FIRST AMENDMENT — TRUE THREATS — SIXTH CIRCUIT HOLDS THAT SUBJECTIVE INTENT IS NOT REQUIRED BY THE FIRST AMENDMENT WHEN PROSECUTING CRIMINAL THREATS. — *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012).

In its 2003 decision *Virginia v. Black*,[1] the Supreme Court reiterated that a "true threat" is not protected by the First Amendment and is subject to prosecution.[2] Despite the *Black* Court's attempt to clarify when speech constitutes a "true threat,"[3] lower courts have disagreed about the standard constitutionally required to differentiate true threats from protected speech.[4] Recently, in *United States v. Jeffries*,[5] the Sixth Circuit held that an intentional communication is not protected by the First Amendment if a "reasonable observer would construe [the speech] as a true threat to another"[6] — regardless of whether the speaker intended the speech to threaten, and regardless of whether the speaker intended that the threatened party receive the speech.[7] In its decision to adopt this objective "reasonable observer" standard, the Sixth Circuit unwisely rejected a "subjective intent" approach that more closely accords with the plain language and balancing of principles articulated by the Supreme Court in *Black*.

During the summer of 2010, Franklin Delano Jeffries II and his ex-wife were involved in a custody dispute over their daughter.[8] Several days prior to a July 14, 2010, hearing before Knox County Chancellor Michael W. Moyers, Jeffries posted a music video, in which he performed a song that he had written titled "Daughter's Love," on YouTube.[9] The song addressed the importance of fathers and daughters' spending time together and included complaints about his ex-

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[1] 538 U.S. 343 (2003).

[2] *Id.* at 359 (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam)) (internal quotation marks omitted).

[3] *See id.* ("'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.").

[4] *Compare* United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) (adopting an objective standard for evaluating threats), *and* Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616–17 (5th Cir. 2004) (noting in dicta that the objective standard appears to be constitutionally required), *with* United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011) ("Because the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes . . . ."), *and* United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008) (suggesting that "an entirely objective definition is no longer tenable").

[5] 692 F.3d 473 (6th Cir. 2012).

[6] *Id.* at 478.

[7] *See id.* at 478, 483.

[8] United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *1 (E.D. Tenn. Oct. 22, 2010).

[9] *See Jeffries*, 692 F.3d at 475.

wife, lawyers, and the legal system.[10] "Daughter's Love" also referenced Jeffries's upcoming hearing, with such lines as "*when I come to court this better be the last time. . . . 'Cause if I have to kill a judge . . . I don't care*."[11] He also sang, "*I guarantee you, if you don't stop, I'll kill you. . . . July the 14th is the last time I'm goin' to court*."[12] Finally, he directed lyrics at Chancellor Moyers: "[*Y*]*ou don't deserve to be a judge and you don't deserve to live. . . . I hope I encourage other dads to go out there and put bombs in their goddamn cars*."[13]

Jeffries distributed a link to the YouTube video to twenty-nine Facebook users, including a local news station, and also posted a link on his Facebook wall.[14] Jeffries removed the video twenty-five hours after uploading it, but by then his ex-wife's sister had informed Chancellor Moyers about the video.[15] Law enforcement was notified and Jeffries was indicted for violating 18 U.S.C. § 875(c),[16] which makes it a federal crime to "transmit[] . . . any communication containing any threat . . . to injure the person of another."[17]

Jeffries was tried before the United States District Court for the Eastern District of Tennessee.[18] He filed a pretrial motion to dismiss the indictment, arguing that it failed to charge an offense as a matter of law because it did not allege that he transmitted a true threat.[19] The court assessed the true threat doctrine and concluded that the government did not need to prove that Jeffries subjectively intended to "realize a goal"[20] by threatening Chancellor Moyers, only that his statement met an objective standard — namely, that a "'reasonable person [would] consider the statement to be a threat' based on 'the surrounding facts and circumstances.'"[21] The court found that precedent divided this analysis into a two-pronged test, analyzing the content of the statement and the context in which the statement was made.[22] The court then denied Jeffries's motion, finding that the content of his statements could reasonably be interpreted as evincing in-

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[10] *Id.*

[11] *Id.* at 475 (quoting the trial court record).

