

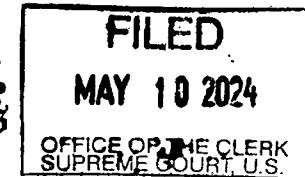
23-7473

NO.

ORIGINAL

IN THE

Supreme Court of the United States



CODY RAY LEVEKE

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eighth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether jury instructions based on *Elonis v. United States* (2015) sufficiently encompass the requirement of "subjective intent to threaten," as articulated by the Supreme Court in *Counterman v. Colorado* (2023), or if such instructions fall short of this standard.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings

DIRECTLY RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the Southern District of Iowa, the United States Court of Appeals for the Eighth Circuit, and United States Supreme Court :

Leveke v. United States, 24-1191 (8th Cir.) (Application for certificate of appealability), judgment entered February 27, 2024.

Leveke v. United States, 4:23-cv-00270 (S.D. Iowa) (28 U.S.C. § 2255 motion), judgement entered January 17, 2024.

Leveke v. United States, 22-5621 (United States Supreme Court) (Petition for writ of certiorari), judgement entered October 31, 2022.

United States v. Leveke, 21-1335 (8th Cir.) (Direct criminal appeal), judgement entered June 21, 2022

United States v. Leveke, 4:20-cr-00011 (S.D. Iowa) (Criminal proceedings), judgement entered January 29, 2021

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PETITION FOR WRIT OF CERTIORARI

Cody Ray Leveke, respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit in the 28 U.S.C. § 2255 proceeding is unpublished and is reproduced in the appendix to this petition at Pet. App. 8

The order of the United States District Court for the Southern District of Iowa in the 28 U.S.C. § 2255 proceeding is unpublished and is reproduced in the appendix to this petition at Pet. App. 1

The decision of the United States Supreme Court in the criminal proceeding is reported at 143 S. Ct. 386 (2022).

The opinion of the United States Court of Appeals for the Eighth Circuit in the criminal proceeding is reported at 38 F.4th 662 (8th Cir. 2022) and is reproduced in the appendix to this petition at Pet. App. 9

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1), as Mr. Leveke timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeals for the Eighth Circuit's judgment.

Mr. Leveke's application for a certificate of appealability to the United States Court of Appeals for the Eighth Circuit was denied on February 27th, 2024.

The United States District Court for the Southern District of Iowa where the criminal proceeding took place under 28 U.S.C. § 2255 had jurisdiction to hear the motion to vacate the convictions.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 U.S.C. § 875(c)

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

STATEMENT OF THE CASE

At the heart of this case lies a question that has divided the circuits: whether jury instructions based on *Elonis v. United States* 135 S. Ct. 2001 (2015) adequately address the First Amendment's requirement of a "subjective intent to threaten" *Counterman v. Colorado*, 143 S. Ct. 2106, 2112 (2023) in true threat prosecutions.

At trial the Petitioner's jury instructions were taken from *Elonis*, where in *United States v. Bachmeier*, 8 F. 4th 1059 (9th Cir. 2021), it was found *Elonis* doesn't instruct on a "subjective intent to threaten" and "relying on *Elonis* is incorrect" id. at 1065.

Filing under *Counterman* and *Bachmeier* to vacate his convictions, the Petition was denied relief under 28 U.S.C. § 2255, and a Certificate of Appealability to the Eighth Circuit, and was assured his jury instructions complied with *Counterman*, despite the Ninth Circuit holding otherwise.

1. Criminal Case

Petitioner was convicted of two counts of violating 18 U.S.C. § 875(c), predicated on communications construed as threats *United States v. Leveke* 38 F.4th 662 (8th Cir. 2022). During the trial, the jury received instructions (App. 22) based on the precedent set by *Elonis v. United States*. In *Elonis* this Court found "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" Leveke 38 F.4th at 668, (quoting Elonis 135 S. Ct. at 2012), App. 13. Before Trial the Petitioner filed a written objection to these jury instructions, demanding a trial "Under the interpretation of law of the 9th Circuit" App. 24. This written request was denied.

On direct appeal, Petitioner contended that the absence of instructions regarding a subjective intent to threaten violated his First Amendment rights, Leveke 38 F.4th at 668, App. 14. The Eighth Circuit affirmed the convictions, citing United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011), which held "The government need not prove [a subjective intent to intimidate or threaten in order to establish [true threats]]" Leveke 38 F.4th at 668, App. 13 (internal quotation marks omitted).

Leveke's court appointed counsel sought certiorari in this court, asking the court to reverse his convictions under the First Amendment on grounds that the Eight Circuits interpretation of the constitution was in error, and a "subjective intent to threaten is the correct standard, This petition for writ of certiorari was denied, Leveke v. United States 143 S. Ct. 386 (2022).

