

NO. 11-5722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES,
Appellee,

v.

FRANKLIN DELANO JEFFRIES, II,
Defendant/Appellant.

Appeal from Judgment of Conviction
in the United States District Court
for the Eastern District of Tennessee

**BRIEF OF DEFENDANT/APPELLANT
FRANKLIN DELANO JEFFRIES, II**

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TABLE OF CONTENTS

STATEMENT IN SUPPORT OF ORAL ARGUMENT 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 3

STATEMENT OF THE CASE 4

STATEMENT OF RELEVANT FACTS 5

I. SUMMARY OF EVIDENCE AT TRIAL 5

 A. Overview 5

 B. Government’s Evidence Introduced Through
 Stipulation 6

 C. YouTube Video 7

 D. Expert Testimony 9

 E. Amanda Long 12

 F. Chancellor Michael Moyers 13

 G. Defense Case -- Candace Sutton 14

II. CLOSING ARGUMENTS 16

 A. Closing Argument for the Government 16

 B. Closing Argument for the Defense 17

III. MOTION FOR JUDGMENT OF ACQUITTAL 18

IV.	JURY INSTRUCTIONS	19
	STATEMENT OF FACTS RELEVANT TO LEGAL ISSUES RAISED ON APPEAL	20
I.	INSTRUCTION ON SUBJECTIVE EVALUATION	20
II.	ADMISSION OF FACEBOOK MESSAGES SENT TO OTHER FACEBOOK USERS	21
	A. Defendant’s <i>Motion in Limine</i>	21
	B. Memorandum and Order	21
III.	EXCLUSION OF OTHER POSTS AND LINKS ON JEFFRIES’ FACEBOOK WALL	22
	A. Motion and Opposition	22
	B. Ruling	23
	C. Excluded Evidence	24
	1. PT Belt Part One	24
	2. Video about Jeffries’ life and successes	24
	3. Other wrestling posts	25
	4. Speak English COORS BEER SUCKS	25
	5. The Big Chair	27
	6. Auditions for Fathers	27
	7. Post regarding overcoming odds	28

8.	Post regarding relationship with daughters	28
IV.	VENUE	29
	SUMMARY OF THE ARGUMENT	30
I.	LAW REGARDING “TRUE THREATS” AND THE FIRST AMENDMENT	31
A.	Introduction	31
B.	First Amendment Protections	31
C.	Section 875 and Its Interpretation by Court of Appeals	33
1.	Statute	33
2.	<i>DeAndino</i> -- General intent, determined objectively	33
3.	<i>Alkhabaz</i> -- What a reasonable person would perceive	34
D.	Supreme Court’s Decision in <i>Black</i> -- Imposition of subjective standard	36
E.	Application of <i>Black</i> in Courts of Appeals	37
II.	THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT HAD TO FIND THAT THE DEFENDANT SUBJECTIVELY INTENDED TO THREATEN IN ORDER TO FIND A TRUE THREAT	40
A.	Summary of Applicable Law -- Standard of Review	40
B.	Application of Law to Facts	41
III.	THE COURT ERRED IN ADMITTING IRRELEVANT BUT HIGHLY PREJUDICIAL INFORMATION	43

A.	Introduction	43
B.	Summary of Applicable Law	44
1.	Standard of review	44
2.	Rules 401, 402, and 403	44
3.	Perspective for evaluating “true threat”	44
C.	Application of Law to Facts	45
1.	The Facebook messages were entirely irrelevant	45
2.	The Facebook messages were prejudicial	46
IV.	THE DISTRICT COURT ERRONEOUSLY EXCLUDED IMPORTANT EVIDENCE FOR THE DEFENSE	47
A.	Summary of Applicable Law	47
1.	Standard of review	47
2.	Right to present a defense	48
B.	Application of Law to Facts	48
1.	The posts on Jeffries’ Wall would have provided important context	49
2.	The videos linked to on Jeffries’ Wall would have shed light on “Daughter’s Love”	50
3.	Conclusion	51

V.	THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH GUILT	52
A.	Summary of Applicable Law -- Standard of Review	52
B.	Application of Law to Facts	52
VI.	THERE WAS INSUFFICIENT EVIDENCE OF VENUE IN THE EASTERN DISTRICT OF TENNESSEE	54
A.	Summary of Applicable Law	54
1.	Standard of review	54
2.	Venue statutes and rules	54
3.	Sixth Circuit interpretation	55
B.	Application of Law to Facts	56
1.	Jeffries properly presented the venue issue by raising it as part of his Rule 29 motion at the close of the Government's evidence. He did not waive the issue by failing to move to dismiss prior to trial	56
a.	Precedent	56
b.	Argument	58
2.	The Government did not establish venue by a preponderance of the evidence	58
a.	Conduct charged and elements of the offense	58
b.	Venue was not proper under the general rule	59
c.	Alternative venue statute	59

d.	The only events that occurred in the Eastern District of Tennessee related to the context of the communication, not the conduct elements of the charged offense	60
e.	Conclusion	61
	CONCLUSION AND RELIEF SOUGHT.	61
	CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS	63
	CERTIFICATE OF SERVICE	64
	DESIGNATION OF RELEVANT DISTRICT COURT FILINGS PURSUANT TO SIXTH CIRCUIT RULE 30(b)	65

TABLE OF AUTHORITIES

CASES

<i>Baze v. Parker</i> , 371 F.3d 310 (6th Cir. 2004)	48
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	41, 47-48
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	48
<i>Hanson v. United States</i> , 285 F.2d 27 (9th Cir. 1960)	57
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	52
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964)	33
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	36
<i>Taylor v. Illinois</i> , 484 U.S. 400 (1988)	48
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	32
<i>United States v. Adams</i> , 583 F.3d 457 (6th Cir. 2009)	41
<i>United States v. Alkhabaz</i> , 104 F.3d 1492 (6th Cir. 1997)	21, 23, 33-36, 41-43, 44-45, 46n.

United States v. Bagdasarian,
652 F.3d 1113 (9th Cir. 2011) 37-39, 41

United States v. Cabrales,
524 U.S. 1 (1998) 55

United States v. Cassel,
408 F.3d 622 (9th Cir. 2005) 39, 42

United States v. Cope,
283 Fed.Appx. 384 (6th Cir. July 3, 2008) 39

United States v. Cope,
312 F.3d 757 (6th Cir. 2002) 44

United States v. Damra,
621 F.3d 474 (6th Cir. 2010) 40

United States v. DeAndino,
958 F.2d 146 (6th Cir. 1992) 33-34, 40, 43, 46n.

United States v. Fisher,
648 F.3d 442 (6th Cir. 2011) 47

United States v. Frederick,
406 F.3d 754 (6th Cir. 2005) 40

United States v. Grenoble,
413 F.3d 569 (6th Cir. 2005) 58n.

United States v. Hardy,
586 F.3d 1040 (6th Cir. 2009) 47

United States v. Kelly,
535 F.3d 1229 (10th Cir. 2008) 57

United States v. Kuehne,
547 F.3d 667 (6th Cir. 2008) 40, 41, 54

United States v. Lenihan,
19 F.3d 1430, 1994 WL 102149 (4th Cir. 1994) 57

United States v. Magleby,
420 F.3d 1136 (10th Cir. 2005) 39

United States v. Mitchell,
408 Fed.Appx. 53 (9th Cir. January 7, 2011) 57

United States v. Parr,
545 F.3d 491 (7th Cir. 2005) 39

United States v. Poulsen,
655 F.3d 492 (6th Cir. 2011) 44, 46

United States v. Ramirez,
635 F.3d 249 (6th Cir. 2011) 52

United States v. Rodriguez-Moreno,
526 U.S. 275 (1999) 55, 60

United States v. Ruelas-Arreguin,
219 F.3d 1056 (9th Cir. 2000) 57

United States v. Russell,
595 F.3d 633 (6th Cir. 2010) 40

United States v. Scaife,
749 F.2d 338 (6th Cir. 1984) 56

United States v. Thomas,
74 F.3d 701 (6th Cir. 1996) 56

United States v. Williams,
641 F.3d 758 (6th Cir. 2011) 39-40

United States v. Wood,
364 F.3d 704 (6th Cir. 2004) 55, 59

United States v. Zidell,
323 F.3d 412 (6th Cir. 2003) 54, 57-57

Virginia v. Black,
538 U.S. 343 (2003) 36-40, 41, 43

Watts v. United States,
397 U.S. 705 (1969) 32, 36, 38

STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution,
First Amendment 31-32, 36, 38, 43

United States Constitution,
Sixth Amendment 54-55

18 U.S.C. §871 38

18 U.S.C. §875 *passim*

18 U.S.C. §879 37

18 U.S.C. §3231 2

18 U.S.C. §3237 55, 59

28 U.S.C. §1291 2

RULES

Federal Rule of Criminal Procedure 18 55

Federal Rule of Criminal Procedure 29 56-58

Federal Rule of Evidence 401 44

Federal Rule of Evidence 402 44

Federal Rule of Evidence 403 44

OTHER AUTHORITIES

Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*,
58 U. Miami L.Rev. 843 (2004) 37n.

Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*,
54 Cath. U.L.Rev. 1, 33 (2004) 39

Frederick Schauer, *Intentions, Conventions, and the First Amendment*,
55 Sup. Ct. Rev. 197 (2003) 37n.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

The appellant submits that decision in this case would be significant aided by the presentation of oral argument on behalf of the parties, particularly as this case involves complicated issues of law. The appellant therefore respectfully requests that this Court grant permission for counsel to present oral argument.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction in the United States District Court for the Eastern District of Tennessee. The district court had jurisdiction under 18 U.S.C. §3231, which grants exclusive jurisdiction over all offenses against the laws of the United States. The defendant went to trial before the Honorable Thomas W. Phillips and a jury on March 29, 2011. On March 31, 2011, the jury returned a verdict of guilty. On June 2, 2011, judgment was entered and the defendant was sentenced to a term of imprisonment of 18 months. A timely notice of appeal was filed on June 15, 2011. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in refusing to instruct the jury that it could find the defendant guilty of making a “true threat” only if it found that he had subjectively intended to threaten?
2. Did the District Court err in admitting highly prejudicial Facebook messages that were irrelevant to the legal test applied, as the analysis was to be conducted from the perspective of the “receiver” of the threat and the receiver could never have known of these messages?
3. Did the District Court err in excluding important information that formed part of the context of the alleged threat -- information which could have been seen by anyone on Jeffries’ Facebook Wall at the same time they saw the link to the alleged threat -- and which would have cast the alleged threat in a more innocuous light?
4. Was there insufficient evidence to establish guilt beyond a reasonable doubt, where a rational juror could not have concluded that a reasonable person would believe beyond a reasonable doubt that Jeffries had an intention of actually threatening or intimidating Chancellor Moyers?
5. Was there insufficient evidence to prove venue in the Eastern District of Tennessee, where none of the actions taken by Jeffries that constituted the elements of the offense were taken in that district?

STATEMENT OF THE CASE

On November 16, 2010, defendant/appellant Franklin Delano Jeffries II [“Jeffries”] was charged in a superseding indictment with one count of transmitting a threat in interstate commerce. R.33. He went to trial before the Honorable Thomas W. Phillips and a jury on March 29, 2011. On March 31, 2011, the jury returned a verdict of guilty. R.102. On June 2, 2011, judgment was entered and the defendant was sentenced to a term of imprisonment of 18 months. R.118. Following a timely notice of appeal, the case was docketed in this court on June 16, 2011.

STATEMENT OF RELEVANT FACTS

I. SUMMARY OF EVIDENCE AT TRIAL.

A. Overview.

The *Superseding Indictment* reads:

The Grand Jury charges that, on or before July 9, 2010, in the Eastern District of Tennessee, the defendant, FRANKLIN DELANO JEFFRIES II, knowingly did transmit in interstate commerce a communication, namely a video of himself posted on the public internet websites YouTube and Facebook, to Knox County Chancellor Michael W. Moyers, and the communication specifically contained a threat to injure and kill Knox County Chancellor Michael W. Moyers, in violation of Title 18, United States Code, Section 875(c).

R.33.

According to the Government, Jeffries filmed a short musical video, discussing in words and song his frustrations with a long-standing custody case. In the video, he said that the video was for the “judge” (apparently Knox County Chancellor Michael Moyers), and made several ominous comments ostensibly aimed at the judge and referring to an upcoming hearing, to be held on July 14, 2010. On July 9, he uploaded that video to the Internet video-sharing service YouTube, along with an explanatory comment. He also posted a link to that video on his account on Facebook, the social-networking website. Finally, he sent messages, through the Facebook system, to other Facebook users (including numerous friends and family

members). The messages to them included a personal or descriptive note as well as a link directing them to his YouTube video. For some, Jeffries' note requested them to "take it [the video] to" the judge.

The Government argued that this conduct was reasonably viewed as a criminal threat intended to intimidate Chancellor Moyers into taking some action in line with Jeffries' wishes. The defense argued that it was reasonably viewed as venting and/or misguided humor, and that a reasonable person would perceive Jeffries actions (which did not include any direct efforts to reach Moyers) as not being actually calculated to influence Chancellor Moyers.

B. Government's Evidence Introduced through Stipulation.

At the beginning of its case, the Government introduced several documents into evidence through stipulation. The documents indicated that a user named dalejeffriesjr had a YouTube account. On July 9, 2010, at 11:03 a.m., that user -- who was accessing the Internet from a location traced back to Jeffries' home at 210 State Line Road, Clarksville, Tennessee -- uploaded a video titled "Allison's Love" to YouTube.¹ See R.103, Government's Exhibit 7. The video was subsequently removed from YouTube by dalejeffriesjr on the following day, July 10, 2010 at 12:08

¹ The video is sometimes referred to as "Allison's Love," and sometimes as "Daughter's Love." The titles are used interchangeably herein.

p.m. R.121, *Tr.* 3/29/2011 at 21-22.

C. YouTube Video.

In the video, Jeffries is sitting in what appears to be his house. He plays an American-flag guitar and sings. The singing is on a few occasions interrupted by monologues. The video opens with the title: “Daughter’s Love.” Jeffries begins by saying: “This song’s for you, judge.” He then begins strumming the guitar, and the song begins: “I’ve had enough of this abuse from you....” He continues:

I had enough of this abuse from you /
It has been going on for 13 years /
I have been to war and killed a man /
I don't care if I go to jail for ten thousand years /
Cause this is my daughter we're talking about /
And when I come to court, this better be the last time /
If I have to kill a judge or a lawyer or woman, I don't care /
Cause this is my daughter we're talking about. /
I'm getting tired of abuse and the parent alienation /
You know it's abuse /
I love ... you /
Daughter, daughter /
You beautiful thing in my life.

Later, he continues in the same vein:

Damn this world is getting tired /
When you don't have your daughter to love on or have a big hug /
Cause she's so mentally abused and psychologically gone /
She can't even hold her own Dad /
Because her mom has abused by parent alienation her /
And the shit needs to stop cause you're gonna lose your job /
And I guarantee you, if you don't stop, I'll kill you /

Cause I'm going to make a point /
Either way you look at it, somebody's gotta pay /
And I'm telling you right now live on the internet /
So put me in jail and make a big thing /
Everybody needs to know the truth.

After several more verses, he concludes with a monologue:

I want the abuse to stop. That's why I started "Traumatized Foundation.org." Traumatized Foundation.org. Because of the children being left behind, being abused by judges, the courts, their being abused by lawyers.

The best interest ain't of the child anymore. The judges and the lawyers are abusing them. Let's get them out of office. Vote them out of office. If fathers don't have rights or women don't have their rights for equal visitation, get their ass out of office. Cause you don't deserve to be a judge and you don't deserve to live. You don't deserve to live, in my book. And you're going to get some crazy guy like me after your ass.

And I hope I encourage other dads to go out there and put bombs in their goddamn car. Blow em up. Because its children we're, children we're talking about.

[Singing again]

I care about her /
And I'm willing to go to prison /
But somebody's gonna listen to me /
Because this is a new war.

[Speaking]

This ain't Iraq or Afghanistan. This is goddamn America. This is my goddamn daughter. There I cussed. Don't tell me

I can't fucking cuss. [Guitar falls over.] Stupid fucking, boom, there went your fucking car. I can shoot ya, I can kill ya, I can fuck ya. Be my friend. Do something right. Serve my daughter. Yeah, look at that. That's the evil. You better keep me on God's side. Do the right thing July 14th.

The video then concludes. R.103, Government Exhibit 7.

D. Expert Testimony.

Jason Passwaters, a digital forensic analyst, testified regarding the records obtained by the Government from Facebook detailing Jeffries' activity on Facebook. He explained the general operation of the Facebook service. R.121, *Tr.* 3/29/2011 at 64-67. He stated that on Facebook users "can post updates, status messages, comments. They can post pictures. They can also post links to external content and videos." *Id.* at 65. He testified:

[A] Facebook wall is an area of your Facebook account that you can post information to, and again depending on the settings, your privacy settings, that other people you are connected to can also post information to.

Id. at 65. He explained that a Facebook user could navigate to the Wall of another user, and then post content on that Wall. *Id.* at 65-70.

Passwaters explained that electronic communications to YouTube or to Facebook would go through many different systems before ending up at the YouTube

or Facebook servers in California. *Id.* at 73-74.²

He also testified that Jeffries posted the following content, along with a link to the “Daughter’s Love” video, to his own wall:

Is saying everything is in God’s hands now. You must accept the Holy Spirit into your heart to understand truth iou accept the Holy Spirit in to your heart and push him out again, does not give you the right to enter into the gates of heaven. You have to hold on to the Holy Spirit everyday, and do not give in to the devil like some of you have been doing like me. Depending on how my court date goes on the 14th for my daughter’s love will determine how evil I will get. I been to hell in War before, and I am willing to go back over my daughter love.

Id. at 83.

Passwaters testified regarding the messages that Jeffries sent to other Facebook users along with links to the video. These included:

RECIPIENT	MESSAGE
Charlotte Jeffries	GIVE THIS TO DANNY AND THE JUDGE!
Candace Sutton	GIVE THIS TO THE JUDGE
Jessica Reynolds	Give this to my Judge for court
Shanica Jeffries	Tell the Judge
Bethany Meagan Danielle	Tell the Judge this
Caylee Carpenter	Tell the judge KK

² Passwaters explained on cross-examination that when a YouTube video is linked to on Facebook, a user would be able to view the video while on the Facebook page. The actual data, however, would still be streamed from the YouTube servers. The video would never actually be transferred to the Facebook servers. R.121, *Tr.* 3/29/2011 at 97-98.

such as status updates, from Facebook even after they have been posted. He acknowledged that, in the IP logs obtained from Facebook, there was an activity from Dale Jeffries account -- activation of the script “remove_confirm.php” -- that occurred about twenty-six times. He was asked:

Q: And activation of that resource is consistent with a user removing an item or post from their Facebook profile?

...