[12] *Id.* at 476 (quoting the trial court record).

[13] *Id.* at 476–77.

[14] *Id.* at 477.

[15] *Id.*

[16] *Id.*

[17] 18 U.S.C. § 875(c) (2006).

[18] *See Jeffries*, 692 F.3d at 483.

[19] United States v. Jeffries, No. 3:10-CR-100, 2010 WL 4923335, at *2 (E.D. Tenn. Oct. 22, 2010).

[20] *Id.* at *6.

[21] *Id.* at *5 (alteration in original) (quoting United States v. DeAndino, 958 F.2d 146, 148 (6th Cir. 1992)).

[22] *See id.* at *7–8.

tent to intimidate Chancellor Moyers, and that the context of the statements, made in a YouTube video forwarded to persons associated with the dispute, made it reasonably foreseeable that Chancellor Moyers would learn of the statements.[23]

Before trial, Jeffries also requested an instruction asking the jury to apply a subjective intent standard in determining if the video constituted a true threat, in addition to the objective standard.[24] The court instead instructed the jury to adopt solely the objective standard.[25] The jury convicted Jeffries, and Jeffries appealed.[26]

The Sixth Circuit affirmed.[27] Writing for a unanimous panel, Judge Sutton[28] upheld the district court's rejection of Jeffries's proposed jury instruction.[29] Judge Sutton reiterated that the First Amendment does not protect "true threat[s]" as defined by the Supreme Court in *Watts v. United States*[30] and later decisions.[31] Judge Sutton analyzed Sixth Circuit precedent in *United States v. DeAndino*[32] and *United States v. Alkhabaz*[33] and agreed with the district court that those cases expressly rejected a subjective intent requirement for true threats.[34]

The court then addressed Jeffries's argument that *Black* required a subjective intent element in all statutes criminalizing threatening speech, thus overruling Sixth Circuit precedent.[35] Although it noted that at least one other appellate court had adopted this interpretation, the Sixth Circuit disagreed.[36] Explaining that *Black* lacked sufficient clarity to mandate this standard, the court instead proposed that *Black* had invalidated an application of a statute criminalizing cross burning because the statute lacked any standard for evaluating the speech.[37] The court held that the district court's objective standard was sufficient for the conviction to stand under *Black*.[38]

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[23] *See id.* at *9.

[24] *Jeffries*, 692 F.3d at 478.

[25] *See id.* at 477–78.

[26] *Id.* at 477.

[27] *Id.* at 483.

[28] Judge Sutton was joined by Judge Griffin and District Judge Dowd, sitting by designation.

[29] *See Jeffries*, 692 F.3d at 478, 483.

[30] 394 U.S. 705 (1969) (per curiam).

[31] *Jeffries*, 692 F.3d at 478 (quoting *Watts*, 394 U.S. at 708) (internal quotation marks omitted).

[32] 958 F.2d 146 (6th Cir. 1992).

[33] 104 F.3d 1492 (6th Cir. 1997).

[34] *Jeffries*, 692 F.3d at 478–79.

[35] *See id.* at 479.

[36] *Id.* at 479; *see also id.* at 481 (citing United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011)).

[37] *Id.* at 479–80.

[38] *See id.* at 481.

Judge Sutton also wrote a separate *dubitante* opinion,[39] raising doubts regarding the Sixth Circuit's precedent applying an objective standard to true threats under § 875(c).[40] He noted that every definition of the word "threat" or "threaten" includes a subjective intent aspect.[41] He assessed the legislative history and argued that the statute's purpose was to prevent extortion, which necessarily included the subjective intent to threaten.[42] He also cited principles of criminal law, finding that most criminal statutes require a mens rea similar to subjective intent.[43] He concluded by advocating that § 875(c) should be read as requiring both standards — a subjective standard to satisfy the statutory language and an objective standard to determine whether the statement is a true threat unprotected by the First Amendment.[44]

In holding that *Black* did not overrule Sixth Circuit precedent, the court reasonably, but mistakenly, undervalued an analytical reading of *Black*'s text and overlooked the *Black* Court's emphasis on a balancing of principles, both of which support interpreting *Black* to require the subjective standard. While Jeffries's speech likely constituted a true threat even under a subjective standard,[45] the Sixth Circuit's decision to adopt solely the objective standard may chill and criminalize speech that the plain language and balancing of principles of *Black* indicate should be protected.

