**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills

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**Civil Discourse and Difficult Decisions**

Legal Skills as Life Skills

*Agenda*

**Student Participants:**

* Eight Student Attorneys – Four law students represent each side.
* Student Jurors – All other students serve as jurors who deliberate and come to a show-of-hands verdict unless there is time to come to a unanimous verdict and use the verdict form.

**How to Prepare for the Program:**

* All students review Exhibits A-C and assess themselves with the civility self-reflection tool and the reality check quiz.
* All students review Exhibits D-F, which include summaries of *Elonis v. U.S.,* 575 U.S. 723 (2015) and *Counterman v. Colorado*, 600 U.S. 66 (2023) as well as the fact scenario
* Student Attorneys also review the Exhibits H-I and read the majority opinions in *Elonis v. U.S.,* 575 U.S. 723 (2015) and *Counterman v. Colorado*, 600 U.S. 66 (2023)

**Other Participants:**

* One Facilitator – The facilitator guides the jury deliberations.
* One Presiding Judge
* Six Attorney Volunteers: Two attorney coaches work with each law school attorney team. 1) Two work with the team representing Andy Jackson; 2) and two work with the team representing Sarah Somers and Sam Bennett. Two attorney volunteers prepare the law school jurors for the activity.

|  |  |  |
| --- | --- | --- |
| **Time** | **Room Assignments** | **Activity** |
| **9:00–9:35 a.m.**  *(35 minutes)*  *Move Rooms:*  **9:35–9:40 a.m.**  *(5 minutes)* | Main Room | **The Judge Welcomes Everyone, Explains the Program and Students’ Roles; Volunteer Introductions; Judge Explains Importance of Civility.** *(~ 12 minutes)*  **Activity: Setting Civil Discourse Ground Rules [Exhibits A and C]**  Facilitators lead discussion on civility self-reflection, ground rules, and the reality check quiz. *(~ 20 minutes)*  **Presentation of the Fictional Scenario**  One Attorney Coach reads the fictional scenario with all students. *(~ 3 minutes)*  ***At 9:35 a.m., the Student Attorneys leave the Main Room to meet with their respective coaches.*** |
| **9:40–10:10 a.m.**  *(30 minutes)*  *Move Rooms:*  **10:10–10:15 a.m.**  *(5 minutes)* | **All Government Student Attorneys:**  Away from Main Room  **All Defense Student Attorneys:**  Away from Main Room  **Student Jurors:**  Main Room | **Small Group Preparation: Student Attorneys**  Government Student Attorneys and Defense Student Attorneys should meet with their respective Coaches away from the Main Room and out of earshot of each other.  Using handouts, each group of Student Attorneys:   * Reviews the jury instructions; * Identifies arguments on both sides; * Discusses their best arguments; and * Discusses the best argument the other side is likely to present and how they will refute it.   Three Student Attorneys from each side will prepare to argue one issue; the remaining Student Attorney will make a closing statement. Each Student Attorney has a time limit of three minutes.  **Small Group Preparation: Student Jurors**  All Student Jurors remain in the Main Room. Using handouts, the Main Facilitator will finish any civility discussion and guide the jurors in:   * Reviewing the jury instructions; * Reviewing applicable case law; and * Identifying arguments on both sides.   ***At 10:40 a.m., Student Attorneys and their Coaches return to the Main Room.*** |
| **10:15–10:45 a.m.**  *(30 minutes)* | Main Room | **Return to the Main Room. The Judge Guides the Presentation of Arguments.** *(~ 12 minutes each side)*   * Three three-minute arguments on each side, with one three-minute closing statement. * Each party argues for a maximum of 12 minutes. * Total argument time between both parties is 24 minutes. |
| **10:45–11:35 a.m.**  *(50 minutes)* | Main Room | **Student Jury Deliberations.**  Facilitators start the conversation and then ensure it keeps moving, encouraging all jurors to engage in the deliberations. The Student Attorneys watch the deliberations.  \*Optional: Facilitators can use the Verdict Form to structure the conversation and/or to count votes. |
| **11:55 a.m. –12:00 p.m.**  *(25 minutes)* | Main Room | **Jury Deliberation Debrief.**  The Judge asks students to share their deliberation experience. Jurors should focus on the nexus between the civil discourse discussions at the beginning of the program and their experiences in deliberations.  **The Judge Discusses the Reality Check Quiz.**  **The Judge Makes Concluding Remarks.** |

**Exhibit A:** *Civility Self-Reflection Tool*

**Civil Discourse and Difficult Decisions**

*Please Complete Prior to the Start of the Program*

**Instructions:** Please reflect on how you interact with your peers when discussing a controversial topic. Note how frequently or infrequently you engage in the action described, then answer the follow-up questions.

**1. When a conversation gets heated, I contribute to the conversation in a more animated manner, I remain the calm participant, or I withdraw from the conversation.**

Would people say you, typically, are an inflamer, an informer, an inquirer, an influencer, a good listener, or a comedian?

What other roles do people take in heated conversations?

**2. When others disagree about an issue in a conversation, I remain silent.**

If yes, why do you remain silent? Is that a good thing? What would have to occur for you to speak?

**3. I take an active role in creating an environment in which individuals can offer differing opinions.**

If yes, what do you say and do?

**4. I give others my attention when they speak, even when I disagree with them.**

When people are really listening to you, what difference does certain behavior (i.e., eye contact) make to you?

What difference, if any, does it make in the conversation?

**5. When I disagree with someone, I keep an open mind and can put aside what I plan to say next in order to evaluate the opposing view.**

If yes, how do you suspend your viewpoint so that you can consider an opposing or different view?

**6. I can’t control others’ behavior or opinions, so I focus on my own actions and approach to engaging others.**

Examples?

**7. When I’m speaking, I use silence to get the attention of others.**

How effective is it?

**8. I remain respectful of people, even if they disrespect me.**

Why or why not? Give an example.

