NO. _____

IN THE

Supreme Court of the United States

CODY RAY LEVEKE

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX

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

CODY RAY LEVEKE, also known as Cody Meyers, also known as Cody Ray Meyers, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	Case No. 4:23-cv-00270-SMR Crim. No. 4:20-cr-00011-SMR-HCA-11 ORDER ON MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

Petitioner Cody Ray Leveke filed this *pro se* Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. [ECF No. 1]. He challenges the sentence imposed in his criminal case. *United States v. Leveke*, No. 4:20-cr-00129-SMR-HCA-1 (S.D. Iowa 2021) ("Crim. Case"). Leveke's criminal case was before then-Chief United States District Judge John A. Jarvey, now retired. The Court takes judicial notice of the proceedings in that case.

I. BACKGROUND

Beginning in 2009, Leveke engaged in a yearslong campaign to persuade the Iowa Legislature to amend a state sex offender registration law to allow him to petition for removal of registration requirements. His point of contact in the Legislature was Senator Herman Quirmbach, who sponsored a bill to amend the law, which passed the Senate but did not gain approval from the House. Senator Quirmbach repeatedly introduced the bill in subsequent legislative sessions but was never able to get it enacted into law.

On September 3, 2019, Leveke sent two emails to Senator Quirmbach each containing the subject line "Mass Shooting of the Iowa Legislature." He also left a voicemail on the Senator's home phone. Leveke wrote in the first email that he was unhappy that the sex offender registration

provision, which he described as invalid, was "still on the books." He explained, "I'm angry enough to pull a mass shooting down at the State House." Leveke accused the Iowa Legislature of violating the United States Constitution and sought an explanation for the continued illegality while also requesting the names of legislators who were responsible for "holding the bill up." These individuals should "live in fear" according to Leveke's email.

Senator Quirmbach soon received an angry voicemail on his home phone from Leveke. In the voicemail, Leveke said that Quirmbach could not get away with violating the Constitution. These communications caused alarm to Senator Quirmbach who immediately contacted law enforcement and the Senate Majority Leader's office. An administrative staff member for the legislature notified the entire legislative body and Capitol security about the messages.

A second email from Leveke arrived in Senator Quirmbach's inbox that evening. This email contained the same subject line "Mass Shooting of the Iowa Legislature." Leveke said he was "ordering" the "Iowa Legislature to stand down with any attempt to violate the civil rights of anyone," repeating his demand that the law be taken off the books. He explained that his interpretation of the Second Amendment was that it allowed individuals to "kill politicians" who do not act according to law. Leveke relayed his belief that "the legislature deserves a violent response at this point" while including with the second email a new article regarding a mass shooting in Texas which had occurred the same day.

Leveke was indicted by a grand jury on two counts of interstate communication of a threat. He proceeded to a jury trial in September 2020, where he represented himself *pro se*. The jury returned a guilty verdict on both counts. Judge Jarvey sentenced Leveke to 60 months' imprisonment. He appealed his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. On appeal, Leveke asserted: (1) insufficient evidence; (2) errors in jury

instructions; and (3) violation of statutory and constitutional speedy trial rights. The panel affirmed the judgment in its entirety. *United States v. Leveke*, 38 F.4th 662, 672 (8th Cir. 2022).

Leveke timely filed this *pro se* Motion to Vacate, Set Aside, or Correct Sentence. [ECF No. 1]. He asserts that his conviction was in violation of the First Amendment because the requisite *mens rea* was not established for his speech to be an unprotected "true threat." The Government responds seeking to dismiss the motion. [ECF No. 5]. For the reasons discussed below, the Court concludes that Leveke's conviction did not violate the First Amendment and he is not entitled to relief.

II. DISCUSSION

A. Section 2255 Standard

A federal inmate may file a motion under 28 U.S.C. § 2255 for relief "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255(a). Section 2255 is intended to provide federal prisoners with "a remedy identical in scope to federal habeas corpus." *Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (quoting *Davis v. United States*, 417 U.S. 333, 343 (1974)). Section 2255 does not provide a remedy for "all claimed errors in conviction and sentencing." *Id.* (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)). The errors redressed by Section 2255 are constitutional and jurisdictional errors or ones that are so fundamental that the result is a "complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962); *see also Sun Bear*, 644 F.3d at 704 (describing the scope of relief available under Section 2255 as "severely limited").

If "the files and records of the case conclusively show" that a petitioner is not entitled to relief, no evidentiary hearing is required. *Voytik v. United States*, 778 F.2d 1306, 1308 (8th Cir. 1985); *see also Franco v. United States*, 762 F.3d 761, 763 (8th Cir. 2014) (finding that no hearing is required when a claim is "inadequate on its face or if the record affirmatively refutes the factual assertions upon which it is based.").

B. Analysis

1. Legal Standard

Leveke was convicted on two counts of interstate communication of a threat, in violation of 18 U.S.C. § 875(c). That section prohibits transmission of "any communication containing any threat to kidnap any person or any threat to injure the person of another." 18 U.S.C. § 875(c). This requires a factfinder to determine: (1) the defendant knowingly transmitted a communication in interstate commerce, (2) the communication contained a threat to injure another person, and (3) "the defendant intended the communication to be threatening and/or knew it would be considered threatening." *United States v. Dierks*, 978 F.3d 585, 590–91 (8th Cir. 2020). The Supreme Court has held that Section 875(c) is a specific intent crime and contains an implicit *mens rea* requirement that "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." *Elonis v. United States*, 575 U.S. 723, 740 (2015).