The Supreme Court has addressed the principles guiding its interpretation of true threats in several cases, but it had not needed to address the question of the proper intent standard constitutionally required in the context of threat crimes until *Black*. As the Court held in *Watts*, threat statutes and the reach of the First Amendment must be viewed in light of the principle that public speech should be "uninhibited, robust, and wide-open."[46] Later, in *R.A.V. v. City of St. Paul*,[47] the Court struck down a city ordinance criminalizing cross burning and held that the First Amendment protects such "abusive in-

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[39] A *dubitante* opinion is written if "the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 574 (9th ed. 2009).

[40] *See Jeffries*, 692 F.3d at 482–85 (Sutton, J., dubitante).

[41] *Id.* at 483–84.

[42] *Id.* at 484.

[43] *Id.* at 484–85.

[44] *Id.* at 485.

[45] While establishing Jeffries's guilt under a subjective intent standard would require various determinations of fact and thus cannot be assessed with certainty, a jury could reasonably decide that the unambiguous nature of Jeffries's lyrics and his active attempt to distribute the video to the media and individuals associated with the case, who were then likely to and did communicate the speech to Chancellor Moyers, adequately proved Jeffries's subjective intent to threaten.

[46] 394 U.S. 705, 708 (1969) (per curiam) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)). *Watts* also noted that speech may be "vituperative, abusive, and inexact," but still fall under the protections of the First Amendment. *Id.*

[47] 505 U.S. 377 (1992).

vective."[48] Despite offering these broad principles, the Court decided both cases while reserving the question of the proper intent standard, since both *Watts* and *R.A.V.* involved convictions in which no intent standard had been applied.[49] In *Black* the Court finally addressed the issue of intent, upholding Virginia's power to ban cross burning done with the "intent to intimidate."[50] A plurality of the Court declared the statute as applied to the defendants unconstitutional, because the application ignored the *purpose* of the cross burning — it did not distinguish between individuals who burn crosses "intend[ing] to express . . . a statement of ideology or intimidation" from those who burn crosses without such intent.[51] The *Jeffries* court reasonably may have thought its hands were tied by circuit precedent and it could not overrule this precedent without a hearing en banc. However, it should have considered further whether the circuit precedent had become ripe for invalidation when the Supreme Court applied these principles in the context of true threat intent standards, and should have given greater consideration to the possibility that the Court in *Black* answered the question of intent that it had previously reserved.

The plain language in *Black* is most reasonably read as adopting the subjective intent requirement. *Black* defined true threats as "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. The speaker need not actually intend to carry out the threat."[52] Although this language suggests that a subjective standard may be proper, *Jeffries* dismissed it by citing the Fourth Circuit's decision in *United States v. White*,[53] which held that the *Black* Court used "the word 'means' . . . to suggest '*intends* to communicate.'"[54] Neither the Fourth Circuit nor the Sixth Circuit explained this reading, beyond observing that it is consistent with circuit precedent — an argument that ignored the defendants' claims that *Black* invalidated that precedent.[55] If, however, as *White* and *Jeffries* suggested, "means to communicate" expresses only the requirement that the defendant "knowingly says the words,"[56] the *Black* Court's statement that "[t]he speaker need not actually intend to carry out the threat"[57] serves little purpose, as the objective standard that the

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48 *Id.* at 391.

49 *See id.* at 380; *Watts*, 394 U.S. at 705.

50 Virginia v. Black, 538 U.S. 343, 363 (2003).

51 *Id.* at 366 (opinion of O'Connor, J.).

52 *Id.* at 359–60 (majority opinion) (citations omitted).

53 670 F.3d 498 (4th Cir. 2012); *see Jeffries*, 692 F.3d at 480.

54 *White*, 670 F.3d at 509.