**9. I ask clarifying questions during conversation.**

Give examples.

**10. I don’t attempt to control a conversation by talking over others.**

How do you do accomplish that goal?

What happens when you can’t get a word in?

**11. When I get particularly passionate about a topic, I sometimes interrupt the person speaking.**

If yes, how do you manage this? Does anyone else comment on it?

**12. I often have side conversations that could distract the person who is talking to other participants.**

How do you feel when someone does that to you?

**13. I try to listen for what people mean – not just what they say – when I disagree with them.**

How does that work? Does it work?

**14. When others disagree with me, I try to find common ground by identifying any areas of agreement.**

What are some phrases you use to find common ground?

**15. Sometimes I tune out, then realize I’ve repeated something that already has been said.**

How do you feel when someone repeats a point that already has been made?

**16. I make physical gestures that show when I disagree with someone’s opinion.**

How does nonverbal conduct impact the tone and/or dynamic of the conversation?

**Exhibit B:** *Reality Check Quiz for All Participants*

**Civil Discourse and Difficult Decisions**

*Professional Decisions Can Have Professional and Legal Consequences*

The following scenarios are based on real situations in which lawyers may find themselves. To answer these questions, you do not need to know professional ethics rules or conduct research of said rules. This exercise will show you that professional responsibility rules often come from common sense determinations about right and wrong and that you still have agency to make good decisions, no matter how hard they may be.

1. My personal criminal behavior can affect my ability to practice law.

**TRUE FALSE**

1. I have been an attorney for many years, running my own small practice for much of that time. Payments from clients come in waves every quarter, but I hold in a separate account any funds with which my clients entrust me. A recent rare and aggressive cancer diagnosis has completely drained my personal wealth. To access an experimental program, I need $15,000, and I need it quick. I can transfer money out of my client accounts to pay for the treatment and replace that money when it arrives from client payments.

**TRUE FALSE**

1. As a federal prosecutor preparing for a trial, I need to ensure my witnesses will be present. I remember that I can give vouchers to certain witnesses pursuant to a federal statute but do not check whether my witnesses are eligible. Though disclosure of the voucher payments is required by my jurisdiction’s ethics rules and Supreme Court opinions such as *Brady v. Maryland* so jurors can fully evaluate witness credibility, I do not disclose the payments. The trial has begun, and when asked about any necessary disclosures, I realize the disclosures have not been made. What should I do?
2. My client told me he intends to lie on the witness stand and will not take my advice against that action. I should inform the Court of my client’s intent to lie.

**TRUE FALSE**

1. My ability to consume alcohol or drugs will never impact my ability to practice law.

**TRUE FALSE**

1. I recently took on a client in a complex case that could boost my career. However, a few months into representing my client, my spouse is involved in a major car accident and is in critical condition in the hospital. The doctors say my spouse will need to remain in the hospital for at least a few weeks, and I know I have pre-trial deadlines during this time. I am having trouble focusing on work. What should I do?
2. I rent an apartment. Over the past two months, my refrigerator has broken three times. My refrigerator just broke for a fourth time, and I am frustrated. I have previously communicated with my landlord about the problem over the phone; this time, however, I decide to deliver a letter to my landlord on my law firm’s letterhead to demonstrate the seriousness of the problem. There is no problem with using my law firm’s letterhead in this way, especially since this could become a legal problem.

**TRUE FALSE**

1. I am a licensed attorney, barred in one jurisdiction. It is improper for me to give legal advice to my relatives in another jurisdiction that I am not barred in.