After the Petitioner's direct appeal, the Supreme Court granted certiorari in Counterman v. Colorado, addressing the very same issue raised by Petitioner — whether the First Amendment necessitates proof of subjective intent to threaten in true threat prosecutions. In Counterman, the Court held:

"The State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State

need []prove a []subjective intent to threaten another" id. at 2111-2 (emphasis added)

This decision resolved the split among circuits, affirming the Ninth Circuit's stance as articulated in *United States v. Bachmeier*, 8 F. 4th 1059 (9th Cir. 2021). In the Bachmeier case a three judge panel of the Ninth Circuit found "" a subjective intent to threaten is the required mental state, [under the First Amendment] not, as Instruction 8.47A allows, mere knowledge that the [communication] would be viewed as a threat. Thus, the mens rea portion of Instruction 8.47A relying on Elonis is incorrect, and it was error to give such an instruction" id. at 1065 (emphasis added) (internal quotation marks omitted).

2. 28 U.S.C. § 2255 Proceedings

Following the Counterman decision, Petitioner filed a 28 U.S.C. § 2255 motion, citing Counterman as controlling precedent. In the same filing, Petitioner also brought to the District Court's attention the Ninth Circuit's ruling in Bachmeier as showing that jury instructions under Elonis do not include Counterman's requirement of a subjective intent to threaten. However, the lower court determined that the instructions given to the jury in Petitioner's trial, based on Elonis, exceeded the requirements set forth in Counterman, App. 6. Petitioner's arguments were not accepted, and relief was denied. The Court also denied the Petitioner a Certificate of Appealability, despite him showing the conflicting opinion from the

Ninth Circuit in Bachmeier finding Elonis doesn't instruct on a subjective intent to threaten that is required by the new Counterman decision, App. 7.

Subsequently, Petitioner filed an Application for Certificate of Appealability with the Eighth Circuit, reiterating the Ninth Circuit's ruling in Bachmeier as persuasive authority. Despite the persuasive authority provided, the Eighth Circuit summarily denied Petitioner's application, further entrenching its erroneous interpretation of the law, App. 8.

3. Issue Presented

The central issue before this Court is whether the Eighth Circuit's denial of a Certificate of Appealability was erroneous. Specifically, the Petitioner contends that the denial was in error because jurists' of the Ninth Circuit in Bachmeier have held identical instructions insufficient under the First Amendment's subjective intent to threaten requirement as affirmed recently in Counterman.

4. Argument

The denial of a Certificate of Appealability hinges on the determination of whether "reasonable jurists could debate whether ... the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Given the conflicting interpretations among circuits regarding the application of Elonis, reasonable jurists should find this case deserving of further consideration by the Court of Appeals.

Moreover, Elonis itself establishes that awareness of a threat in communication does not necessarily imply intent to threaten the recipient, further highlighting the necessity for a subjective intent to threaten jury instruction as clarified in Counterman. In Elonis, the Supreme Court held: "In the context of Section 875(c), that requires proof that a communication was transmitted and that it contained a threat. And because 'the crucial element separating legal innocence from wrongful conduct' is the threatening nature of the communication, the mental state requirement must apply to the fact that the communication contains a threat" Elonis 135 S. Ct. at 2003.

This establishes that a person must be aware that a communication contains a threat to violate 875(c), but not necessarily that the threat will threaten others. Persons can receive threats and not be threatened by them.

REASONS FOR GRANTING THE WRIT

The split among circuits regarding the interpretation of Elonis necessitates the intervention of this Court to provide clarity and consistency in the application of First Amendment principles to true threat prosecutions.

Under the Ninth Circuit's ruling in Bachmeier, jury instructions drawn from Elonis do not instruct the jury to find a subjective intent to threaten. As stated in Bachmeier, "a subjective intent to threaten is the required mental state, not, as Instruction 8.47A allows, mere "knowledge that the [communication] would be viewed as a threat." Thus, the mens rea portion of Instruction 8.47A relying on

Elonis is incorrect, and it was error to give such an instruction" Bachmeier, 8 F. 4th at 1065 (emphasis added).

Contrarily, the Eighth Circuit's decision in Leveke suggests otherwise, asserting that subjective intent to threaten is not a requisite element under Elonis. "The government need not prove [] a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats." Leveke 38 F. at 668, App. 13 (emphasis added) (internal quotation marks omitted).

Granting the writ will not only reconcile the conflicting interpretations of Elonis but also ensure uniformity and consistency in the administration of justice nationwide. Post Counterman Decisions by the Courts of Appeals over 18 U.S.C. § 875(c), and 876(c) jury instructions in true threat cases disagree with the Ninth Circuit's holding in Bachmeier, finding instruction under Elonis include a subjective intent to threaten requirement: "the standard articulated in Elonis goes beyond the [] requirement." United States v. Knight (5th Cir. March 4th, 2024), "the Supreme Court's recent decision in Counterman [] is irrelevant here" United States v. Curtin 78 F.4th 1299, 1306 n.3 (11th Cir. 2023)

Failure to address this split may lead to disparate outcomes in similar cases across different circuits, undermining the fundamental principles of fairness and equal protection under the law.

Therefore, it is imperative for this Court to grant certiorari to provide guidance and establish a clear legal standard regarding the application of *Elonis* in true threat prosecutions.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to address the erroneous denial of a Certificate of Appealability by the Eighth Circuit. The conflicting interpretations among circuits regarding the application of *Elonis* warrant clarification by this Court to ensure uniformity and consistency in the administration of justice.

Dated this 9th Day of May, 2024

Respectfully submitted,



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