55 *See Jeffries*, 692 F.3d at 480–81.

56 *Id.* at 480.

57 Black, 538 U.S. at 359–60.

Fourth and Sixth Circuits read into *Black* looks only to the reasonable observer's interpretation of the statements.[58] While the *Jeffries* court correctly noted that the intent standard for true threats was an issue of debate among the circuits, its reliance on *White* led it to neglect a complete analysis of *Black*'s holding, potentially leading it to overlook the possibility that *Black* requires subjective intent.

The brief analysis that the *Jeffries* court did offer regarding *Black* evinces a potential misunderstanding of the Supreme Court's reasoning. As the Ninth Circuit noted, the most straightforward reading of *Black* is that it held that the provision allowing juries to establish a prima facie presumption of intent to intimidate from any cross burning was unconstitutional because it removed the subjective intent analysis and replaced it with an objective standard focused on the *objective content* inherent in all incidents of cross burning.[59] A plurality of the *Black* Court noted that the prima facie provision "does not distinguish between a cross burning done with the *purpose* of creating anger or resentment and a cross burning done with the *purpose* of threatening or intimidating a victim," and does not require the factfinder to discern whether the cross burning "*intend*[*ed*] to express either a statement of ideology or intimidation."[60] Rather than hold that the application of the prima facie provision could not fulfill the statutory requirement of demonstrating "intent to intimidate," the *Black* Court held that it was *constitutionally* inadequate under the First Amendment.[61] *Jeffries* read *Black* as invalidating a statute due to "overbreadth" caused by the lack of any discernible standard,[62] but as the *Black* plurality suggested, the overbreadth in that case resulted from the inability to determine the speech's *purpose*, which fully depends on assessing the speaker's subjective intent.[63] Although the *Jeffries* court attempted to interpret *Black* as consistent with its circuit precedent, a closer reading of *Black* may have demonstrated to the court that it would be more reasonable, and constitutionally required, to invalidate its prior prece-

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[58] *See id.*; *White*, 670 F.3d at 509.

[59] *See* United States v. Cassel, 408 F.3d 622, 631–32 (9th Cir. 2005).

[60] Virginia v. Black, 538 U.S. 343, 366 (2003) (opinion of O'Connor, J.) (emphases added); *see also id.* at 365 (invalidating the prima facie provision because it "permit[ted] the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself"). Justices Souter, Kennedy, and Ginsburg concurred with the plurality's reasoning but dissented on the decision to remand to the Virginia Supreme Court for severability analysis and possible retrial, arguing that the statute was unconstitutional regardless of the prima facie evidence provision. *Id.* at 386–87 (Souter, J., concurring in the judgment in part and dissenting in part).

[61] *See id.* at 367 (opinion of O'Connor, J.).

[62] *Jeffries*, 692 F.3d at 480.

[63] *See Black*, 538 U.S. at 367.

dent, which had developed only to answer the very intent question unaddressed by the Supreme Court until its holding in *Black*.[64]

In addition to the plain language of *Black*, the *Black* Court's interpretation of First Amendment principles, particularly its emphasis on balancing the encouragement of "free trade in ideas" against the desire to protect individuals from fear of violence and from the possibility that violence will occur, indicates that *Black* requires the subjective intent standard.[65] The *Jeffries* court overlooked the possibility that the objective standard may fail to "winnow[] out"[66] discomforting, inexact, and abusive speech that is nonetheless protected under core First Amendment principles.[67] While *Jeffries* rightly noted that the objective standard requires "contextual cues" to determine whether a reasonable observer would consider the threat "a serious expression of an intention to inflict bodily harm,"[68] solely analyzing the objective context ignores the foremost contextual cue: the speaker's intent. This approach gives little weight to the speaker's constitutional right to be inexact and even abusive — a right the *Black* Court emphasized as protected by permitting cross burning not intended to threaten.[69] This standard instead allows the public to evaluate the speech's meaning, chilling speech that would not be a true threat under a subjective standard, and may lead to criminalizing the sort of "inexact" speech that *Watts* held was protected by the First Amendment.[70] If, for example, an individual were to upload a video to YouTube and negligently but honestly believe the video's privacy settings prevented anyone else from viewing it, the objective standard would not take the individual's subjective intent into account, and would deprive the defendant of First Amendment protections even if a jury believed the individual intended neither to distribute the video to any other viewer nor act on any speech contained therein. Constitutionally protected

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[64] *See* Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 217 ("If there is no such First Amendment requirement [of subjective intent], then Virginia's statutory presumption was . . . incapable of being unconstitutional in the way that the majority understood it.").