**TRUE FALSE**

**Exhibit B:** *Answer Key and Discussion Prompts for the Judge or Main Facilitator*

**Civil Discourse and Difficult Decisions**

*Professional Decisions Can Have Professional and Legal Consequences*

1. **True.** There are many ways your personal behavior can affect your ability to practice law. For example, attorneys have been suspended for criminally failing to file income tax returns and domestic violence. *See Matter of Barnes*, 241 A.D.2d 13, 15, 670 N.Y.S.2d 26, 27 (1998) (suspending an attorney for 3 years for failing to file tax returns for 10 years); *People v. Betterton-Fike*, 479 P.3d 436, 443–44 (Colo. O.P.D.J. 2020) (suspending an attorney for eight months for domestic violence).
2. **False.** Theft of client funds, as one of the most serious ethical violations a lawyer can commit, is almost always sanctioned by disbarment. *See, e.g., In re Carey*, 809 A.2d 563, 564 (Del. 2002). Even if a disciplinary court finds “compelling evidence of personal and emotional problems” that incentivized the theft, the need to protect the public, keep public trust, and deter potential misconduct strongly push a disciplinary court to disbar any attorney who intentionally steals client funds. *Id.* at 564–65. There may also be civil and criminal consequences for the theft. *See, e.g.*, Brian Melley and Kathleen Foody, *Disbarred, bankrupt lawyer Girardi charged with client theft*, The San Diego Union-Tribune (February 1, 2023), <https://www.sandiegouniontribune.com/news/california/story/2023-02-01/onetime-high-flying-lawyer-girardi-indicted-on-client-theft> (noting how Tom Girardi, once famed for fighting powerful corporations and leading a case that inspired the movie “Erin Brockovich,” faced federal indictment and civil suit for allegedly stealing more than $18 million from clients).
3. **Inform the Court and opposing counsel immediately.** You have already made mistakes that will have ramifications whether in delaying the trial, losing professional esteem from the Court and opposing counsel, starting tough conversations with your employer, and maybe even disciplinary proceedings. But adding concealment on top of misconduct will result in even worse consequences and sanctions. In *In re Howes*, 52 A.3d 1, 4 (D.C. 2012), the D.C. Court of Appeals considered the appropriate sanction for the federal prosecutor in this situation who chose to intentionally misrepresent to the Court that such disclosures had been made. Righting the effect of the prosecutor’s misconduct resulted in “substantial reductions in sentences for convicted felons.” *Id.* Though the prosecutor had never been disciplined before and did not engage in misconduct for his own gain, the Court disbarred him for “the protracted and extensive nature of the dishonesty involved.” *Id.*
4. **Your duties depend on your jurisdiction.**  In Florida, an attorney must inform the Court that their client intends to perjure themselves *only if they know so*. F.L. Bar Bd. of Governors, Op. 04-1, 1 (2005), <https://www.floridabar.org/etopinions/opinion-04-1>. They must also withdraw representation from the client. *Id. Extra tidbit*: If the attorney did not know in advance but realizes that their client has materially perjured themselves on stand, the attorney must take “reasonable remedial measures to rectify the fraud,” including convincing the client to remediate their statement or, if the client refuses, disclosing the false testimony to the Court anyway. *Id.* at 3–4.
5. **False.** The substances you consume may affect your ability to practice law.Thankfully, there is less stigma associated with alcoholism and drug dependency, *but the time is now* to build healthy habits in relation to these substances, whether that means completely abstaining or ensuring that you do not become addicted. Examples of attorneys receiving sanctions for alcohol- or drug-related misconduct abound. Sometimes the professional responsibility sanction includes a temporary prohibition from consuming alcohol or drugs. *See People v. Hodgson*, 497 P.3d 1089, 1089–90 (Colo. O.P.D.J. 2021) (suspending an attorney for 30 days after she violated her previous disciplinary sanction which was a 2-year probation prohibiting her from consuming alcohol or drugs).
6. **You should consider withdrawing or seeking assistance on the case.** Model Rule of Professional Conduct 1.1 requires lawyers to provide “competent representation” to a client, which includes “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Traumatic events in a lawyer’s personal life may interfere with a lawyer’s ability to meet the requisite level of thoroughness or preparation for representation, in all cases but especially in more complex cases. It is up to the lawyer to ensure their client receives competent representation. Sanctions for failure to provide competent representation can include suspension. *See, e.g.*, *In re Conduct of Bettis*, 149 P.3d 1194, 1196 (Or. 2006) (suspending an attorney for 30 days for failure to gain understanding of legal or factual issues in client’s case before seeking client’s jury trial waiver). But more importantly, you must take care of your mental health for your sake, not just to meet ethical obligations.
7. **False.** Attorneys may not make false or misleading communications about themselves or their services. *In re Winstead*, 69 A.3d 390, 397 (D.C. 2013). Many jurisdictions have rules specifically regarding the use of law firm letterhead. For example, District of Columbia Rule of Professional Conduct 7.5(a) states that “[a] lawyer shall not use a firm name, letterhead, or other professional designation” in a way that makes a false or misleading communication. Using your firm’s letterhead for personal issues can misrepresent the standing of your law firm, indicating that you are writing in your capacity as a firm employee or that one of the firm’s attorneys is representing you. One alternative is to simply write a letter identifying yourself as an attorney, without using your firm’s letterhead.
8. **Your duties depend on the jurisdiction of the state in which your relatives live.**  In most jurisdictions, lawyers are prohibited from the unlicensed practice of law. Therefore, it is not wise to presume that you may give legal advice to relatives who live outside the state(s) in which you are barred. For example, a Colorado lawyer was recently admonished for assisting family members in a dispute with their condo association in Minnesota. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, No. A15-2078 (Minn. Aug. 31, 2016). Despite never stepping foot in Minnesota or charging his relatives for his services, the lawyer’s approximately two dozen emails were enough to establish “a clear, ongoing attorney-client relationship with his Minnesota clients.” *Id.*  Therefore, if you want to provide legal advice, it is prudent for you to investigate and comply with the ethics rules of your relatives’ jurisdictions.

**Exhibit C:** *Handout for Setting Ground Rules –for Use by All Participants and the Facilitator*

**Civil Discourse and Difficult Decisions**

*Setting Ground Rules for a Civil Discussion*

Use the questions to develop basic norms of civil discourse. Does a core set of 5-10 principles exist for civil discourse? If so, outline them after reading the points below.

In courtrooms, the loudest voices shouldn’t prevail because they are the loudest. Opposing arguments grounded in reason, thoughtful analysis, and supporting evidence should ideally form the foundation of effective advocacy. When points and arguments are advanced within set guidelines for courtroom decorum, all participants can be heard and their positions considered.

In fact, in the American adversarial system, advocates test the arguments of the other side, while a judge holds participants to the same protocol and standards of appropriate behavior. Questioning, even challenging, the opposing side is an integral part of the adversarial process. However, the adversarial system does not translate to incivility. Court proceedings are designed to promote effective, civil discourse.

**Put an X next to the actions and attitudes that you believe are important for civil discourse.**

**1.** **Be mindful of your own behavior.**  Notice how you are reacting/responding when others speak. Pay attention to how your words and your silence are impacting others in the group.

**What are you doing to sustain or promote an environment for civil discussion/debate?** Are you refraining from subtle, but disrespectful behavior?

**2. Wait** to be recognized by the judge before speaking. This allows time – before you speak – for reflection on what the previous speaker(s) have said.

**3. Don’t interrupt** or talk over someone else who is speaking. Be disciplined and cordial in your manner.

**4. Listen for content** in the statements of others, especially when you disagree. Listen for what the speakers are trying to communicate, even if they aren’t expressing their points concisely. That’s what judges often need to do when listening to advocates.

**5. Find common ground.** Identify and call attention to areas of agreement. This is an underappreciated legal skill and habit. It’s very Lincolnesque.