[A:] ... It does look like remove for obvious reasons, “remove_confirm.php” would handle that kind of activity. The rest of the entry there would identify the specific content that was going to be removed.

Id. at 111-114. He explained that the Government had not asked him to determine what “remove_confirm.php” exactly did. *Id.*

Passwaters agreed that he had not been provided with any records that would show whether any of the recipients of Jeffries’ messages logged into Facebook on July 9 (and thus could have have read Jeffries’ message), or whether they accessed YouTube on July 9 or 10 (and could have seen the video). He agreed that he had, in an earlier report, indicated to the Government that such logs from YouTube would be helpful, but he was not given any such logs. *Id.* at 116-117.

E. Amanda Long.

Jeffries’ ex-sister-in-law, Amanda Long, testified that, on July 9, she was using Facebook, accessing her niece Allison Jeffries’ page. She saw that Allison was a

Facebook friends of Jeffries, and then Ms. Long went to Jeffries' page. His page was viewable to the public. When she got there, she saw a link to a video, and clicked on it. It was the video entitled "Allison's love." R.121, *Tr.* 3/30/2011 at 129-133. On cross-examination, she admitted that she didn't "have a reason" why she was looking at Jeffries' Facebook Wall. *Id.* at 138. After she viewed the video, she called her sister-in-law and her husband. *Id.* at 138. She said that she believed that it was her father-in-law who videotaped the video. *Id.* at 139-140.⁴

F. Chancellor Michael Moyers.

Chancellor Moyers testified that he became the presiding chancellor over Jeffries' case in 2007, after another judge recused himself. He explained: "[B]y the time it got to me it was a post divorce case involving child custody, child visitation and child support." R.121, *Tr.* 3/30/2011 at 149. He explained that in November 2009, Jeffries had filed a petition for visitation, stating that he was not getting the visitation to which he was entitled under the parenting plan. A hearing was held in December, and an order granting him visitation was issued on January 13. The order required him to engage in age-appropriate activity with his daughter, such as not smoking, drinking, or using profanity around her, and "set the matter for review in six

⁴ As noted below, it was a home-made video of a computer screen showing "Daughter's Love" that was actually shown to Chancellor Moyers.

months.” *Id.* at 150. Moyers noted that this was the first time he had had to “admonish a parent not to use profanity around a child and put it in an order.” The order also prohibited the daughter from being exposed to Jeffries’ mother. *Id.* at 150-156. A review hearing was scheduled for July 14, 2010, to review the status of visitation. *Id.* at 151.

Chancellor Moyers explained that, around July 12, he was informed by the head of courtroom security for the Knox County Sheriff’s Department “that a threat had been received.” Later that day, Judge Bob McGee, who had obtained a copy of the video, brought it to him and Chancellor Moyers viewed it. *Id.* at 151-152.

On cross-examination, Chancellor Moyers stated that the video he actually watched “was captured by like a video camera focusing on a screen.” The content was the same. That video was also introduced into evidence. *Id.* at 158-160.

G. Defense Case -- Candace Sutton.

Jeffries did not testify. The only defense witness was his sister, Candace Sutton. Ms. Sutton testified that on July 7, 2010, she gave birth to a premature child. On July 9, the day the video was uploaded, her daughter was “on a respirator fighting for her life,” and Ms. Sutton herself was in pain. Her mother, Charlotte Jeffries, came to the hospital but seemed to be more worried about another situation. Ms. Sutton had a discussion with her, and ended up watching the video. She testified:

I called my brother and told him that this wasn't the time to be trying to get my mom's attention for anything, to take that down and I needed her there.

R.121, *Tr.* 3/30/2011 at 175-179. She didn't talk to him directly, but left a message.

Id.

Ms. Sutton testified that her mother and brother were associated with the fathers' rights group, DADS of Tennessee. She testified that Jeffries had joined the military four or five years ago. He was deployed to Iraq, where he made films for the military and interviewed people. When his first tour of duty was over, he reenlisted.

Id. at 179-182.

Ms. Sutton testified that Jeffries had "like hundreds of videos on YouTube."

Id. at 182. She explained:

Q: What kind of videos does Sergeant Jeffries make?

A: He has always wanted to be a comedian. He makes all kinds of videos. He thinks they are funny a lot because all my friends laugh. A lot of times they are laughing at him. He thinks they are funny too. He wants, he has always wanted to be a comedian.

...

Q: The videos that your brother makes that are funny, do they appear funny to you?

A: Sometimes.

Q: Have you ever known your brother to make videos with an intent to shock, for their shock value?

A: Yes, he wants to be like Tim Green and Johnny Knoxville.

Id. at 191-192.

Ms. Sutton testified that the “Danny” referenced in Jeffries’ message to his mother was Jeffries’ lawyer, Danny Garland. Ms. Sutton said that Jeffries knew she was in the hospital at the time he sent her a message about the video asking her to give it to the judge. She also described many of the people to whom Jeffries evidently sent messages about this video. Bethany Danielle is Ms. Sutton’s niece, who lives “past Atlanta” in Georgia. Caylee Carpenter is Ms. Sutton’s nine-year-old daughter, who is in fourth grade. Ms. Sutton said that Caylee would not know where the courthouse was or who Chancellor Moyers is. She testified that Chelsey Sutton is her 21-year-old daughter. Kari Anthony is a cousin who lives in Kentucky. Cheryl Jeffries is a sister-in-law living in Oregon. Kimberly Romans lives in Chattanooga. Raysaundra Barmes lives in Alaska. *Id.* at 184-190.

II. CLOSING ARGUMENTS.

A. Closing Argument for the Government.

In closing, the government argued:

First, ladies and gentlemen, this communication was a serious expression of an intention to inflict bodily harm. You saw the defendant. You saw what he said. He threatened one person and one person alone. He didn’t threaten all of the judges in all of America. He threatened Chancellor Moyers, one person, [a] serious expression. He dedicated the video to “judge.”

He references the custody dispute throughout the video. He talks

about the July 14th hearing that he had that was to be in front of Chancellor Moyers and he also made that very distinctive cussing comment that you all heard.

...

Now, how do we know this is a threat to achieve a goal? Well, we see the fact that he didn't just take this video and put it in a drawer somewhere. He uploaded it to YouTube. He didn't just upload it to YouTube, ladies and gentlemen, he then sent it to 28 of his friends and also put it on his Facebook wall.

R.121, *Tr.* 3/30/2011 at 217, 222.

She concluded:

Ladies and gentlemen, it's very much reasonable to believe that this defendant thought the judge was going to get this message. He was telling people to give the judge the video. Telling them. Not with a smiley face, not with a just kidding.

Id. at 223.

B. Closing Argument for the Defense.

Defense counsel argued:

It seems to me ... [t]hat's what's going on with Sergeant Jeffries [is] that he is verbalizing, venting and as he says going back to war in his mind and using war similes and war words as he describes the emotions that he is having at that particular time.

[W]hen you are looking at whether this is a true threat, is this something that he was trying to achieve, a specific goal by intimidation? ...We are hearing frustration.

Id. at 228-229. He continued:

When he says give it to the lawyer? Think about that. [To be considered criminal] [t]his must be for the purpose of intimidating and in order to

accomplish a true threat to inflict damage. If it is a true threat to inflict damage, I don't believe there is a member of this jury or a member in this courtroom that would send it first and foremost to your lawyer. You don't send threats by way of your lawyer, if you are going to court the next week. Think about the context.

They [the Government] then said, well, he sent it to other people. The first other one he sent it to was his sister we have talked about who had two days before that had four hours of surgery with regard to having a two month premature baby that was in intensive care, neonatal intensive care.

Now, if you want to believe the government ... he sent a link to that sister, to be sure that the sister got out of her hospital bed and came to court the next day and gave it to the judge to intimidate the judge so that he would not have to come back to court again. That does not make sense.

He supposedly sent it to the sister's daughter, nine years old with an instruction give this to the judge for court....

My point is you have to look at it as a reasonable person and in context. Is it a true threat? ... There are ways if I want to get word to a judge that I am wanting to intimidate him I can figure out how to do that even from Clarksville, Tennessee. It is not by sending it to my niece who is nine years old and saying, take this to the judge.

Id. at 232-233.

III. MOTION FOR JUDGMENT OF ACQUITTAL.

Jeffries moved for a judgment of acquittal at the conclusion of the Government's evidence, the conclusion of the case as a whole, and in a post-verdict motion. The Court denied all such requests. R.121, *Tr.* 3/30/2011 at 174, 205-206; R.113.

IV. JURY INSTRUCTIONS.

As to the elements of the crime, the Court instructed the jury that it had to find that “the communication was sent in interstate commerce.” R.121, *Tr.* 3/30/2011 at 258. It also instructed:

In order to sustain a conviction under Section 875(c) the communication must be a true threat. This means that a reasonable person would;

Number one, take the statement as a serious expression of an intention to inflict bodily harm, and

[N]umber two, perceive such expression as being communicated to effect some change or achieve some goal through intimidation.... In making this determination you must examine the content of the video in the context in which it was made....

In evaluating whether a statement is a true threat, you should consider whether in light of the context a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury on Chancellor Moyers and whether the communication was done to effect some change or achieve some goal through intimidation.

Id. at 258-259.

**STATEMENT OF FACTS RELEVANT TO LEGAL ISSUES
RAISED ON APPEAL**

I. INSTRUCTION ON SUBJECTIVE EVALUATION.

In his *Supplemental Proposed Jury Instructions* filed prior to trial, Jeffries requested that the Court instruct the jury as follows:

In determining whether a communication constitutes a “true threat,” you must determine the defendant’s subjective purpose in making the communication. If the defendant did not seriously intend to inflict bodily harm, or did not make the communication with the subjective intent to effect some change or achieve some goal through intimidation, then it is not a “true threat.”