[65] *Black*, 538 U.S. at 358 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)) (internal quotation marks omitted); *see id.* at 359–60.

[66] *Jeffries*, 692 F.3d at 480.

[67] *See id.*; *see also* Watts v. United States, 394 U.S. 705, 708 (1969); *Black*, 538 U.S. at 358.

[68] *Jeffries*, 692 F.3d at 480 (quoting United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997)) (internal quotation mark omitted).

[69] *See Black*, 538 U.S. at 365 (opinion of O'Connor, J.); *see also Watts*, 394 U.S. at 708.

[70] *See, e.g.*, Paul T. Crane, Note, "*True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1274–76 (2006) (discussing the possibility that a subjective standard would have changed the trial court's decision in Rogers v. United States, 422 U.S. 35 (1975), wherein the defendant was prosecuted and convicted for claiming that he was going to "whip Nixon's ass," *id.* at 42 (Marshall, J., concurring) (internal quotation marks omitted), given that the defendant's subjective intent to follow through on the statement may have been doubtful in light of his other erratic speech).

speech that would not be a true threat even under a purely objective standard would also likely be chilled, as individuals would have difficulty discerning what a jury would consider objectively threatening and may rationally err on the side of caution by saying nothing at all.[71]

Critics of the subjective standard argue that it would impede judicial efficiency because it would require increased factfinding, resulting in greater expenditures of prosecutorial resources,[72] but that assumption is not necessarily correct. It is not clear that a subjective standard would require any additional evidence to demonstrate the defendant's subjective intent, and even if a subjective standard were to impose additional prosecutorial burdens, these burdens would not be excessive or unusual. The means of demonstrating subjective intent, chiefly through circumstantial evidence, closely track the mens rea element required in most criminal statutes,[73] and such evidence is likely to overlap significantly with the kind submitted under an objective standard.[74] Prosecutors are experienced in proving states of mind, and the subjective standard would require only that threat statutes incorporate a mental state analysis akin to those required of criminal prosecutions.[75] The Court has been traditionally hesitant to eliminate a specific intent mens rea requirement from criminal statutes absent a clear statement from Congress,[76] regardless of the increased burden this stance may put on the judiciary. Therefore, it is hard to imagine that the Court intended to exclude the subjective intent requirement, the mens rea equivalent, from determining the reach of a basic constitutional right absent a clear statement of its own.

The Sixth Circuit's choice to leave its true threat jurisprudence unchanged in light of the plain language and balancing of principles in *Black* does the law a disservice, further complicating an ongoing circuit split. As Judge Sutton wrote, advocating for greater emphasis on statutory interpretation and for less on the First Amendment, "the bright lights of the First Amendment may have done more to distract than inform."[77] The courts are even more poorly served by ignoring *Black* in favor of following the "bright lights" of circuit precedent.

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[71] *See* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 316–17 (2001).

[72] *See, e.g.*, Crane, *supra* note 70, at 1273 (noting that critics argue that the subjective standard results in a greater prosecutorial burden).

[73] *See* Morissette v. United States, 342 U.S. 246, 251–52 (1952).

[74] *See* United States v. Cassel, 408 F.3d 622, 634 (9th Cir. 2005) (holding the true threat subjective standard analogous to the mens rea element in criminal statutes).

[75] *See, e.g.*, United States v. Balint, 258 U.S. 250, 251 (1922) (noting that scientier was traditionally a necessary element in every crime).

[76] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605–06 (1994); Liparota v. United States, 471 U.S. 419, 425–27 (1985).

[77] *Jeffries*, 692 F.3d at 485 (Sutton, J., dubitante).