**6. Follow the direction of the discussion.** Don’t repeat what’s already been said. It is an advocate’s trap.

**7. Ask questions of yourself.** Don’t assume that you know what someone else means.

**8. Don’t disrespect others by making** demeaning or inappropriate comments, facial expressions, or gestures.**Exhibit D:** *Law and Fictional Scenario for the Arguments*

***Elonis v. U.S.* (2015)and *Counterman v. Colorado* (2023)Applied to Social Media Posts:**

**Artistic Expression or True Threats?**

*This First Amendment scenario applies the landmark Supreme Court cases of* ***Elonis v. U.S.*** *and* ***Counterman v. Colorado*** *to a conflict involving Facebook posts.*

The First Amendment provides that “Congress shall make no law … abridging the freedom of speech[.]”

*Elonis v. U.S.* was the first time that the United States Supreme Court heard a case involving the constitutionality of prosecuting potential threats in a social media context. The Supreme Court recently revisited the issue presented in *Elonis* in *Counterman v. Colorado*. This is a relatively new and rapidly developing area of law. The Supreme Court’s decisions may have far-reaching consequences for the development of First Amendment law, in general, and for students and social media users in particular.

Most students and adults use some form of social media, including Facebook, Twitter, Instagram, LinkedIn, etc. The growth of social media has often blurred the lines between professional and personal conduct.

Disputes also have developed as statements made on social media are taken out of context. This is especially true when an individual who makes a statement cannot control who else views the statement and/or how others interpret it. For instance, several court cases have arisen over the authority of schools to discipline students for comments about teachers and school administrators that the students made outside of school on their own personal social media sites.

There is common concern that comments made on social media sites may be misconstrued if they are interpreted differently than intended or taken out of context. On the other hand, there are legitimate concerns that authorities must protect against cyberbullying, harassment, and threats that are made through social media. As a result, when drafting laws, state and the federal lawmakers struggle with how to balance First Amendment free speech rights with the interests of individuals who want (and are entitled) to be free from harassment, fear, and intimidation on the Internet.

**Exhibit D:** *Law and Fictional Scenario for the Arguments*

**Facts & Case Summary - *Elonis v. U.S.*, 575 U.S. 723 (2015)**

Anthony Elonis was arrested on December 8, 2010, and charged with five counts of violating a federal anti-threat statute, 18 U.S.C. § 875(c). Specifically, he was charged with threatening his ex-wife, co-workers, a kindergarten class, the local police, and an FBI agent.

Using the pseudonym “Tone Dougie,” Elonis had posted statements on Facebook that appeared to threaten his ex-wife and other people in his life.  Prior to the postings, his wife and family had left him, and he had lost his job at an amusement park. Shortly after this chain of events, Elonis posted several statements on his Facebook page that were interpreted as threats by the subjects of his statements.

At his trial, Elonis asked the court to dismiss the charges, stating that his Facebook comments were not true threats.  He argued that he was an aspiring rap artist and that his comments were merely a form of artistic expression and a therapeutic release to help him deal with the recent events in his life.

In an apparent attempt to underscore that his comments should not be taken seriously, he posted links to YouTube videos that he parodied, and noted that well-known popular rap artist Eminem often uses similar language in his lyrics.  For several of his comments, he also posted a disclaimer stating: “This is not a threat.”

Despite the fact that his ex-wife, an FBI agent, and others viewing his comments might have perceived his statements as threats, Elonis argued that he could not be convicted of making a threat because he did not intend to threaten anyone with his postings.  In other words, he claimed that he didn’t mean what he said in a literal sense. In legal terms, he said that he did not have a subjective intent to threaten anyone.

The trial court denied his motion to dismiss the case.  The court held that the proper legal test for determining whether someone made a threat is an objective one: whether reasonable people hearing the comment would perceive it to be a threat.  Elonis was convicted of four of the five counts.  He was sentenced to 44 months in prison, to be followed by three years of supervised release.[1]  He appealed to the U.S. Court of Appeals for the Third Circuit, which affirmed his conviction.  The U.S. Supreme Court, granted certiorari (agreed to hear the case), decided the case, and published its opinion in June 2015.

The Supreme Court reversed and remanded the Third Circuit’s decision, holding that a jury instruction requiring only negligence with respect to the communication of a threat, is not sufficient to support a conviction under 18 U.S.C. § 875(c). Rather, according to the Supreme Court, “wrongdoing must be conscious to be criminal.” Thus, the Supreme Court determined that “the crucial element separating legal innocence from wrongful conduct” under § 875(c) was “the threatening nature of the communication” and thus culpability required consideration of the defendant’s state of mind as to that element.

**THE FIRST AMENDMENT PROVIDES THAT** “Congress shall make no law . . . abridging the freedom of speech[.]”

**APPLICABLE LAW**

Under federal law, an individual who “transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another” is guilty of a felony and faces up to five years’ in prison. 18 U.S.C. § 875(c). Numerous states have adopted similar statutes.

**PROCEDURE**

**Lower Court 1:** U.S. District Court for the Eastern District of Pennsylvania

**Lower Court Ruling 1:** The U.S. District Court rejected Elonis’ argument that a subjective (i.e., individual) intent to threaten is required to secure a conviction under the federal anti-threat statute.

**Lower Court 2:** U.S. Court of Appeals for the Third Circuit

**Lower Court Ruling 2:** The Court of Appeals affirmed the U.S. District Court. It held that a reasonable person (i.e., objective) standard is the correct legal test for determining whether Elonis could be convicted of communicating a threat under federal law.

**ISSUE BEFORE THE SUPREME COURT OF THE UNITED STATES**

Does a conviction of threatening another person under federal anti-threat statute18 U.S.C. § 875(c) require proof that the defendant meant what he said in a literal sense?

**JUDGMENT**

[Reversed and remanded](http://www.supremecourt.gov/opinions/14pdf/13-983_7l48.pdf), 8-1, in an opinion by Chief Justice Roberts on June 1, 2015. Justice Alito filed an opinion concurring in part and dissenting in part. Justice Thomas filed a dissenting opinion.

