



## *Elonis v. United States*

Oral Argument: December 1, 2014

### **Background**

The Supreme Court of the United States has interpreted the First Amendment to contain several categorical exceptions to the Free Speech Clause. These types of speech are not protected by the First Amendment, and the government can penalize or punish a speaker for communicating in these ways. One categorical exception is “true threats.”

But what exactly is a “true threat?” How do we measure or test for it? The Supreme Court has not specifically said whether a “true threat” requires the speaker to have a *specific intent* to threaten the listener, or, instead, whether it merely requires the speaker to reasonably know that a listener would perceive the communication as a threat.

This case tests whether the “true threats” exception to the First Amendment contains a specific intent requirement.

### **Facts<sup>‡</sup>**

In May 2010, Anthony Elonis’s wife of seven years, Tara Elonis, moved out of their home with their two young children. Following the separation, Anthony Elonis began experiencing troubles at Dorney Park & Wildwater Kingdom amusement park, where he worked as an operations supervisor and a communications technician. After the separation, supervisors at the amusement park observed Elonis crying, with his head down on his desk. He was sent home on several occasions because he was too upset to work.

One of the employees that Elonis supervised, Amber Morrissey, filed five sexual harassment reports against him. In one incident, she claimed that Elonis came into the office where she was working alone late at night and began to undress in front of her. She left the building after Elonis removed his shirt.

On October 27, 2010, Elonis posted on his Facebook page a picture taken for the Dorney Park Halloween Haunt. The picture showed Elonis in costume holding a knife to Morrissey’s neck with a caption that read, “I wish.” Elonis’s supervisor saw the post and fired Elonis that

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<sup>‡</sup> NOTE: This summary includes direct quotes taken from trial transcripts and actual postings on Facebook. These quotes include profanity and many statements which the reader may find disturbing.

same day. Two days after he was fired, Elonis started posting violent statements on his Facebook page. For example, one post regarding Dorney Park read,

*Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the f\*\*king gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so f\*\*king scary?*

One post about his estranged wife, Tara, included the following:

*If I only knew then what I know now, I would have smothered your a\*\* with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder.*

Elonis posted this comment in response to a post by Tara's sister, who wrote "Halloween costume shopping with my niece and nephew should be interesting":

*Tell [their son] he should dress up as matricide for Halloween. I don't know what his costume would entail though. Maybe [Tara's] head on a stick?*

He also posted this comment:

*There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. Hurry up and die, b\*\*ch, so I can bust this nut all over your corpse from atop your shallow grave. I used to be a nice guy but then you became a sl\*t. Guess it's not your fault you liked your daddy raped you. So hurry up and die, b\*\*ch, so I can forgive you.*

Based on these statements, Tara obtained a restraining order against Elonis. Apparently, in response, Elonis wrote more on Facebook. On November 7, he wrote this post, which became the basis for Count 2 of the indictment against him:

*Did you know that it's illegal for me to say I want to kill my wife?  
It's illegal.  
It's indirect criminal contempt.  
It's one of the only sentences that I'm not allowed to say.  
Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.  
I'm not actually saying it.  
I'm just letting you know that it's illegal for me to say that.  
It's kind of like a public service.  
I'm letting you know so that you don't accidentally go out and say something like that.  
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.  
That's illegal.*

*Very, very illegal.  
But not illegal to say with a mortar launcher.  
Because that's its own sentence.  
It's an incomplete sentence but it may have nothing to do with the sentence before that.  
So that's perfectly fine.  
Perfectly legal.*

*I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.  
Insanely illegal.  
Ridiculously, wrecklessly, insanely illegal.  
Yet even more illegal to show an illustrated diagram.*

[Elonis inserted an accurate diagram of Tara's house here.]