R.87 at 6. The Court refused to give this instruction, instructing only that the jury evaluate from an objective perspective.⁵ It emphasized this point:

Specifically, the government does not have to prove that defendant subjectively intended for Chancellor Moyers to understand the communication as a threat, nor does the government have to prove that the defendant intended to carry out the threat.

R.121, *Tr.* 3/30/2011 at 261. At trial, defense counsel reiterated for the record his objection to the Court’s failure to give the instruction including a subjective standard. *Id.* at 213.

⁵ The trial, including many rulings, was (with some exceptions discussed *infra*) conducted largely in line with the legal approach taken in the jury instruction as actually given.

II. ADMISSION OF FACEBOOK MESSAGES SENT TO OTHER FACEBOOK USERS.

A. Defendant's *Motion in Limine*.

On March 14, Jeffries filed a *Motion in Limine to Exclude Irrelevant Messages*.

R.85. The motion sought exclusion of the Facebook messages sent to other individuals, as those messages were not part of the charged conduct. *Id.* at 4.

He argued also that, while certainly prejudicial, they were not part of the relevant context. Under a legal test focused on the perspective of “the receiver” of the threat, these messages were irrelevant as they could not have been read by either Chancellor Moyers or Ms. Long. *Id.* at 6-8.

B. Memorandum and Order.

The Court issued a written ruling on the motion *in limine*. *Memorandum and Order*, R.94. It began its discussion by noting:

[T]he Court has already held that it is irrelevant whether the alleged victim—or anyone for that matter—watched the Video. [*Id.*]. The issue is whether a reasonable person, having knowledge of the context in which the communication was sent (i.e. the relationship between Defendant and Chancellor Moyers, the background of the custody dispute), and having viewed its content, would view such communication as a threat to inflict bodily injury, and done to effect some change. *See United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997). Whether the alleged victim viewed the communication—in this case, the Video—is irrelevant. *Id.*

Id. at 3.

The court went on to offer this explanation of the relevance of the Facebook messages:

Defendant is correct that the Facebook Messages are not part of the “charged conduct” in the Superseding Indictment. The Superseding Indictment expressly defines the “charged conduct” or “communication” as the Video. While the Superseding Indictment does not explicitly mention the Facebook Messages, they are at least part of the “context” in which the “communications” were made. Notably, the Facebook Messages were sent contemporaneously with the Video links.... Because the Facebook Messages are part of the “context” in which the “communication” was sent, they are relevant.

Id. at 3. The Court went on to rule that the messages were not unfairly prejudicial, with the exception of those messages that mentioned the word “crazy.” *Id.* at 4-5.⁶

III. EXCLUSION OF OTHER POSTS AND LINKS ON JEFFRIES’ FACEBOOK WALL.

A. Motion and Opposition.

The Government filed a pretrial motion *in limine* to preclude the defense from introducing other YouTube videos created by Jeffries. R.82. Jeffries filed an opposition, arguing that these messages were central to his defense. He explained:

Any visitor to [Jeffries’ Facebook] Wall on July 9 -- and it is supposedly

⁶ At trial, Jeffries objected again to the admission of any of these messages. That objection was overruled. R.121, *Tr.* 3/29/2011 at 39. He also objected to admission of the redacted entries, and that objection was also overruled. *Id.* at 87.

such a visitor to his Wall that set in motion the chain of events that conveyed the video to Chancellor Moyers -- would have seen not only a link to "Allison's Love" but also other entries including links to a few other short videos that he had recently posted. These other videos, which would have been visible and accessible to any visitor to his Wall on July 9 -- therefore form part of the context of the supposed criminal conduct.

Defendant's Opposition to Government's Motion to Preclude "Unnecessary Evidence", R.84, at 4. He continued:

The applicable legal test requires the jury to determine how a reasonable person would have perceived the objective of the Defendant in making and posting a link to this video. In making this assessment, the jury must consider not solely the link to the video but also the surrounding circumstances, as they will shade the objective determination of the purpose of the video and link.

Id. at 4.

B. Ruling of the Court.

The Court allowed the Government's motion *in limine*. It wrote:

The Court does not agree, however, that the other videos are part of the "context" in this case. The only video that matters is the one charged in the Superseding Indictment (the video titled "Daughter's Love"). The other videos are not relevant to the conduct charged in the Superseding Indictment.

Memorandum and Order, R.91, at 9.

C. Excluded Evidence.

At trial, Jeffries was prevented by the Court from presenting evidence of the other videos posted by Jeffries to his Facebook Wall. R.121, *Tr.* 3/29/2011 at 124. This included not merely exclusion of the videos themselves, but also of the posts linking, with explanatory text, to the videos, as well as some text-only posts also. The defendant filed a *Written Proffer* outlining the excluded evidence, as well as a CD containing copies of the videos. R.99, R.99-1, R.99 Exhibit 2. In reverse order (i.e., the first one would have appeared closest to the link to “Daughter’s Love” on the Facebook Wall), the excluded entries included:

1. PT Belt Part One.

Jeffries posted a link to this video on his Facebook Wall on June 26. He wrote: “I better get a daggone number one spot.... I made this here video dumb enough for everyone of all ages to follow along with....” R.99-1 at 1. The video itself is introduced by Jeffries, while apparently in Iraq. It runs for over 6 minutes, with several humorous scenes acted out by different soldiers, ostensibly for the purpose of emphasizing the importance of wearing a reflective PT belt for safety. On Jeffries’ Wall, Billy Bloys commented: “thats funny.” R.99 Exhibit 2, “PT Belt Part One.”

2. Video about Jeffries’ life and successes.

Jeffries posted a link to a YouTube video on June 25. His post was “liked” by

one friend. The text states: “Dale Jeffries sets the National Record in just 3 seconds. His wrestling days proved to set his life in directions to over come the odds.” R.99-1 at 2. The video itself is a two-minute news-type segment about Jeffries, discussing his work on a feature film about monster trucks, and including footage about Jeffries’ high school wrestling career. Jeffries discusses the importance of dedication and his struggles in life. The whole video has the appearance of a college journalism project. R.99 Exhibit 2, “DALE JEFFRIES SETS THE NATIONAL RECORD 3 SECOND PIN IN WRESTLING.”

3. Other wrestling posts.

On June 25, Jeffries posted a link, writing: “Dale Jeffries in 1993 has the National Fastest Pin in the Record Books of 3 seconds. Click on my his name and see his video of how fast he was.” R-99.1 at 3. He also made another post on the same subject, writing:

It might be the fastest pin for big boys, but in 1993 Dale Jeffries set the National Record of the fastest Pin ever until this day 2010. And you can see my video that talks about my famous 3 second pin.

R.99-1 at 4.

4. Speak English COORS BEER SUCKS.

On June 22, Jeffries posted a link to a YouTube video entitled “Speak English COORS BEER SUCKS.” He wrote:

Yeah, but I got saved and Baptized under water after this video. I am Dale Jeffries. I still like the comedy side of this video. Goo thing I was not drinking this day. I had to quit drinking for the better and the worse. Yeah, you with out sin cas...

R.99-1 at 5. The video itself runs about five and a half minutes. It shows Jeffries sitting and playing his American-flag guitar. He repeatedly makes funny or strange faces, and talks in a mock-foreign language. The point of this consciously-silly video seems to be that Coors should only advertise its products in America in English. At one point Jeffries addresses Coors directly in plain speech (in one of several monologues during the song):

Hey Coors Light, this song I wrote for you. I was driving through Phoenix, I come from a NASCAR race, I looked up on a billboard, I seen Spanish advertisement. Coors Light, don't be freaking advertising in Spanish! On a billboard! That's like advertising in Arabic.

He later states: "Coors Light, man, I'm not drinking that beer again." He concludes with another speech:

Coors Light, you suck. Actually, Coors, man, [you] piss me off. They did that in Phoenix, Arizona. Phoenix, Arizona! Just because you're near the border don't mean you advertise in Spanish. [AAAAGH!] Don't drink Coors Light. This has been an advertisement by Dale Jeffries.

R.99 Exhibit 2, "Speak English COORS BEER SUCKS." One friend has "liked" the video, and written: "love it DALE! KATHY YOU HALF TO SEE THIS." R.99-1 at 5.

5. The Big Chair.

On June 22, Jeffries posted a link on Facebook to a YouTube video entitled: “Funniest Video on YouTube (The Big Chair).” R.99-1 at 6. He wrote: “THIS IS ONE OF MY FUNNIEST VIDEOS I DID IN IRAQ!” The text associated with the video reads: “You will either laugh really hard or say Dale Jeffries is crazy. Your watching Saddam Hussain’s Bloopers. This chair you see was his thrown, and he did use this chair in his palace in Victory Baghdad Iraq.” *Id.* One friend has “liked” the video.

The video was apparently shot in one of Saddam Hussein’s palaces. It shows a number of people sitting in a throne-like chair, including Jeffries. Much of the video is comprised by him jumping up and down and moving all over the chair. Jeffries sings and plays guitar in the background:

I am rubbing my buttohole on Saddam Hussein’s chair.... I am rubbing my asshole on Saddam Hussein’s chair.... I am going to sit up and put my ass in his chair....

R.99 Exhibit 2, “Funniest Video on YouTube (The Big Chair).”