**AFTERMATH**

For a summary of Anthony Elonis’ life after this Supreme Court decision, including the Third Circuit’s decision on remand and why Anthony Elonis is currently serving a different sentence for cyberstalking, read this [news article](https://www.lehighvalleylive.com/news/2023/03/his-facebook-threats-case-made-it-to-the-us-supreme-court-now-hell-spend-12-years-in-prison-for-cyberstalking.html).

**Exhibit D:** *Law and Fictional Scenario for the Arguments*

**Facts & Case Summary – *Counterman v. Colorado,* 600 U.S. 66 (2023)**

Billy Counterman was arrested on May 12, 2016, and charged with three counts of violating a Colorado anti-threat statute, Colo. Rev. Stat. § 18–3–602(1)(c) (2022), which makes it unlawful to repeatedly communicate with a person in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress.” *Id.* Counterman was charged with repeatedly threatening a local female singer and musician, C.W.

From 2014 to 2016, Counterman sent hundreds of Facebook messages to C.W. even though the two had never met. C.W. never responded and repeatedly blocked Counterman, and he responded by creating new Facebook accounts to resume contact.

Counterman’s messages included overfamiliar statements not commonly exchanged between strangers (“Good morning sweetheart”; “I am going to the store would you like anything?”). Other messages suggested that Counterman might be surveilling C.W. (“Was that you in the white jeep?” and “A fine display with your partner”). And other messages expressed anger at C.W. and imagined harm befalling her (“F\*ck off permanently”; “Staying cyber life is going to kill you”; and “You’re not being good for human relations. Die.”).

Counterman’s messages made C.W. believe he was threatening her life. She contacted a lawyer and law enforcement.

At his trial, Counterman moved to dismiss the charges on First Amendment grounds, arguing that his messages were not “true threats” and could not form the basis of a criminal prosecution. To do so, he argued, would be a violation of his First Amendment rights to free speech.

The trial court denied Counterman’s motion to dismiss, holding that, under Colorado law, whether a statement is a true threat must be assessed using an objective standard: whether reasonable people hearing the comment would perceive it to be a threat.  The case was sent to the jury which found Counterman guilty as charged. Counterman was sentenced to 54 months in prison. He appealed to the Colorado Court of Appeals, which affirmed his conviction. The Colorado Supreme Court denied certiorari review. The U.S. Supreme Court granted certiorari (agreed to hear the case), decided the case, and published its opinion in June 2023.

The Supreme Court’s decision found that, to criminally prosecute a defendant based on true threats, the defendant’s *subjective* intent to threaten the victim must be established based on a showing of (at least) recklessness. The recklessness standard added nuance to the Supreme Court’s prior decision in *Elonis*, which held that a criminal conviction for true threats required a showing that the defendant *intended* to issue threats or knew the communications would be viewed as threats. Accordingly, the Supreme Court vacated the judgment of the Colorado Court of Appeals and remanded the case for further proceedings.

**THE FIRST AMENDMENT PROVIDES THAT**

“Congress shall make no law . . . abridging the freedom of speech[.]”

**APPLICABLE LAW**

Under Colorado law, it is unlawful to “[r]epeatedly . . . make[ ] any form of communication with another person” in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress.” Colo. Rev. Stat. § 18–3–602(1)(c) (2022).

**PROCEDURE**

**Lower Court 1:** District Court, Arapahoe County, Colorado

**Lower Court 1 Ruling:** Counterman was convicted in the District Court of Arapahoe County, Colorado, for stalking (serious emotional distress). The Court held that, under Colorado law, the correct legal test for determining whether a statement is a true threat is an objective “reasonable person” standard.

**Lower Court 2:** Colorado Court of Appeals, Division II.

**Lower Court Ruling 2:** The Colorado Court of Appeals affirmed the District Court’s decision. Relying on Colorado precedent, it declined to adopt a subjective standard in determining if Counterman could be convicted of communicating a true threat under state law.

**ISSUE BEFORE THE SUPREME COURT OF THE UNITED STATES**

Does the First Amendment require proof that a defendant had some subjective understanding of the threatening nature of his statements to sustain a criminal conviction under a state’s anti-stalking statute?

**JUDGMENT**

Reversed and remanded, 7-2, in an opinion by Justice Kagan on June 27, 2023. Justice Sotomayor filed an opinion concurring in part and concurring in the judgment which Justice Gorsuch joined in part. Justice Thomas filed a dissenting opinion. Justice Barrett filed a dissenting opinion which Justice Thomas joined.

**Exhibit D:** *Law and Fictional Scenario for the Arguments*

***Counterman v. Colorado* and *Elonis v. U.S.* Applied to Facebook Postings**

Fictional Scenario: Facebook Postings – Artistic Expression or True Threats?

Andy Jackson is a 21-year-old senior at Bay State College and captain of the College’s lacrosse team. Andy, who is known as “The Gunner” for his ripped biceps and aggressive style of play, is also a DJ and rapper whose lyrics get attention for their controversial double meanings. He grew up in Brooklyn and counts Jay-Z and other New York rappers as inspiration. In his free time, he’s become connected with a local music management group, which has booked him as a DJ for parties. His manager has not allowed him to play his own music yet.

Andy and Sarah Somers have gone through a difficult breakup, after which he says she started rumors alleging inappropriate behavior that could jeopardize his lacrosse scholarship. Friends tell Andy what she is saying, and he sees on the Whisper\* app a series of damaging photos and videos that only Sarah could have posted. Andy is afraid that the allegations could cost him his place on the lacrosse team, which has a zero-tolerance policy regarding academic ethics, sexual misconduct, and illegal behavior.

Andy posts on Facebook a creative parody of some well-known rap lyrics implying that Sarah is a pathological liar who has gotten so wasted at parties that she has passed out. In the meantime, Sarah starts dating Sam Bennett, a high-profile player on a rival lacrosse team, but friends tell Andy that Sarah is still spreading rumors.

