to Leveke's final claim regarding the court's *sua sponte* instruction about the applicability of the First Amendment, Leveke repeatedly claimed his emails were not threats but constitutionally protected political hyperbole. He specifically testified: "I can say whatever I want as long as it's not a true threat, and this ain't a true threat." In response to the testimony and without objection, the court told the jury that it need not concern itself with the First Amendment regardless of whether the government proved its case. "We will not find error when the jury instruction fairly and adequately submitted the issue to the jury and will only reverse when the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." United States v. Mink, 9 F.4th 590, 610–11 (8th Cir. 2021) (cleaned up). Because we find that, when taken as a whole, the instructions sufficiently articulated the elements for the charges and the matters were fairly and adequately submitted to the jury, there was no reversible error.

3. Sufficiency of the Indictment

Leveke has submitted a *pro se* supplemental brief in which he argues the indictment failed to state an essential element of his offense: that a statement may only be considered a true threat if a reasonable person would interpret that statement as a threat. While we generally do not accept *pro se* briefs when a party is represented by counsel, United States v. Parks, 902 F.3d 805, 815 (8th Cir. 2018), we may quickly dispose of Leveke's argument. "An indictment is legally sufficient on its face if it contains all of the essential elements of the offense charged, fairly informs the defendant of the charges against which he must defend, and alleges sufficient information to allow a defendant to plead a conviction or acquittal as a bar to a subsequent prosecution. United States v. Sholley-Gonzalez, 996 F.3d 887, 893 (8th Cir. 2021) (cleaned up). The indictment pleaded the essential elements for

§ 875(c) offenses. See Elonis, 575 U.S. at 732, 740 (stating elements of 18 U.S.C. § 875(c) include: (1) a communication transmitted in interstate commerce, (2) that contains a threat, and (3) which is transmitted for the purpose of issuing a threat or with knowledge the communication will be viewed as a threat).

4. Right to a Speedy Trial

When a defendant brings a speedy trial challenge under both the Speedy Trial Act and the Sixth Amendment, we review the claims separately. United States v. Johnson, 990 F.3d 661, 666 (8th Cir. 2021). We review the "district court's findings of fact for clear error and its legal conclusions *de novo*." United States v. Flores-Lagonas, 993 F.3d 550, 562–63 (8th Cir. 2021).

A. The Speedy Trial Act

While the Speedy Trial Act provides that the trial of a criminal defendant who has pled not guilty must begin within seventy days from the date of the indictment or arraignment, whichever is later, the Act excludes certain periods of delay from this calculation. 18 U.S.C. § 3161(c)(1) & 3161(h). One such excludable period is when the judge overseeing the trial grants a continuance "on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." Id. § 3161(h)(7)(A).

Leveke asserts the district court unlawfully used the "ends of justice" provision to postpone all jury trials due to the COVID-19 pandemic without consideration as to whether relatively straight-forward trials could be held. He argues his jury trial was not especially complex, had limited witnesses, and revolved around the interpretation of two emails and thus should have occurred within seventy days of his indictment. This Circuit has not yet decided whether the "ends of justice" may be properly invoked to delay jury trials due to the COVID-19 pandemic. The Ninth Circuit and Sixth Circuit have generally answered this question in the affirmative. See United States v. Olsen, 21 F.4th 1036, 1044–47, 1049 (9th Cir.

2022) (per curiam) (announcing certain factors district courts should consider when granting trial continuances due to the COVID-19 pandemic and holding the district court erred by dismissing the defendant's indictment with prejudice); United States v. Roush, No. 21-3820, 2021 WL 6689969, at *2 (6th Cir. Dec. 7, 2021), cert. denied, 142 S. Ct. 1187 (2022) (determining the district court did not abuse its discretion when it found postponing or limiting jury trials during the COVID-19 outweighed the defendant's right to a speedy trial).

Here, the district court issued numerous administrative orders explaining how and why the COVID-19 pandemic was interrupting jury trials in the entire district. See, e.g., U.S. Dist. Court for the S. Dist. of Iowa, Pub. Admin. Order No. 20-AO-8-P (Apr. 8, 2020) (explaining the continuances were necessary given the severity of the risk posed to the public and recommendations from the Centers for Disease Control and Prevention, among other reasons). As COVID-19 infection rates in the surrounding counties fluctuated, so too did the availability of jury trials. Compare U.S. Dist. Court for the S. Dist. of Iowa, Pub. Admin. Order No. 20-AO-14-P (June 29, 2020) (reopening all divisions other than the Central Division), with Admin. Order No. 20-AO-19-P (suspending jury trials in the Central Division due to record-high rates of infection and an "extraordinary outbreak" in the Polk County Jail). Aside from general administrative orders, the court also made findings relating to Leveke's individual case. While responding to Leveke's litany of motions, the district court elaborated on COVID-19's disruption to the entire judicial system and how Leveke's jury trial could not have taken place sooner given the safety hazards posed by the rising COVID-19 infection rate in Leveke's area. It is evident the district court considered the factors in § 3161(h)(7)(B) and did not err in continuing Leveke's jury trial under § 3161(h)(7)(A).