*Insanely illegal.  
Ridiculously, horribly felonious.  
Cause they will come to my house in the middle of the night and they will lock me up.  
Extremely against the law.  
Uh, one thing that is technically legal to say is that we have a group that meets Fridays at my parent's house and the password is sic semper tyrannis.*

On November 15 Anthony posted this on his Facebook page, which became the basis of Count 2 (threats to Tara) and Count 3 (threats to local law enforcement):

*Fold up your PFA and put it in your pocket  
Is it thick enough to stop a bullet?  
Try to enforce an Order  
That was improperly granted in the first palace  
Me thinks the judge needs an education on true threat jurisprudence  
And prison time will add zeroes to my settlement  
Which you won't see a lick  
Because you suck dog d\*\*k in front of children  
\*\*\*\*\*  
And if worse comes to worse  
I've got enough explosives to take care of the state police and the sheriff's department  
[link: Freedom of Speech, [www.wikipedia.org](http://www.wikipedia.org)]*

On November 16, he posted this, which became the basis of Count 4:

*That's it, I've had enough about  
I'm checking out and making a name for myself*

*Enough elementary schools in a ten-mile radius to initiate the most heinous school  
shooting ever imagined  
And hell hath no fury like a crazy man in a kindergarten class  
The only question is . . . which one?*

By then, after Dorsey Park contacted the FBI claiming that Elonis had posted threats against the Park and its employees, FBI Agent Denise Stevens was monitoring Elonis's public Facebook postings. After reading these and other posts, Agent Stevens and another FBI agent visited Elonis's house to interview him. Elonis's father answered the door and waited several minutes for Elonis to appear. Elonis asked the agents if they were law enforcement and if he was free to go. The agents identified themselves and told Elonis he was free to go, and Elonis went inside and closed the door. Later that day, Elonis posted this on Facebook, which became the basis of Count 5:

*You know your sh\*\*t's ridiculous when you have the FBI knockin' at yo' door  
Little Agent Lady stood so close  
Took all the strength I had not to turn the b\*\*ch ghost  
Pull my knife, flick my wrist, and slit her throat  
Leave her bleedin' from her jugular in the arms of her partner*

[laughter]

*So the next time you knock, you best be serving a warrant  
And bring yo' SWAT and an explosives expert while you're at it  
Cause little did y'all know, I was strapped wit' a bomb  
Why do you think it took me so long to get dressed with no shoes on?  
I was jus' waitin' for y'all to handcuff me and pat me down  
Touch the detonator in my pocket and we're all goin'*

[BOOM!]

After reading this post, Agent Stevens contacted the U.S. Attorney's Office. Elonis was arrested on December 8, 2010, and charged with violating 18 U.S.C. Sec. 875(c) for "transmit[ting] in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another . . . ." The grand jury indicted Elonis on five counts of making such threats: Count 1 on threats to patrons and employees of Dorney Park; Count 2 on threats to Tara; Count 3 on threats to employees of the Pennsylvania State Police and Berks County Sheriff's Department; Count 4 on threats to a kindergarten class; and Count 5 on threats to an FBI agent.

Elonis moved to dismiss the indictments against him. He argued that both the statute and the First Amendment required the speaker to have a subjective intent to threaten, and that his posts lacked the requisite intent. The district court denied the motion, ruling that even if the subjective intent standard applied, it would be a question for the jury.

At trial, Elonis stated that he started rapping and listening to rap music after his wife left him because R&B music depressed him. He said, "This is therapeutic . . . it helped me to deal with the pain." Although Elonis had a public Facebook page, in mid-October 2010, he changed his

username from his actual name to the rap-style pseudonym “Tone Dougie,” a play on his first and middle names. He said that he wrote the posts for “entertainment purposes only,” and that they “did not reflect the views, values, or beliefs of Anthony Elonis, the person.”

Still, Tara testified that she took Elonis’s statements seriously. For example, she said, “I felt like I was being stalked. I felt extremely afraid for mine and my children's and my families' lives.” She also testified that Elonis rarely listened to rap music when they were together, and that she had never seen Elonis write rap lyrics during their seven years of marriage.