In another post, on March 3, 2023, Andy shares a new song and lyrics, sampling from “Threat” by Jay-Z. Andy includes the following lyrics from “Threat”: “[T]his threat… I’m so serious about mine, I’m so sincere” and “Am I frightenin’ ya? Shall I continue? I put the gun to ya, I let it sing you a song.”

Andy adds his own lyrics which state that if Sarah keeps up the attacks on his reputation, she’ll “regret this day” because the next time she drinks too much at a party, she’ll learn a “new meaning of unconscious.” He also says that Sam should watch himself on the field because “The Gunner is locked and loaded.” Andy tags his management group in the post and shares that he felt inspired by his life when writing this song.

Sarah is still friends with Andy on Facebook and sees her name in his lyrics. She reads his entire post and is concerned enough that she and Sam go to the campus police and ask how to get a restraining order against Andy. They also report Andy’s posts to the director of campus life.

Friends tell Andy that Sarah is so concerned about his lyrics that she is thinking of withdrawing from college and returning to her home state. A campus police officer calls Andy and tells him to stop posting about Sarah and Sam or they will seek a restraining order and Andy could be charged with a crime.

Andy does not post for two days, but then the management group “likes” his post and comments that it wants to get Andy into the studio soon. Andy then posts a new song, on March 5, 2023, which states that “snitches running to the cops talking about restraining orders … better put that in your pocket and hope its thick enough to stop a bullet.” The lyrics again call out Sarah and Sam by name and repeat the refrain from “Threat” and also the statement that “the Gunner is locked and loaded.” Andy ends the post with skull, wink, and gun emojis. Andy also adds a statement in the comments section that his lyrics are “fake,” and his music is his therapy.

Ultimately, Andy is charged with two counts of violating 18 U.S.C. § 875(c), which makes it a federal crime to “transmit [ ] in interstate or foreign commerce any communication containing…any threat to injure the person of another.”

At today’s hearing in federal court, Andy’s attorneys will argue that Andy’s statements were not true threats but are free speech protected by the Constitution. The Government will argue that Andy’s statements are true threats and not protected by the Constitution.

**\*Whisper** was a form of [anonymous social media](https://en.wikipedia.org/wiki/Anonymous_social_media), allowing users to post and share photo and video messages [anonymously](https://en.wikipedia.org/wiki/Anonymously). The postings, called “whispers,” consisted of text superimposed over an image.





**Exhibit E:** *Student Jury Preparation Exercise*

***Elonis v. U.S. and Counterman v. Colorado Applied to Facebook Postings***

*Arguments Worksheet – Discussion Starter*

**Directions**: Put an **A** next to arguments for Andy and a **G** next to arguments for the government.

1. The First Amendment protects unpopular and even offensive speech from governmental sanction. Such protections are necessary to preserve the free flow of ideas in a democracy.
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted.
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, purely objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority.
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is the standard a reasonable adult, or child, or some expert? An objective standard is too ambiguous.
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant to carry out the threat. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat.
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting.
7. When a threatening statement is made, the damage is done when the intended victim hears the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not or whether the threat is carried out or not.
8. People make all kinds of exaggerated statements that, if evaluated out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction.
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all the facts and put them in the proper context to make this decision.
10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship.

**Exhibit E:** *Student Jury Preparation Exercise*

***Elonis v. U.S. and Counterman v. Colorado Applied to Facebook Postings***

*Arguments Worksheet – Answer Key for Jury Coaches*

**Directions:** Put an **A** by arguments for Andy and a **G** by arguments for the Government.

1. The First Amendment protects unpopular and even offensive speech from governmental sanction. Such protections are necessary to preserve the free flow of ideas in a democracy. **A**
2. The First Amendment does not protect all types of speech. For instance, obscenity, fighting words, and true threats are not protected and may be prosecuted. **G**
3. To be considered a threat, a person must have the internal, subjective intent to make the threat. If threats are judged by an external, purely objective standard, this could lead to the prosecution of unpopular ideas simply because they offend the majority. **A**
4. Using an objective standard to analyze threats would result in even more vagueness in the law. How is the objective standard to be determined? Is a reasonable adult, or child, or some expert the standard? An objective standard is too ambiguous. **A**
5. Laws are frequently passed to prohibit conduct regardless of the intent of the defendant to carry out the threat. For instance, a person who calls in a bomb threat may be prosecuted regardless of whether the caller ever actually intended to follow through with the threat. **G**
6. Defendants should not be permitted to escape criminal responsibility for making threats simply by hiding behind disclaimers or saying that their threats are simply artistic expression or emotional venting. **G**
7. When a threatening statement is made, the damage is done when the intended victim hears the statement. The defendant should still be punished for this type of conduct whether the defendant intends to carry out the threat or not or whether the threat is carried out or not. **G**
8. People make all kinds of exaggerated statements that, if evaluated out of context, can be construed as threats. This is particularly true for anonymous statements that are made on the Internet and social media. People should not have to choose either to remain silent or run the risk of a criminal conviction. **A**
9. The context of a statement can be used to determine whether or not it is a true threat. When deciding a case, the jury will review all the facts and put them in the proper context to make this decision. **G**
10. Free expression is about pushing limits. If the majority can determine what speech is a threat and what speech is not, this could have a chilling effect on First Amendment freedoms by leading to self-censorship. **A**

**Exhibit F:** *Jury Instructions*

**Interstate Transmission of Threat to Kidnap or Injure[[1]](#footnote-2)**

**18 U.S.C. § 875(c)**

It’s a Federal crime to knowingly send in interstate commerce[[2]](#footnote-3) a true threat to injure any person.

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

1. the Defendant knowingly sent a message in interstate commerce containing a true threat to injure the person of another; and
2. the Defendant sent the message with the intent to communicate a true threat, or with reckless disregard of the fact that it would be viewed as a true threat.

To act with “reckless disregard of the fact” means to be aware of but consciously and carelessly ignore facts and circumstances clearly indicating that the message would be viewed as a true threat.