6. Auditions for Fathers.

Jeffries posted a link on June 20 to a video entitled “Auditions for Fathers.” Two people commented approvingly. R.99-1 at 7. The video shows an “audition” by Jeffries’ two young daughters. They sit on a stool while Jeffries interacts with them and eventually plays a song on his guitar about how he loves them. R.99

Exhibit 2, “Auditions for Fathers.”

7. Post regarding overcoming odds.

On June 20, Jeffries posted a link to his own website. On Facebook, he wrote:

[Dale Jeffries] will not lay down and just die. I over come the odds in High School, College, and now the United States military. My life story will be told an my fame will build new relationships, but I must place God over all of them to overcome the odds again.

R.99-1 at 8.

8. Post regarding relationship with daughters.

On June 20, Jeffries posted a paragraph talking about his enjoyment of his time with his daughters, and lamenting that he could not be with his oldest daughter (Allison) on Father’s Day. He wrote in part: “Life is to short, and ex-spouses should encourage their Chrildren to make a phone call to their Fathers who are still alive. If I can’t stop the Abuse! I will tell the truth. I love you Allison, Ashley and Abidale.” R.99-1 at 9.

IV. VENUE.

At the close of the Government’s case, Jeffries moved for a judgment of acquittal on general grounds. He also argued that the Government had not proven that venue was proper in the Eastern District of Tennessee, as all of Jeffries’ actions

had taken place in Clarksville, which is not in the Eastern District. R.121, *Tr.* 3/30/2011 at 167-169. The Court denied the motion. *Id.* at 174. Jeffries renewed the motion at the conclusion of all the evidence, which was also denied. *Id.* at 205-206. The Court instructed the jury on venue. *Id.* at 257-258. It stated, during discussions regarding the charge, that Jeffries had not raised the issue pretrial, and therefore had waived it. *Id.* at 202. Jeffries filed a post-verdict motion for judgment of acquittal, including an argument on venue, which was denied. R.104, R.113.

SUMMARY OF THE ARGUMENT

The trial court erred in instructing the jury on an objective standard rather than a standard that would have required the jury to determine whether the defendant subjectively intended to threaten Chancellor Moyers.

In the alternative, the trial court erred in highly-prejudicial Facebook messages that were irrelevant to the applicable legal test as they could not have been viewed by the “receiver” of the threat, either Amanda Long or Chancellor Moyers. At the same time, the court refused to admit highly-probative evidence of other information and other video links that were on Jeffries’ Facebook Wall at the same time as the link to “Daughter’s Love” and which could easily have been seen by anyone.

The Government presented insufficient evidence to establish guilt, where under the facts of the case it was entirely reasonable to view the video as not intended to influence (or even reach) Chancellor Moyers. Finally, the Government’s failed to prove that venue was proper, as none the actions taken by Jeffries that constituted the alleged crime occurred in the Eastern District of Tennessee.

ARGUMENT

I. LAW REGARDING “TRUE THREATS” AND THE FIRST AMENDMENT.

A. Introduction.

As background to understanding the legal claims made below, it is necessary to understand the evolution of the “true threats” doctrine in this Court and the Supreme Court. As will be seen, in the 1990s, this Court -- largely in harmony with decisions of other Courts of Appeals -- laid out a detailed framework for evaluating “true threats” from an objective, rather than subjective, standpoint. This was, as it turned out, the approach applied to this issue by the trial court in this case. However, in 2003 the Supreme Court changed course and imposed a subjective requirement on the standard. An understanding of these legal developments is necessary to evaluating Jeffries’ claims that, first, the District Court improperly failed to instruct the jury on a subjective standard, and, second, that even if the old, objective-only standard were applicable, the District Court’s evidentiary rulings were erroneous and the evidence was insufficient.

B. First Amendment Protections.

The First Amendment to the United States Constitution states:

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.

“[T]he bedrock principle underlying the First Amendment ... is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In the seminal case of *Watts v. United States*, 394 U.S. 705 (1969), the defendant was indicted for violating a statute prohibiting making threats to the President of the United States. After a public rally near the Washington Monument, the defendant, then 18 years of age, had been talking to some other people. He stated publicly:

‘They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.’ ‘They are not going to make me kill my black brothers.’

Id. at 706. Based on this conduct, the defendant was tried and convicted for making threats to the President.

The Supreme Court reversed the conviction. It stated that the conduct in question was not criminal but rather constitutionally-protected speech. It set out what came to be known as the “true threat” requirement:

[T]he statute initially requires the Government to prove a true ‘threat.’ We do not believe that the kind of political hyperbole indulged in by

petitioner fits within that statutory term. For we must interpret the language Congress chose ‘against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). The language of the political arena, like the language used in labor disputes ... is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President.’ Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 708.

C. Section 875 and Its Interpretation by Court of Appeals.

1. Statute.

18 U.S.C. §875(c) states:

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.

2. *DeAndino* -- General intent, determined objectively.

Because of the obvious free-speech implications, courts have considered the scope of §875(c) very closely. The first significant opinion by this Court came in *United States v. DeAndino*, 958 F.2d 146 (6th Cir. 1992). There, the District Court dismissed the indictment, holding that the indictment had failed to allege that the

defendant had a “specific intent” to threaten. On appeal, the Court disagreed. It held that only a general intent was necessary. It explained that, in that situation:

whether the communication is a “true threat,” and hence criminal, would not be determined by probing [the defendant’s] subjective purpose, but instead would be determined objectively from all the surrounding facts and circumstances.

Id. at 148.

3. *Alkhabaz* -- What a reasonable person would perceive.

The Court further developed its interpretation of §875(c) in the case of *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). There, the basis for the indictments against the defendant (known as Baker) was a series of email messages he exchanged with another individual (known as Gonda) who shared with him an interest in violence against women. They had numerous discussions of their mutual fantasies, and discussions of the logistics of abducting and injuring women.

Prior to trial, the defendant successfully moved to quash the superseding indictment. On appeal, the Court ultimately concluded that the e-mail messages did not meet the requirements of the statute, and thus affirmed the decision of the District Court. *Id.* at 1496.

Drawing on *DeAndino*, the Court reiterated that §875(c) was only a general intent statute. It went on, however, to “consider[] the type of offense that Congress

intended to prohibit when it enacted Section 875(c).” It wrote:

At their core, threats are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation. This is true regardless of whether the goal is highly reprehensible or seemingly innocuous.

Id. at 1495. It then concluded that a true threat is defined in part by its apparent purpose:

Although it may offend our sensibilities, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation.

Id. The Court then expressed this definition in terms of two requirements necessary for a prosecution under §875(c). It wrote:

Accordingly, to achieve the intent of Congress, we hold that, to constitute “a communication containing a threat” under Section 875(c), a communication must be such that a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus).

Id.

Applying this standard, it found that the e-mails between the defendant and his correspondent were not true threats, as they were not offered for the purpose of intimidating anyone or forcing someone to do something. The Court wrote:

Even if a reasonable person would take the communications between

Baker and Gonda as serious expressions of an intention to inflict bodily harm, no reasonable person would perceive such communications as being conveyed to effect some change or achieve some goal through intimidation. Quite the opposite, Baker and Gonda apparently sent e-mail messages to each other in an attempt to foster a friendship based on shared sexual fantasies.

Id. at 1496.

D. Supreme Court’s decision in *Black* -- Imposition of subjective standard.

In *Virginia v. Black*, 538 U.S. 343 (2003), the Supreme Court addressed a state conviction for cross burning with intent to intimidate. It found that a state could, without violating the First Amendment, ban cross burning carried out with that intent. The statute in question, however, was found to be unconstitutional as written, as it allowed the mere fact of burning to serve as prime facie evidence of intent.

In the course of reaching this decision, the Court discussed the “true threats” doctrine at length. In doing so, it put emphasis not just on what an observer might reasonably believe, but rather on what the speaker actually meant. It wrote, in pertinent part:

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, *supra*, at 708, 89 S.Ct. 1399 (“political hyberbole” is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S., at 388, 112 S.Ct. 2538. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protect[s]

individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” *Ibid.* Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359-360 (*emphasis added*).

E. Application of *Black* in Courts of Appeals.

Black’s explicit emphasis, *quoted supra*, on what a defendant “means” has led the lower courts to re-evaluate previously-settled approaches to threat statutes in recognition that a purely-objective test is no longer available.⁷ Most notably, in *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011), the Court addressed a conviction for threatening to kill a presidential candidate, under 18 U.S.C. §879(a)(3).

It discussed the impact of *Black*:

The federal statute under which Bagdasarian was indicted, 18 U.S.C. § 879(a)(3), makes it a crime to “knowingly and willfully threaten[] to kill, kidnap, or inflict bodily harm upon ... a major candidate for the office of President or Vice President, or a member of the immediate family of such candidate.” A statute like § 879, “which makes criminal a form of pure speech, must be interpreted with the commands of the

⁷ See also Frederick Schauer, *Intentions, Conventions, and the First Amendment*, 55 Sup. Ct. Rev. 197, 217 (2003) (“[I]t is plain that ... the *Black* majority ... believed that the First Amendment imposed upon Virginia a requirement that the threatener have specifically intended to intimidate.”); Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. Miami L.Rev. 843, 883–84 (2004) (“the speaker must intend to make a threat for the threatening language or conduct to constitute a true threat”).