While Leveke contends his trial could have been held sooner because he requested a bench trial, the record demonstrates Leveke continually waffled on his desire to have a bench trial and did not waive his right to a jury trial. During the status conference shortly before Leveke's desired date for a bench trial, the district court went through in-detail with Leveke his right to a jury trial and waiver of that

right. The court informed Leveke that a conditional waiver would not be accepted since trial was only four days away and withdrawal of a waiver would be unworkable for the prosecution and its witnesses, not to mention the difficulty of summoning a jury on such short notice. Armed with this information, Leveke refused to unconditionally waive his right to a jury trial. Trial commenced a few weeks later. On this record, the district court did not abuse its discretion in not accepting Leveke's conditional waiver. See Zemunski v. Kenney, 984 F.2d 953, 954 (8th Cir. 1993) (finding a motion to withdraw a jury waiver may be untimely and properly denied if it would "unduly interfere with or delay the proceedings") (cleaned up).

Leveke also contends the district court should have granted his initial request sooner to move his trial to another division where jury trials had resumed. Criminal defendants have no constitutional right to be tried in a particular division within the district and state where the alleged crime took place. United States v. Worthey, 716 F.3d 1107, 1112 (8th Cir. 2013). "The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice." Fed. R. Crim. P. 18. Because district judges have broad discretion to determine where to hold the trial, a defendant must show abuse of that discretion or prejudice. United States v. Stanko, 528 F.3d 581, 584 (8th Cir. 2008).

The government resisted Leveke's request to move the case to another division, stating its witnesses were located in the Central Division and Leveke's transportation to another detention facility would potentially spread COVID-19. While Leveke repeated his request at a status conference on September 4, 2020, he proceeded to make indefinite statements about wanting a jury trial or a bench trial. Ultimately, the court granted Leveke's request to move divisions on September 16, 2020, ordering that a jury trial would take place in the Eastern Division on September 29, 2020. The trial took place on that date in that division. We find no abuse of discretion in the court's timing of granting Leveke's request to change divisions.

Additionally, Leveke has not shown prejudice caused by the delay. While he points to a longer period of detention, repossession of his vehicle, increased pretrial anxiety, and an in-custody assault, none of these circumstances demonstrate he was deprived of an opportunity to properly defend himself at trial. See id.

B. The Sixth Amendment

To show a Sixth Amendment speedy trial violation, the defendant must allege the interval between accusation and trial has crossed a line from ordinary to presumptively prejudicial delay. United States v. Saguto, 929 F.3d 519, 523 (8th Cir. 2019) (quoting United States v. Aldaco, 477 F.3d 1008, 1019 (8th Cir. 2007)) (cleaned up). If the defendant makes that threshold showing, then we proceed to analyze the following factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Flores-Lagonas, 993 F.3d at 563 (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)) (internal quotation marks omitted).

Leveke's constitutional claim fails because he has not shown that a nine-month delay was presumptively prejudicial. See United States v. Walker, 840 F.3d 477, 485 (8th Cir. 2016) (determining eleven-and-a-half-month delay meets threshold for first factor, but barely). Having failed to satisfy the first factor, our analysis ends. See United States v. Titlbach, 339 F.3d 692, 699 (8th Cir. 2003) (stating if no presumptively prejudicial delay exists, the court need not examine the remaining three Barker factors).

III. CONCLUSION

For the foregoing reasons, we affirm Leveke's convictions.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1335

United States of America

Plaintiff - Appellee

v.

Cody Ray Leveke, also known as Cody Meyer, also known as Cody Ray Meyers

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:20-cr-00011-JAJ-1)

JUDGMENT

Before SMITH, Chief Judge, WOLLMAN, and ERICKSON, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

June 21, 2022

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Adopted April 15, 2015
Effective August 1, 2015

Revision of Part V of the Eighth Circuit Plan to Implement the Criminal Justice Act of 1964.

V. Duty of Counsel as to Panel Rehearing, Rehearing En Banc, and Certiorari

Where the decision of the court of appeals is adverse to the defendant in whole or in part, the duty of counsel on appeal extends to (1) advising the defendant of the right to file a petition for panel rehearing and a petition for rehearing en banc in the court of appeals and a petition for writ of certiorari in the Supreme Court of the United States, and (2) informing the defendant of counsel's opinion as to the merit and likelihood of the success of those petitions. If the defendant requests that counsel file any of those petitions, counsel must file the petition if counsel determines that there are reasonable grounds to believe that the petition would satisfy the standards of Federal Rule of Appellate Procedure 40, Federal Rule of Appellate Procedure 35(a) or Supreme Court Rule 10, as applicable. *See Austin v. United States,* 513 U.S. 5 (1994) (per curiam); 8th Cir. R. 35A.

If counsel declines to file a petition for panel rehearing or rehearing en banc requested by the defendant based upon counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion to withdraw must be filed on or before the due date for a petition for rehearing, must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for rehearing, and must request an extension of time of 28 days within which to file pro se a petition for rehearing. The motion also must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

If counsel declines to file a petition for writ of certiorari requested by the defendant based on counsel's determination that there are not reasonable grounds to do so, counsel must so inform the court and must file a written motion to withdraw. The motion must certify that counsel has advised the defendant of the procedures for filing *pro se* a timely petition for writ of certiorari.

A motion to withdraw must be accompanied by counsel's certification that a copy of the motion was furnished to the defendant and to the United States.

Where counsel is granted leave to withdraw pursuant to the procedures of *Anders v. California,* 386 U.S. 738 (1967), and *Penson v. Ohio*, 488 U.S. 75 (1988), counsel's duty of representation is completed, and the clerk's letter transmitting the decision of the court will notify the defendant of the procedures for filing pro se a timely petition for panel rehearing, a timely petition for rehearing en banc, and a timely petion for writ of certiorari.