A “true threat” is a serious threat—not idle talk, a careless remark, or something said jokingly— that is made under circumstances that would place a reasonable person in fear of being injured.

**ANNOTATIONS AND COMMENTS**

18 U.S.C. § 875(c) provides that:

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

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

This instruction is based on *Elonis v. U.S.,* 575 U.S. 723, 135 S. Ct. 2001 (2015) and *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106 (2023). In *Elonis,* the Supreme Court rejected a district court’s instruction that failed to consider the defendant’s subjective mental state. The Supreme Court held that an objective standard requiring that “liability tum on whether a ‘reasonable person’ regards the communication as a threat-regardless of what the defendant thinks-reduces culpability on the all-important element of the crime to negligence.” 135 S. Ct. at 2011 (citation omitted). The Court specifically held that the mental state requirement of § 875(c) “is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.” *Id.* at 2012.

In *Counterman*, the Court clarified that a finding of recklessness on the part of the defendant is also sufficient to prove subjective intent.143 S. Ct. at 2117. In the threats context, recklessness means “that a speaker is aware ‘that others could regard his statement as’ threatening violence and ‘delivers them anyway.’” *Id*. (quoting *Elonis*, 135 S. Ct. at 2015 (Alito, J., concurring in part and dissenting in part)).

In addition, although the Supreme Court has made clear that the defendant’s subjective mental state must be taken into account, the objective person standard remains useful in the determination of whether the defendant’s statement actually constitutes a “true threat,” as that term has been defined in prior case law. *See e.g., U.S. v. Martinez,* 736 F.3d 981, 984-86 (11th Cir. 2013), *overruled on other grounds*,F.3d \_\_, 2015 WL 5155225 (11th Cir. Sept. 3, 2015) (discussing *Watts v. U.S.,* 394 U.S. 705 (1969) as the origin of the “true threats” doctrine).

**Exhibit G:** *Opening Protocol: for the Judges, Attorney Coaches, and Eight Student Attorneys*

***Elonis v. United States* Applied to Student’s Rap Posts**

**Note:** Always stand when addressing the Judge.

**A Law Clerk Announces the Judge.**

**The Judge takes the bench, welcomes the group, and says: “The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?”**

**Judge: Is Counsel for the Defendant ready?**

**Andy Jackson’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge: Is Counsel for the Government ready?**

**Government’s Attorney #1** *(Stands at counsel table)* Yes, Your Honor.

**Judge:**  **Counsel for the Defendant may proceed.**

**Attorneys for Andy Jackson, the Defendant**

**Attorney #1 *(Goes to the lectern)***

“May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_. My colleagues and I are counsel for Mr. Andy Jackson, the Defendant before this Court today. There are three issues before the Court. I will argue the first issue. Seated at the Defendant’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from.” *(Attorney #1 sits down)*

**Attorney #2 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2.”

*(Sits down)*

**Attorney #3 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3.” *(Sits down)*

**Attorney #4 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will be handling the closing arguments for the Defendant.” *(Sits down)*

**Judge: Counsel for the Government may proceed with your introductions.**

**Attorneys for the Government**

**Attorney #1** ***(Goes to the lectern)***

“May it please the Court. My name is \_\_\_\_\_\_\_\_\_\_\_\_. I am from \_\_\_\_\_\_\_\_\_\_\_ and I will be arguing the first issue on behalf of the Government, the United States. Seated at the Government’s counsel table are my colleagues who will handle the other issues and closing arguments. They will introduce themselves and tell you where they are from.” *(Sits down)*

**Attorney #2 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #2.” *(Sits down*)

**Attorney #3 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and I will be handling Issue #3.” *(Sits down*)

**Attorney #4 *(Stands at counsel table)***

“I am \_\_\_\_\_\_\_\_\_\_\_\_ from \_\_\_\_\_\_\_\_\_\_ and I will handle the closing arguments for the Government.” *(Sits down)*

**Judge: “Now we will turn to the major questions about this issue. The attorneys will make their arguments, and then the audience will break into jury deliberation groups. Your professors will facilitate your deliberations so that everyone has the opportunity to speak. At the end, we will take a vote to determine the verdict.”**

**Exhibit H:** *Talking Points: for the Judges, Attorney Coaches, and the Eight Student Attorneys*

***Elonis v. United States* Applied to Student’s Rap Posts** *Questions for Consideration in Developing Talking Points*

**Judge: “The issue before us today is – Does the First Amendment require proof that a defendant is serious about following through on a threat before the defendant may be convicted of threatening another person?”**

**ISSUE #1**

**Judge: “We will start with Issue #1. Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting?”**

Andy’s Attorney #1 goes first.

Government’s Attorney #1 goes second.

Potential Follow-up Questions:

* Should the First Amendment protect all forms of artistic expression? Why/Why not?
* What artistic expression should not be protected?
* Should there be limits on First Amendment protections of artistic expressions?
* What artistic expressions should be limited?
* Should the First Amendment be underinclusive or overinclusive in protection of artistic expression?
* How do Mr. Jackson’s posts compare to Anthony Elonis’ posts and Billy Counterman’s messages?

**ISSUE #2**

**Judge: “Let’s turn our attention to Issue 2. Is it necessary to determine if the speaker means what he says in the threat in order for it to be a crime instead of protected free speech?”**

Andy’s Attorney #2 goes first.

Government’s Attorney #2 goes second.