First Amendment clearly in mind.” *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). Although the State cannot criminalize constitutionally protected speech, the First Amendment does not immunize “true threats.” *Id.* at 708, 89 S.Ct. 1399. The Court held in *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003), that under the First Amendment the State can punish threatening expression, but only if the “speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Id.* at 359, 123 S.Ct. 1536. **It is therefore not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.**

Id. at 1116 (*emphasis added*). It continued by addressing the crucial issue of whether an objective or subjective test should be applied:

Such a choice reflects a false dichotomy. The issue is actually whether, as to a threat prosecuted under a particular threat statute, only a subjective analysis need be applied or whether both a subjective and an objective analysis is required. Whether we have held that a threat under a particular statute must be examined under an objective standard, as with 18 U.S.C. § 871(a), which makes it unlawful to threaten the President, or whether we have held that the statute requires the application of both an objective and subjective standard, as with 18 U.S.C. § 879(a)(3), the provision that we consider here, our analysis in its most important respect is ultimately the same: In order to affirm a conviction under any threat statute that criminalizes pure speech, we must find sufficient evidence that the speech at issue constitutes a “true threat,” as defined in *Black*. **Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.** The difference is that with respect to some threat statutes, we require that the purported threat meet an objective standard *in addition*, and for some we do not.

Id. at 1117 (*italics in original*) (*emphasis added*).⁸ See also *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (“The threat must be made ‘with the intent of placing the victim in fear of bodily harm or death’,” citing *Black*); *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2005) (“It is more likely, however, that an entirely objective definition is no longer tenable [after *Black*]”). As one commentator has explained:

Black stands as a bright beacon reconfirming that without an intent (an aim) to intimidate, speech cannot lawfully be punished, no matter how likely the tendency that unintended intimidation in fact will result.

Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech*, 54 Cath. U.L.Rev. 1, 33 (2004).

This Court has twice declined to address the impact of *Black* on prior interpretations of the threat statute. In *United States v. Cope*, 283 Fed.Appx. 384 (6th Cir. July 3, 2008) (unpublished), the Court wrote:

[W]e do not wish to get ahead of ourselves. The fact remains that this case is here on plain-error review. We therefore need not decide whether *Black* requires or *Cassel* counsels in favor of adding a subjective-intent requirement to other threat statutes—most pertinently, those statutes that do not already contain such a requirement.

Id. at 389. Most recently, the Court in *United States v. Williams*, 641 F.3d 758 (6th

⁸ For an even more detailed analysis of the decision in *Black*, see *United States v. Cassel*, 408 F.3d 622 (9th Cir. 2005).

Cir. 2011), directly noted the potential effect of *Black* on *Alkhabaz*. It wrote:

Although we have previously held that section 875(c), which, analogously, prohibits sending threats to kidnap or injure a person, is a general intent crime, *United States v. DeAndino*, 958 F.2d 146, 149 (6th Cir.1992), the Supreme Court has since recognized that in some circumstances the prosecution may need to establish that the defendant subjectively intended to make a threat, *Virginia v. Black*, 538 U.S. 343, 364–65, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

Id. at 769. It found, however, that the instructions as given in that case did require the jury to find that the defendant subjectively intended to make a threat, and therefore it was not necessary to reach the legal issue. *Id.* 769-770.

II. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT IT HAD TO FIND THAT THE DEFENDANT SUBJECTIVELY INTENDED TO THREATEN IN ORDER TO FIND A TRUE THREAT.

A. Summary of Applicable Law -- Standard of Review.

This Court has recently written:

“When jury instructions are claimed to be erroneous, we review the instructions as a whole, in order to determine whether they adequately informed the jury of the relevant considerations and provided a basis in law for aiding the jury in reaching its decision.” *United States v. Russell*, 595 F.3d 633, 642 (6th Cir.2010) (quoting *United States v. Frederick*, 406 F.3d 754, 761 (6th Cir.2005)). “A judgment may be reversed based upon an improper jury instruction ‘only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial.’” *Id.* (quoting *Kuehne*, 547 F.3d at 669).

United States v. Damra, 621 F.3d 474, 498 (6th Cir. 2010). It has further explained:

A refusal to give requested instructions is reversible error only if (1) the instructions are correct statements of the law; (2) the instructions are not substantially covered by other delivered charges; and [(3)] the failure to give the instruction impairs the defendant's theory of the case.

United States v. Adams, 583 F.3d 457, 469 (6th Cir. 2009). Constitutional error requires reversal unless harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Kuehne*, 547 F.3d 667, 681 (6th Cir. 2008) (omission of element of crime evaluated under harmless beyond a reasonable doubt standard).

B. Application of Law to Facts.

The jury was instructed in this case in compliance with this Court's opinion in *Alkhabaz*, which rejected any proof requirement regarding a defendant's subjective intention. After *Black*, however, that interpretation of the law is no longer viable. *Black* was clear that a "true threat" exists only where there are "statements where **the speaker means** to communicate a serious expression of an intent." 538 U.S. at 359 (*emphasis added*). As the Ninth Circuit persuasively explained in detail earlier this year: "the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech." *Bagdasarian*, 652 F.3d at 1117. "A natural reading of this language [from *Black*] embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language

to *threaten* the victim.” *Cassel*, 408 F.3d at 631. The District Court’s refusal to instruct the jury on a subjective standard was therefore error.

This case represents a perfect example of the importance of a subjective test, where a jury might well find a communication to be objectively threatening while concluding that the speaker did not personally have any such intent. There was little doubt that the video itself was, objectively speaking, somewhat disturbing. Whether or not Jeffries subjectively intended for Chancellor Moyers to be threatened by it, however, is a vastly different question. Taking into account a number of factors, including *inter alia* the fact he sent it largely to people extremely unlikely to do anything with it (such as a 9-year-old and a person in Alaska), the fact he took no steps to contact Chancellor Moyers directly, and the fact he had a history of making irreverent and shocking videos, all suggest that he had no subjective intention to threaten the judge. Perhaps most importantly, the fact he removed the video from YouTube and apparently the links from Facebook the very next day would tend to negate any conclusion that he subjectively intended for Chancellor Moyers to see and be affected by the video. He was merely a person who expressed his internal frustrations and channeled his desire to shock in a patently misguided way. At the very least, this was a consummate jury question, yet was never presented to the jury.

In short, this would have been a live issue in the case. The jury was

erroneously instructed that the subjective intention was not relevant, and the District Court refused to give the correct instruction on that issue requested by the defendant. As a result, what was perhaps Jeffries' best defense was taken from him. Further, Jeffries was convicted on the basis of a jury finding that did not, standing alone, amount to a crime under the statute as limited by the First Amendment. This error was not harmless, much less harmless beyond a reasonable doubt. A new trial is required.

III. THE COURT ERRED IN ADMITTING IRRELEVANT BUT HIGHLY PREJUDICIAL INFORMATION.

A. Introduction

The remainder of Jeffries' claims assume *arguendo* that the District Court was correct in following *DeAndino* and *Alkhabaz* in applying an objective but not a subjective test. Even under the rule of *Alkhabaz*, the Court erred in its evidentiary rulings and the Government presented constitutionally insufficient evidence. That is, if *Alkhabaz* is good law, the Court did not follow its dictates. These claims are therefore presented in the alternative to the claim of instructional error based on *Black* made above.

B. Summary of Applicable Law.

1. Standard of review.

This Court reviews “a district court's evidentiary rulings, including a ruling on a motion *in limine* on the introduction of certain evidence, for an abuse of discretion.” *United States v. Poulsen*, 655 F.3d 492, 509 (6th Cir. 2011). Reversal is required when the erroneous admission of evidence affects the “substantial rights” of a party. *United States v. Cope*, 312 F.3d 757, 775 (6th Cir.2002).

2. Rules 401, 402, and 403.

Fed. R. Evid. 401 provides that:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 402 states that “Evidence which is not relevant is not admissible.”

Fed. R. Evid. 403 provides that even relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

3. Perspective for evaluating “true threat.”

In *Alkhabaz*, the Court explained that the evaluation of whether something is

a true threat is to be conducted “objectively, from the perspective of **the receiver.**”
104 F.3d at 1496 (*emphasis added*).

C. Application of Law to Facts.

1. The Facebook messages were entirely irrelevant.

The Court allowed the Government to introduce a slew of Facebook messages which were not relevant to the legal test applied at trial. As noted, under *Alkhabaz*, the standard is to be applied from the perspective of the receiver. Yet the Government was allowed to introduce copious evidence that would never have been available to the receiver.

There is perhaps some doubt about who is the “receiver” in this case -- that is, whether this analysis should be conducted from the perspective of Amanda Long, who actually saw the video and passed it on, or Chancellor Moyers, the alleged target of the threat. This is immaterial. Neither one could have possibly have had access to all 28 of the Facebook messages. There was no evidence that Long or Chancellor Moyers could have, for example, accessed Jeffries’ message to Caylee Carpenter, even if they had wanted to. Indeed, they were almost certainly totally unaware of the existence of *any* of these Facebook messages.⁹ Thus, whether the receiver of the

⁹ By analogy, if a person were to send out twenty different letters to different addresses through the U.S. Postal Service, none of the individual recipients
(continued...)

supposed threat in this case is considered Amanda Long or Chancellor Moyers, it is beyond dispute that they did not know about the Facebook messages. **Information that a receiver did not know and could not know is certainly not part of “the perspective of the receiver.”** It is simply irrelevant.¹⁰

2. The Facebook messages were prejudicial.

Although this evidence was not relevant to any material issue, it nonetheless carried with it a significant danger of unfair prejudice, as it led the jury to focus on the wrong issue. There was surely a grave danger that the jury considered this evidence in determining that the defendant subjectively intended to convey a “true threat” and thus was guilty of the charged crime.¹¹ The jury had no other way of

(...continued)

would have any way of knowing what was in (or even that there were) the other letters. No one, other than the sender, could hope to know what was in all of them.