When the trial concluded, the judge gave the following instruction to the jury:

A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.

In other words, the judge told the jury that Elonis’s subjective intent to threaten (or lack thereof) did not matter. Instead, what mattered was whether a reasonable person would think *others* would take the statements as a serious threat. (Elonis calls this a “negligence” standard.) But Elonis did not object to the judge’s instruction at trial; instead, he challenged it only later.

Based on this instruction, the jury convicted Elonis on Counts 2 through 5, and the court sentenced him to 44 months’ imprisonment followed by three years supervised release. Elonis filed a post-trial motion to dismiss the indictment and for a new trial, but the court rejected it.

Elonis appealed to the United States Court of Appeals for the Third Circuit and lost. He sought review at the United States Supreme Court. The Supreme Court granted *certiorari*, specifying these questions:

1. Whether a conviction for threatening another person requires proof of the speaker’s subjective intent to threaten; and
2. Whether, as a matter of statutory interpretation, 18 U.S.C. Sec. 875(c) requires proof of the speaker’s subjective intent to threaten.

## Issue

Does the “true threats” exception to the First Amendment, and does 18 U.S.C. Sec. 875(c), require the government to show that the defendant-speaker had a subjective intent to threaten the listener?

## Constitutional Foundation and Applicable Provision

### *First Amendment*

Congress shall make no law . . . abridging the freedom of speech . . . .

### *18 U.S.C. Section 875(c)*

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

## Precedents

### *Watts v. United States (1969)*

This is the leading case on the “true threats” exception to the First Amendment. Watts was drafted into the Vietnam War. He went to a rally protesting the war and said, “If they ever make me carry a rifle, the first person I want in my sights is LBJ [President Lyndon B. Johnson].” Watts was arrested for making threats against the President of the United States. Watts appealed under the First Amendment, arguing that his prosecution violated his First Amendment right to free speech.

The Supreme Court of the United States held that there is a “true threats” exception to the First Amendment that would allow the government to punish certain true threats, but that Watts’s speech did not fall within that exception. In particular, the Court held that Watts’s speech was not a “true threat,” because Watts’s threats against the President amounted to political hyperbole, Watts’s statement was expressly conditional, the crowd laughed at his speech, and Watts made the statement in a political debate. In short, the context of the speech suggested that it was not a “true threat” against the President.

Because Watts’s speech did not amount to a “true threat,” his speech was protected by the First Amendment, and his conviction was overturned.

### *Virginia v. Black (2003)*

The Ku Klux Klan held a rally on a hilltop and burned a thirty-foot cross that was seen by about 50 motorists who drove by. A sheriff saw the blaze, and arrested Black and other Klan members that were present. They were convicted under a Virginia statute that outlawed cross burning with the intent to intimidate. The statute criminalized cross burning with the intent to intimidate, and said that cross burning in public view was *prima facie* evidence—that is, sufficient evidence to prove guilt—of an intent to intimidate. Black appealed, arguing that the conviction violated his First Amendment right to free speech.

The Supreme Court held that the Virginia ban on cross burning with intent to intimidate did not violate the First Amendment. However, the Virginia law unconstitutionally equated cross burning with an intent to intimidate. The Court also did not explicitly say whether the government had to show that the speaker had a specific, subjective intent to threaten. Instead, it wrote that

“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. . . . 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.” 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.