Potential Follow-up Questions:

* What impact should the emojis have on our understanding of Mr. Jackson’s intent?
* How would a “reasonable person” interpret the lyrics and emojis in these posts?
* Who is a “reasonable person” in free speech cases? Should it be narrowed in some way considering the speaker or potential victim’s background?
* What evidence is there that Mr. Jackson intended to communicate a true threat, as that term is defined in the Jury Instruction? What evidence is there that he did not intend to communicate a true threat?
* What evidence is there that Mr. Jackson was reckless as that term is defined in the Jury Instruction?
* What impact should the call from Campus Police or the information that Sarah is considering withdrawing from school due to Mr. Jackson’s posts have on our understanding of Mr. Jackson’s intent?
* Should it matter if someone uses a disclaimer saying the expression is not a threat?
* Does the Government prosecute people in other situations for making threats regardless of whether they intend to carry the threats out? How similar are those situations to here?

**ISSUE #3**

**Judge: “We turn our attention now to Issue #3. Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?”**

Andy’s Attorney #3 goes first.

Government’s Attorney #3 goes second.

Potential Follow-up Questions:

* Should online content have the same protections as news media content or artistic content?
* Should the government try to interpret people’s intentions and decide if the content is meant to threaten or entertain the reader or audience?
* How important is context when determining if speech is a threat or not? Could you say the same thing in two different settings and have two different interpretations?
* Is there a potential for chilling effect on speech?

Judge: And now we will have closing arguments from each side. After closing arguments, I will turn the program over to the moderator who will facilitate breaking into jury deliberations.

**CLOSING ARGUMENTS**

Attorney #4 on each side refers to his/her worksheet and notes to deliver the closing arguments, summarizing the key points for Elonis and for the Government.

**Judge***:* **Now that you’ve heard the closing arguments, I will turn over the program to the facilitator who will coordinate the jury deliberations.**

**Exhibit I:** *Closing Arguments Worksheet: for Judges, Attorney Coaches, and Student Attorneys*

*Elonis v. U.S.* Applied to Student’s Rap Posts

Worksheet Specifically for Student Attorney #4

**Purpose of Closing Arguments:** To persuade the jurors to adopt your view of the significant points favoring your team’s position on each issue. Attorneys **argue the merits** of their case.

**Each Student Attorney Addresses the Judge and Jurors, Starting with:**

“I would like to review with you the key points presented today.”

**Read Aloud: Issue #1** -- **Does the First Amendment protect Mr. Andy Jackson’s comments, even though they may be potentially upsetting**?

*Write the key word from the main point that you want to emphasize.*

Why should the jury support your position on this point?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**Read Aloud: Issue #2—Is it necessary to determine if the speaker means what he says in the threat in order to suppress it?**

*Write a key word from the main point that you want to emphasize.*

Why should the jury support your position on this point?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**Read Aloud: Issue #3 -- Should comments on social media be given any additional protections beyond comments made in person or by other means of communication?**

*Write the key word from the point that you want to emphasize.*

Why should the jury support your position on this point?

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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**Summary:** *Of all the points argued, what is the most compelling reason the jury should decide in favor of your client?*

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

CASE NO. 23-CR-27708

UNITED STATES,

vs.

ANDY JACKSON,

Defendant.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_/

**VERDICT FORM**

**Count 1**

1. Do you find beyond a reasonable doubt that the Defendant knowingly sent a message **on March 3, 2023**, in interstate commerce containing a true threat to injure the person of another?

Yes \_\_\_\_\_\_ No \_\_\_\_\_\_

**The Number of Jurors who answered “Yes”: \_\_\_\_\_\_**

**The Number of Jurors who answered “No”: \_\_\_\_\_\_**

1. Do you find beyond a reasonable doubt that the Defendant sent the message with the intent to communicate a true threat, or with reckless disregard of the fact that it would be viewed as a true threat?

Yes \_\_\_\_\_\_ No \_\_\_\_\_\_

**The Number of Jurors who answered “Yes”: \_\_\_\_\_\_**

**The Number of Jurors who answered “No”: \_\_\_\_\_\_**

1. As to Count 1, interstate transmission of threat to kidnap or injure,18 U.S.C. § 875(c), we find the Defendant:

GUILTY \_\_\_\_\_\_ NOT GUILTY \_\_\_\_\_\_

**The Number of Jurors who answered “GUILTY”: \_\_\_\_\_\_**

**The Number of Jurors who answered “NOT GUILTY”: \_\_\_\_\_\_**

**Count 2**

1. Do you find beyond a reasonable doubt that the Defendant knowingly sent a message **on March 5, 2023**, in interstate commerce containing a true threat to injure the person of another?

Yes \_\_\_\_\_\_ No \_\_\_\_\_\_

**The Number of Jurors who answered “Yes”: \_\_\_\_\_\_**

**The Number of Jurors who answered “No”: \_\_\_\_\_\_**

1. Do you find beyond a reasonable doubt that the Defendant sent the message with the intent to communicate a true threat, or with reckless disregard of the fact that it would be viewed as a true threat?

Yes \_\_\_\_\_\_ No \_\_\_\_\_\_

**The Number of Jurors who answered “Yes”: \_\_\_\_\_\_**

**The Number of Jurors who answered “No”: \_\_\_\_\_\_**

1. As to Count 1, interstate transmission of threat to kidnap or injure,18 U.S.C. § 875(c), we find the Defendant:

GUILTY \_\_\_\_\_\_ NOT GUILTY \_\_\_\_\_\_

**The Number of Jurors who answered “GUILTY”: \_\_\_\_\_\_**

**The Number of Jurors who answered “NOT GUILTY”: \_\_\_\_\_\_**

**SO SAY WE ALL.**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOREPERSON’S SIGNATURE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

FOREPERSON’S PRINTED NAME

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

DATE

1. This Instruction is based on Instruction O30.3 from the Eleventh Circuit Pattern Jury Instructions (2022). The Instruction has been modified for purposes of the Civil Discourse and Difficult Decisions (CD3) Program by adding the recklessness standard outlined in *Counterman v. Colorado*, 600 U.S. 66 (2023), which was decided by the United States Supreme Court on June 27, 2023. [↑](#footnote-ref-2)
2. For purposes of the CD3 Program, the interstate commerce element is met in this case. [↑](#footnote-ref-3)