It is likely that the only people who knew about (or could know about) all the separate messages were Jeffries himself and the attorney for the Government who subpoenaed the relevant records from Facebook.

¹⁰ Further, because of the District Court’s strange ruling leading to the admission of redacted messages, Jeffries ended up facing evidence of Facebook messages that was fundamentally inaccurate. The jury ended up being tasked with evaluating, for example, the significance of the fact that Jeffries sent a link to the video, with no accompanying text, to Chelsey Sutton, something that quite simply never happened!

¹¹ Again, this claim assumes, for the purpose of argument, that the *DeAndino / Alkhabaz* principles remain good law.

using that evidence. Where the defendant's primary defense was that the video could not have been perceived as intended to make its way to Chancellor Moyers, and where the Government was able to introduce evidence of Jeffries saying that he wanted the message taken to the judge, there can be no suggestion that this was harmless.¹² Reversal is therefore required.

IV. THE DISTRICT COURT ERRONEOUSLY EXCLUDED IMPORTANT EVIDENCE FOR THE DEFENSE.

A. Summary of Applicable Law

1. Standard of review.

This Court generally reviews a District Court's evidentiary rulings for abuse of discretion. *Poulsen*, 655 F.3d at 510. A challenge to an evidentiary ruling that relates to a claimed violation of a constitutional right is reviewed *de novo*. *United States v. Hardy*, 586 F.3d 1040, 1043 (6th Cir. 2009). An erroneous evidentiary decision requires reversal when it "has caused more than harmless error." *United States v. Fisher*, 648 F.3d 442, 449 (6th Cir. 2011). A violation of a constitutional right requires reversal unless harmless beyond a reasonable doubt. *Chapman*, 386

¹² Obviously, it is not necessarily true that the messages had to be taken at face value, as defense counsel argued in closing. They were not unequivocal admissions of guilt. However, they could have been and likely were used by the jury as very probative evidence on the forbidden question of subjective intention.

U.S. at 24.

2. Right to present a defense.

This Court has written:

A fair opportunity to present a defense is a constitutional right. *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (citing cases). Presenting relevant evidence is integral to that right. *Taylor v. Illinois*, 484 U.S. 400, 408-09, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (stating that “[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive”).

Baze v. Parker, 371 F.3d 310, 323 (6th Cir. 2004).

B. Application of Law to Facts.

If any person -- Amanda Long or one of Jeffries’ Facebook friends -- had gone to Jeffries’ wall on July 9, they would have seen a link to the “Daughter’s Love” video. They would also have seen, immediately beneath that link, other text entries and several other links to different recent videos.¹³ This other information on his Wall at the same time surely formed part of the “context” of the supposed criminal

¹³ In cross-examination, Passwaters explained that a user’s Facebook Wall would have a summary of that user’s own activity, including links and updates, and would appear in reverse chronological order. The most recent prior activity would be at the top, the next most recent prior activity would be below it, and so on. A visitor to a user’s Wall would see a number of the most recent entries on the Wall, and could hit a button to see even older entries. R.121, *Tr.* 3/29/2011 at 104-110.

context, yet the Court did not allow Jeffries to present this crucial evidence.¹⁴

1. The posts on Jeffries' Wall would have provided important context.

The excluded Facebook posts themselves -- that is, the text (including word-only entries and annotated links to YouTube videos) that would have been visible on Jeffries' Wall on July 9 -- would have shown a number of important facts.¹⁵ First, they would have shown that Jeffries regularly posted items to Facebook. The link to "Daughter's Love" was hardly unique, but merely one in a stream of entries. Had this been the only item Jeffries had ever posted, that would arguably have led a viewer to believe that it was especially serious and important to Jeffries. The fact that there were numerous other entries, on the other hand, tended to negate that conclusion. Second, they would have shown that Jeffries regularly posted links to self-created comedy videos. His links to "PT Belt Part One," "Speak English COORS BEER SUCKS," and "Funniest Video on YouTube (The Big Chair)," strongly suggested that Jeffries thought of himself as a humorist, albeit one who might cross the line and be

¹⁴ In closing argument, the Government stated: "Nothing has been hidden from you. Everything about this communication has been told to you." R.121, *Tr.* 3/30/2011 at 214. In the circumstances of this case, this was hardly accurate.

¹⁵ The defense did not seek to introduce all of the information from Jeffries' Facebook profile, or all of the "hundreds" of videos he had uploaded to YouTube. Rather, it offered only the information that, because of its recency, would have been visible at the same time a user saw the link to "Daughter's Love."

inappropriate or even appear “crazy.” They would have showed that he would use his guitar to sing comic songs. R.99-1 at 1, 5, 6; R.99 Exhibit 2. Third, they would have showed that Jeffries regularly used Facebook to discuss his hopes and dreams for the future and, even more importantly, to vent his frustration about his difficulties with his ex-wife. *See* R.99-1 at 8, 9, 10; R.99 Exhibit 2.

2. The videos linked to on Jeffries’ Wall would have shed light on “Daughter’s Love.”

Admitting the videos themselves -- videos which any visitor to Jeffries’ page could have seen at the same time they saw “Daughter’s Love” -- would have shed even more light on the critical issues in the case. They would have allowed the jury (evaluating from the perspective of a reasonable recipient) to better understand Jeffries’ sometimes peculiar sense of humor. The video “Speak English COORS BEER SUCKS” is particularly pertinent, as the parallels between it and “Daughter’s Love” are striking. *See* R.99 Exhibit 2. In both, Jeffries sings and plays his American-flag guitar. In both, he alternates between song and monologue. In both, he makes a variety of facial expressions. In both, he appears (or appears to be trying to look) distraught. In both, he talks about how “This is America.” In both, he directly addresses the supposed “target” of the video -- either the “Judge” or “Coors Light.” (In one, he says, “This song’s for you, Judge,” and in the other, he says, “Hey

Coors Light, this song I wrote for you.”) The obvious silliness, and lack of serious intent, of the one video would certainly inform a reasonable recipient’s evaluation of the other. Yet the jury never even heard of the existence of the Coors video.

3. Conclusion.

This evidence would have been highly relevant to the legal test applied here. In determining whether the expression was communicated to achieve a goal by intimidating Chancellor Moyers, a reasonable person would take into account not only the actual “Daughter’s Love” video, but also the surrounding context. This would include the other entries and linked videos on Jeffries’ Facebook Wall. A reasonable person would be more likely to perceive “Daughter’s Love” as a misguided combination of frustration and comedy, rather than a serious expression of a threatening intention, having viewed other videos that also combined comedy and frustration, and having seen that Jeffries used his Facebook Wall to vent his emotions and to cultivate his image as a provocative, outrageous, even “crazy,” free-spirit.

If the threat in question had come in a written letter, the Government would not have been permitted to introduce only one sentence from that letter and prevent the defense from introducing the surrounding sentences and paragraphs. Yet that is in essence what the Government was able to do here. Despite the legal test being

focused on what a recipient would view, the Government was successful in excluding exculpatory evidence that any recipient could easily have seen (even as it simultaneously was able to introduce evidence that the recipient would never have seen). The exclusion of this highly-relevant evidence, infringing also on Jeffries' constitutional right to present a defense, was prejudicial error requiring reversal.

V. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH GUILT.

A. Summary of Applicable Law -- Standard of Review.

“This court reviews *de novo* a denial of a motion for judgment of acquittal, but affirms the decision ‘if the evidence, viewed in the light most favorable to the government, would allow a rational trier of fact to find the defendant guilty beyond a reasonable doubt.’” *United States v. Ramirez*, 635 F.3d 249, 255 (6th Cir. 2011), *citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

B. Application of Law to Facts.

When the full context of the video is considered, a reasonable person would not have concluded -- particularly beyond a reasonable doubt -- that the video was a serious expression of an intention to inflict bodily harm and was being communicated to intimidate Chancellor Moyers. To be sure, given Jeffries' statements in the video and the fact that he made it publicly viewable, that is one possible interpretation --

though a rambling musical video uploaded to Internet services seems a strange way to communicate a threat to a judge. When the full context is considered, however, it is far from the only possible interpretation, and no rational trier of fact could conclude that none of the other possible interpretations were reasonable.¹⁶

One can conclude that there was an intention to intimidate Chancellor Moyers only if one concludes that Jeffries reasonably intended for the video to be seen by Moyers. Moyers obviously could not have been intimidated by something he would not see. While he made the video available, Jeffries did not send it directly to Chancellor Moyers. While Jeffries, subsequent to the transmission, did send certain messages ostensibly requesting that others “take” the video to the “judge,” the meaning of these messages is called into question given that at least some of them were sent to people patently unable or unlikely to do so -- including a nine-year-old niece and a sister who was in the hospital with a premature baby. That is, any rational juror would have a reasonable doubt as to whether in sending such messages -- and making no effort to reach Chancellor Moyers more directly -- Jeffries was actually intending for the recipient to relay information to Chancellor Moyers.

In light of this context, an interpretation that Jeffries was merely venting or

¹⁶ Because the evidence at trial was essentially undisputed, and because the jury was applying an objective reasonable-person test, this Court’s sufficiency analysis will closely approach *de novo* review of the evidence.

trying to be entertaining or otherwise posturing for his own friends and family, and never intended for the video to reach Chancellor Moyers, is not an unreasonable interpretation. Consequently, the evidence presented at trial was insufficient to establish Jeffries' guilt beyond a reasonable doubt. A judgment of acquittal should be entered.