## ARGUMENTS FOR ELONIS (PETITIONER)

- Freedom of speech is one of the fundamental rights in the United States. Without examining the specific details of speech (such as what the speaker intended for it to mean), this right will be weakened. It is, therefore, important to be extremely cautious and particular when regulating speech.
- Mr. Elonis's speech did not violate federal law. He did not intend to threaten anyone by posting rap lyrics, satire, and parodies of his favorite comedy sketches to his Facebook page. Instead, he was merely using his private social media page as a therapeutic outlet to help him cope with his personal struggles. His posts were personal rap lyrics – similar to ones that rappers and musicians create daily. They were not meant to scare his ex-wife, family, or the community. This form of speech is protected by the First Amendment.
- **Subjective intent** is the correct test for this case. In order for speech to qualify as a “threat” that is not protected speech under the First Amendment, the speaker must have *intended* to intimidate or instill the fear of violence in the recipient of the speech. This is known as **subjective intent** and is a violation of federal law. Because Mr. Elonis did not intend to threaten or hurt anyone, his Facebook posts should be protected by the First Amendment – which gives all individuals the right to speak freely.
- The plain meaning of the word “threat” implies that the speaker *intended* to intimidate or injure the recipient. Because the statute does not define threat, this plain definition should be used when interpreting the statute.
- The **objective speaker test** is the wrong test for this case. This test asks if a behavior is something that the average person would consider to be normal. Using the **objective speaker test** in this case will result in people being much more limited in what they can legally say. This result will make it more difficult for people to speak about unpopular ideas or minority viewpoints without the fear of negative consequences—including censorship or criminal punishment—by the government.
- Posts and writings on social media sites and forums can be easily misunderstood or misinterpreted, where one's tone may be unclear. Therefore, the speaker's intent is essential in order to determine whether speech is threatening. Without knowing the speaker's intent, innocent language can be misunderstood or twisted into felonious threats.



## ARGUMENTS FOR THE UNITED STATES (RESPONDENT)

- The Constitution of the United States is designed to “insure domestic tranquility... and secure the blessings of liberty.” As President Franklin D. Roosevelt famously said, an essential freedom is “freedom from fear.” The First Amendment right of free speech does not include the right of the speaker to create a fear of violence in the hearts of those who hear it.
- The **true threats** doctrine exists to protect individuals from *fearing* violence or the disruption that such a fear creates. Applying the **subjective intent test** would defeat the goal of protecting individuals by shifting the focus to whether Mr. Elonis *intended* to strike fear in the listeners, not whether the listeners *felt* fear from his comments.
- The **objective speaker test** is the correct test for analyzing a “true threat.” The trial court judge sufficiently instructed the jury so that they could objectively judge whether Mr. Elonis’s statements were threats. The judge said that true threats are distinguished from “idle or careless talk, exaggeration, something said in a joking manner or an outburst of transitory anger.” By instructing the jury in such a way, the only reasonable interpretation of Mr. Elonis’s Facebook comments was to take them as serious threats.
- A majority of U.S. Courts of Appeals use the **objective speaker test** to analyze whether a statement made is a **true threat**, making it unprotected speech. When these courts discussed the **subjective intent test**, they did so only as an afterthought and not in their analysis of the issue. Even the courts that do not openly use the **objective speaker test**, such as the Ninth Circuit Court of Appeals, have ruled in ways that suggests they do not fully accept the **subjective intent test**.
- The Ninth Circuit and state courts within it have analyzed cases under both the **objective speaker** and the **subjective intent test**. It is likely that any temporary internal confusion will be worked out independent of the Supreme Court’s intervention.
- The **subjective intent test** is only applicable in cases where the statute contains the element of intent. The Supreme Court’s ruling in *Virginia v. Black* was based on a statute that already contained the element of intent. The **objective speaker test** should be used to determine whether a statement is a **true threat**.

## GLOSSARY

**Objective Speaker Test:** Looks to whether a reasonable person who heard the statement would expect the person to whom the statement is directed to fear an intention of bodily harm. (Elonis refers to this test in the context of this case as a “negligence” standard.)

**Prima Facie:** [*Latin*] On its face or general.

**Subjective Intent Test:** The speaker intended his or her comments to intimidate or instill fear of violence in the recipient.

**True Threat:** A statement where a **reasonable person** could foresee the intended recipients to interpret it as a serious expression of an intention to inflict bodily injury or take the life of an individual.