Leveke argues that his conviction violates the First Amendment to the United States Constitution. He contends that a recent decision by the United States Supreme Court altered the constitutional standard for establishing a "true threat" under the First Amendment. [ECF No. 1 at 13] (citing *Counterman v. Colorado*, 600 U.S. 66 (2023)). Leveke urges that his conviction

cannot stand because the Government must prove a subjective intent to obtain a conviction for a true threat. *Id.*

In *Counterman*, the Supreme Court considered whether the First Amendment requires proof of a defendant's subjective mindset to obtain a criminal conviction for a true threat and what *mens rea* standard is sufficient. *Counterman*, 600 U.S. at 72. The Court concluded that a *mens rea* of recklessness allows "'breathing space' for protected speech, without sacrificing too many of the benefits of enforcing laws against true threats." *Id.* at 82 (quoting *Elonis*, 575 U.S. at 748 (Alito, J., concurring)). Justice Kagan described recklessness as a *mens rea* standard lower than "purpose" or "knowledge," but still constituting "morally culpable conduct, involving a 'deliberate decision to endanger another.'" *Id.* at 79 (cleaned up) (quoting *Voisine v. United States*, 579 U.S. 686, 694 (2016)). She explained a person acts recklessly when they "consciously disregard[] a substantial and unjustifiable risk that the conduct will cause harm to another. That standard involves insufficient concern with risk, rather than awareness of impending harm." *Id.* at 79 (cleaned up) (citations omitted). The *Counterman* Court remanded the case back to state court because the jury had been instructed on an objective standard. *Id.* at 82.

2. Analysis

Leveke argues that *Counterman* requires vacating his conviction because the jury instructions did not require that "he consciously disregarded a substantial risk that his communications would be viewed as threatening violence." [ECF No. 6 at 2]. However, as the Eighth Circuit noted in Leveke's appeal, "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 *Dierks*, 978 F.3d at 591). The jury instructions given in his criminal case reflected this standard. Jury Instructions, Crim. Case, ECF No. 234 at 3–4.

The "consciously disregarded a substantial risk" which Leveke relies upon is actually a lower standard of *mens rea* than the standard required by Section 875(c) and the jury instructions given in his case. *Counterman* expressly stated this point. *Counterman*, 600 U.S. at 78–79 (setting forth the "standard mental-state hierarchy" descending from purpose to knowledge to reckless). Here, the jury was required to find that Leveke sent a communication "for the *purpose* of issuing a threat or with *knowledge* that communication would be viewed as a threat." Jury Instructions, Crim. Case, ECF No. 234 at 3–4 (emphasis added); *see also Dierks*, 978 F.3d at 591 (approving the standard set forth in the jury instructions).

Leveke essentially argues that it was error that the jury was not instructed on a lower *mens rea*. The jury instructions stated the correct *mens rea* and he is not entitled to relief.

III. CONCLUSION

For the reasons discussed above, the Motion to Vacate, Set Aside, or Correct Sentence is DENIED. [ECF No. 1].

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings in the United States Courts, the Court must issue or deny a Certificate of Appealability when it enters a final order adverse to the movant. District courts have the authority to issue certificates of appealability under 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A certificate of appealability may issue only if the defendant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing is a showing "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'"

Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (citation omitted). Leveke has not made a substantial showing of the denial of a constitutional right on her claims. He may request issuance of a certificate of appealability by a judge with the Eighth Circuit. *See* Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated this 16th day of January, 2024.

STEPHANIE M. ROSE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1191

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

Petitioner - Appellant

v.

United States of America

Respondent - Appellee

Appeal from U.S. District Court for the Southern District of Iowa - Central
(4:23-cv-00270-SHL)

JUDGMENT

Before COLLOTON, BENTON, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The motion for appointment of counsel is denied as moot.

February 27, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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.

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[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.

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.

Muscatine County Jail
Muscatine, Iowa

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
VS PLAINTIFF
CODY RAY MEYERS
DEFENDANT

CASE: 4:20-CR-00011
Resistance to Govt motion in limine
Objection to Jury Instructions
Objection to Jurisdiction
Objection to Govt proposed Voir Dire

Defendant hereby objects to the proposed Jury instructions sent by the Court to me on Friday 25th of September 2020,

The instructions do not define the word threat which is "A serious expresso of intent to commit unlawfull violence (see: Virgina vs. Black)

Defendant proposes using the wordage: "for the purpose of expressing or implying intent to commit unlawfull violence/ knowlege that the communication would be viewed as a "serious expression of intent to commit unlawfull violence

Defendant objects to Jurisdiction. (See: Motion ECF #206). Defendant demands a trial in the Jurisdiction where the messages were sent from. Under the interpretation of law of the 9th Circuit court of appeals. ECF #206 was filled on 9/14/20 and "withdraws any demand made for trial in Iowa". (ECF #206 at line 23) Two days prior to the Courts 9/16/20 order setting this trial in Davenport (See: ECF #207). The court holds this trial in violation of Defendants 6th Amendment right to a "trial in the state and district wherein the crime was committed"

Defendant Objects to and resists Governments Voir Dire questions regarding the sex Offende registry. The Jury should have reported crimes requiring registration on the Jury Questionai this question is not needed.

Defendant resists the Governments motion in limine in it's entirety.

APPENDIX E
APP. p. 024

Respectfully Submitted By: Cody Ray Meyers ON 9/26/20