VI. THERE WAS INSUFFICIENT EVIDENCE OF VENUE IN THE EASTERN DISTRICT OF TENNESSEE.

A. Summary of Applicable Law.

1. Standard of review.

This Court has explained:

The Court “review[s] *de novo* the trial court's denial of a motion for judgment of acquittal. In conducting this review, we view the evidence in the light most favorable to the prosecution, and inquire whether a rational trier of fact could find that venue is proper. The [g]overnment's showing on this point need only be supported by a preponderance of the evidence.”

Kuehne, 547 F.3d at 677, quoting *United States v. Zidell*, 323 F.3d 412, 420–21 (6th Cir.2003) .

2. Venue statutes and rules.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed.” Consistent with that requirement, Fed. R. Crim. P. 18 states the general rule for venue:

Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. 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.

18 U.S.C. §3237(a) provides further guidance for certain offenses that might be prosecuted in more than one district. It states:

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

3. Sixth Circuit interpretation.

In *United States v. Wood*, 364 F.3d 704 (6th Cir. 2004), the Court discussed the issue of venue at length. It wrote:

“[T]he locus delicti [of the crime charged] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *Cabrales*, 524 U.S. at 6-7, 118 S.Ct. 1772. In determining the “locus delicti” of a crime, the Supreme Court directs us to “initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.” *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279, 119 S.Ct. 1239, 143 L.Ed.2d 388 (1999). **Venue is therefore appropriate only in the district where the conduct comprising the essential elements of the offense occurred....** Because venue is an essential aspect of the government's case, “[i]f the government does not

establish venue and the defendant objects at trial, then an appellate court must reverse the conviction.” *United States v. Scaife*, 749 F.2d 338, 346 (6th Cir.1984).

Id. at 709-710 (*emphasis added*).

The Court has also held that “the Government is required to establish venue by a preponderance of the evidence.” *United States v. Thomas*, 74 F.3d 701, 709 (6th Cir. 1996).

B. Application of Law to Facts.

- 1. Jeffries properly presented the venue issue by raising it as part of his Rule 29 motion at the close of the Government’s evidence. He did not waive the issue by failing to move to dismiss prior to trial.**

a. Precedent.

At argument on the Rule 29 motion, the Government argued, and the Court agreed, that Jeffries had waived any venue argument by failing to make it in a pretrial motion. The court reiterated that conclusion in a post-trial ruling. R.113 at 2. The case law, however, supports the position that where the indictment is facially sufficient in alleging venue, then all a defendant can or need do is to challenge the proof presented by the Government at trial by means of a Rule 29 motion. As one court has explained at length:

If a defect in venue is clear on the face of the indictment, a defendant's objection must be raised before the government has completed its case.

See Hanson v. United States, 285 F.2d 27, 28 (9th Cir.1960). However, as numerous circuits have recognized, if the venue defect is not evident on the face of the indictment, a defendant may challenge venue in a motion for acquittal at the close of the government's case....

Thus, in line with the persuasive decisions of our sister circuits, we hold that venue objections made at the close of the government's case-in-chief are timely if the defect in venue is not apparent on the face of the indictment.

United States v. Ruelas-Arreguin, 219 F.3d 1056 (9th Cir. 2000) (*some citations omitted*); *see also United States v. Mitchell*, 408 Fed.Appx. 53, 54 (9th Cir. January 7, 2011) (“Although he waited until the government had completed its case-in-chief to make a Rule 29 motion, Mitchell did not waive his right to object to venue because the alleged defect in venue was not clear on the face of the indictment”); *United States v. Kelly*, 535 F.3d 1229, 1234 (10th Cir. 2008); *United States v. Lenihan*, 19 F.3d 1430, 1994 WL 102149, *2-*3 (4th Cir. 1994) (*unpublished*) (“The timeliness of a defendant's objection depends, in turn, upon whether the defect in venue is clear on the face of the indictment, i.e., whether the indictment alleges facts that, even if proven, would not sustain venue”).

Consistent with this approach, in *Zidell*, 323 F.3d at 420-421, this Court held that the venue issue was preserved even where the defendant apparently did not make a pretrial motion regarding venue, did not make any specific argument regarding

venue at trial, and instead made only a general Rule 29 challenge.¹⁷

b. Argument.

In light of relevant authority, Jeffries did not waive his right to challenge venue by not making a pretrial motion. The *Superseding Indictment* made a facially-sufficient allegation of venue, alleging that the Defendant took certain actions in the Eastern District of Tennessee. It did not, for example, allege that Jeffries acted in the Western District, yet seek to put him to trial in the Eastern District. Nor did it leave the venue issue unaddressed. Jeffries was thus entitled to require the Government to carry its burden of proof on this issue at trial.

2. The Government did not establish venue by a preponderance of the evidence.

a. Conduct charged and elements of the offense.

The only conduct at issue at trial was the Defendant's. The Government was not required to prove at trial any actions by any other person. At trial, the Court instructed the jury that it had to find the following elements: (1) that Jeffries

¹⁷ The District Court here relied on *United States v. Grenoble*, 413 F.3d 569 (6th Cir. 2005), for the proposition that venue must be raised pretrial if a defendant is on notice of the potential issue, even if the indictment is facially sufficient. R.113 at 14 n.8. *Grenoble* does hold that an absence of notice supports a finding of non-waiver, but it does not explicitly state that an absence of notice is a necessary precondition for preservation of the issue. In any event, *Grenoble* does not purport to overrule the earlier decision of *Zidell*, where the issue was deemed to be fully preserved by the motion for judgment of acquittal.

knowingly made a transmission in interstate commerce; (2) that the communication contained a “true threat,” and was made to effect some change or achieve some goal through the use of intimidation; and (3) that the threat was to injure or kidnap the person of another. None of these elements involved any conduct by anyone else.

b. Venue was not proper under the general rule.

As the Court has said, the general rule is that “[v]enue is therefore appropriate only in the district where the **conduct** comprising the essential elements of the offense occurred.” *Wood*, 364 F.3d at 710 (*emphasis added*). Under this test, there can be no real question as to whether venue was proper here. The conduct comprising the essential elements of the offense -- making a transmission in interstate commerce, which contained a true threat, which was to injure or kidnap someone -- occurred (according to the evidence at trial) only in the Middle District of Tennessee. That is where he made the video, and where he “transmitted” the video (to the YouTube servers in California). Jeffries’ conduct certainly cannot be found to have occurred in the Eastern District, where the Government presented no evidence whatsoever that he even came into the Eastern District during that time.

c. Alternative venue statute.

In the alternative, if the offense is considered a multi-district offense, under the provisions of §3237, the analysis is more complicated but the conclusion is the same:

venue was still not proper. That statute provides that, when an offense begins in one district and is completed in another district, then the prosecution can occur “in any district in which such offense was begun, continued, or completed.” The most plausible analysis, based on the conduct comprising the elements of the offense, is that Jeffries’ offense was begun, continued, and completed all in the Middle District of Tennessee. The offense was over once the video had been created and transmitted. It would have been equally a crime (or not a crime) whether anyone ever read the Facebook messages or watched the YouTube video.

d. The only events that occurred in the Eastern District of Tennessee related to the context of the communication, not the conduct elements of the charged offense.

To be sure, there was evidence introduced by the Government that a person in the Eastern District, Amanda Long, accessed the Facebook servers and YouTube servers in California and thus was able to view the video. Such evidence, however, is irrelevant to the venue analysis. As the Court correctly noted, it was not an element of the offense, and thus the Government was not required to prove, that anyone saw the video. The offense, if there was any offense, was complete once Jeffries created the video, transmitted it in interstate commerce to YouTube, and linked to it on Facebook. None of what the Supreme Court has called the “conduct elements,” *Rodriguez-Moreno*, 526 U.S. at 280, occurred when the video was subsequently

viewed (perhaps hours later) in the Eastern District. Any subsequent viewings or discussions of the video are simply not relevant to the venue analysis.

e. Conclusion.

For these reasons, the Government failed to prove that venue was proper by a preponderance standard. Consequently, the Government's proof failed and a judgment of acquittal should be entered.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, this Court should vacate the conviction and enter a judgment of acquittal. In the alternative, it should grant a new trial.

Respectfully submitted,
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- I. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

- II. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using WordPerfect version X4 in 14-point Times New Roman.

/s/ Jonathan Harwell

Jonathan Harwell

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2011, this brief was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Opposing counsel may access this filing through the Court's electronic filing system.

/s/ Jonathan Harwell

Jonathan Harwell

NO. 11-5722

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES,
Appellee,

v.

FRANKLIN DELANO JEFFRIES, II,
Defendant/Appellant.

**DESIGNATION OF RELEVANT DISTRICT COURT FILINGS
PURSUANT TO SIXTH CIRCUIT RULE 30(b)**

Entry Number	Description
R.33	Superseding Indictment
R.82	United States's Motion in Limine to Preclude Unnecessary Evidence Regarding the Details of the Divorce Dispute and To Preclude the Introduction of Unrelated Youtube Videos
R.84	Defendant's Opposition to Government's Motion to Preclude "Unnecessary Evidence"
R.85	Motion in Limine to Exclude Irrelevant Messages

R.87	Supplemental Proposed Jury Instructions
R.91	Memorandum and Order
R.94	Memorandum and Order
R.99 R.99-1 Exhibit 2	Written Proffer Exhibit 1 - Printout of Posts CD containing videos (provided to Court of Appeals separately by mail)
R.102	Jury Verdict
R.103	Exhibit and Witness List Government Exhibit 7 (provided to Court of Appeals separately by mail)
R.104	Post-trial Motion for Judgment of Acquittal or New Trial
R.113	Memorandum and Order
R.118	Judgment
R.121	Trial Transcript