UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	No. 09 CR 650
vs.	)	Judge Donald E. Walter
	)	Sitting by Designation
HAROLD TURNER,	)	
	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO VACATE HIS CONVICTION, PURSUANT TO 28 U.S.C. § 2255

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Defendant Harold Turner, by his undersigned counsel, submits this memorandum of law in support of his motion, pursuant to 28 U.S.C. § 2255, to vacate his conviction, on the ground that the Supreme Court's decision in *Elonis v. United States*, No. 13-983, 575 U.S. ___, 2015 WL 2464051 (June 1, 2015), establishes that his conviction cannot stand because the conduct for which he was convicted is not a crime. For the Court's convenience, a copy of the Supreme Court's decision is attached as Exhibit A to the accompanying Declaration of Richard H. Dolan ("Dolan Decl."). For the Court's convenience, we have also annexed to the Dolan Declaration the excerpts from the trial record cited below.

Preliminary Statement

On June 1, 2015, the Supreme Court reversed the conviction in *Elonis v. United States*, in which the defendant had been charged with communicating a threat over interstate wire facilities, in violation of 18 U.S.C. § 875(c). The Supreme Court reversed the conviction because the jury had been erroneously instructed to apply a "reasonable person" standard in deciding whether the communication at issue there was a "threat" within the meaning of the statute. This Court gave essentially the same instruction to the jury in Turner's case, using the same "reasonable person" standard rejected in *Elonis*. As we explain in greater detail below, the Court's decision in *Elonis* is directly controlling in this case, and now requires that Turner's conviction be vacated.

Jurisdictional Statement

This Court has jurisdiction to consider Defendant's motion under 28 U.S.C. § 2255(a), because Turner is a "prisoner in custody" under the judgment of conviction entered by this Court on January 14, 2011, a true copy of which is attached as Exhibit B to the Dolan Decl. Turner is currently serving his sentence of supervised release following his release from prison. Dolan Decl. ¶ 11 and Exh. B. "[A] petitioner who is on parole or serving a term of supervised release is 'in custody' for the purposes of the federal habeas corpus statutes." *Abimobola v. United States*, 369 F. Supp.2d 249, 252 (E.D.N.Y. 2005) (citing *Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994)). Turner's term of supervised release will expire in October 2015. Dolan Decl. ¶ 11.

This motion is timely in that it is brought within one year of the time within which Turner's judgment of conviction became final, within the meaning of Section 2255(f). Turner appealed his conviction to the Second Circuit, which affirmed by divided vote on June 21, 2013. *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), *cert. denied*, 135 S. Ct. 49 (Oct. 6, 2014). Turner timely moved for rehearing *en banc* in the Second Circuit, which was denied by order entered on October 15, 2013. Turner timely petitioned the Supreme Court of the United States for a writ of certiorari, which was denied by order entered on October 6, 2014. *See Turner v. United States*, -- U.S. -- , 135 S. Ct. 49 (October 6, 2014).

In *Rosa v. United States*, -- F.3d --, 2015 WL 2215555 (2d Cir. May 15, 2015), the Second Circuit agreed with the eight other circuits to consider the question and held that, for purposes of applying the one-year statute of limitations in Section 2255(f), "the statute of limitations runs from the denial of certiorari," 2015 WL 2215555 at *1. Since this petition is being filed within one year of the denial of certiorari on Turner's direct appeal, it is timely.

Procedural Background

A. The Three Trials

Turner was charged in a one-count indictment with "threaten[ing] to assault and murder three United States judges with intent to impede, intimidate and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the performance of official duties." Dolan Decl., Exh. C. His first trial began on December 2, 2009. *Id.*, Exh. D, at page 6 (district court docket sheet). The jury deadlocked. Despite an *Allen* charge, the jury remained divided with nine voting to acquit and three to convict. *Id.*, Exh. E (Transcript of First Trial), at 602-604. On December 7, 2009, the Court ordered a mistrial. Dolan Decl., Exh. D, at page 7.

A second jury was empanelled and trial began on March 1, 2010. *Id.* at page 8. After a second hung jury and another unsuccessful *Allen* charge, a mistrial was declared on March 10, 2010. *Id.* at page 10. On August 8, 2010, Turner's third jury trial began. *Id.* at page 13.

B. The Government's Summation on the Threat Element

On the "threat" issue, the Government's summation at the third trial told the jury that whether Turner's statements were a criminal threat turned on "the prospective [sic] of the victim," subject to a "reasonable person" condition: "How would a reasonable person in the judges' shoes have reacted to what was written on this web site?" Dolan Decl., Exh. F (excerpts from transcript of Turner's third trial ("Tr.")) at 503: 20-21. The Government told the jury that "that's the only thing that matters."[1] *Id.* at Tr. 514: 21-22.

The prosecutor made the same point repeatedly: "The law is how would a victim look at those words and interpret them," *id.*, at Tr. 511: 7-9, and hammered away at that argument:

> Look at these words, how an average person would understand them if they were the subject of that which was written. That's the only thing that matters. And so in this case, you heard from the judges, the actual victims in this case, and they told you they took it as a threat, that they were concerned. And you know those judges were reasonable in assuming that because the average person on the street, they would have felt concern too. They would have thought this was a threat if it was written about them. And that's all it takes for the first element.

Id., at Tr. 514: 19-25; 515: 1-4. The Government repeated numerous times that the touchstone of reasonableness was how someone "in the judges' shoes" would react. *Id.*, at Tr. 503: 20; 504: 7-8; 505: 18-19; 509: 2-3.

The Government reduced the "threat" element to the jury's evaluation of the "reasonableness" of the judges' subjective fears about Turner's imaginary "followers," all viewed from "the perspective of the victims":

> All three judges, three victims in this case, they all have different personalities. They all have different backgrounds. But they came to one conclusion, that this was a threat. How could they not, having read those words? So all three victims in this case, without equivocation, have told you they thought this was serious and this was a threat of violence. And the question for you is: How would a reasonable person in the judges' shoes have reacted?

Id. at Tr. 508: 20 - 509: 3.

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[1] Similarly, in *Elonis* "[t]he Government's closing argument emphasized that it was irrelevant whether Elonis intended the postings to be threats—'it doesn't matter what he thinks.'" *Elonis*, slip op. at 7. In reversing the conviction, the Supreme Court noted pointedly that, under a correct view of the law, "'what [Elonis] thinks' does matter." *Elonis*, slip op. at 14.

The Government ended its summation by telling the jury that "when it all comes down to it, this, ladies and gentlemen, is a simple case. There are three elements. The first element from the victims' prospective [sic], how would they interpret these words, how would a reasonable person interpret these words. They would interpret it as a threat. Second element, judges were judges. Third element, he wrote these words for a reason; to intimidate, to interfere, to impede and retaliate." *Id.* at Tr. 520: 4-11.

C. The Jury Instructions on the Threat Element

The jury instructions at the third trial tracked the instructions at the earlier trials. With respect to the "threat" element, the Court charged the jury:

> *As to the first element, whether a particular statement is a threat is governed by an objective standard. That is, a statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement and familiar with its context would understand it as a serious expression of an intent to inflict injury*. An absence of explicitly threatening language does not preclude you from finding the statement to be a threat.
>
> It is not necessary for the government to prove that the defendant intended to carry out the threat, that the defendant had the ability to carry out the threat, or that the defendant communicated the threat to the victims. The relevant intent is the intent to communicate the threat.
>
> In determining whether the charged statements constitute a threat, you should consider the context in which they were made. Written words or phrases and their reasonable connotations take their character as threatening or harmless from the context in which they are used, measured by the common experience of the society in which they are published. This includes the circumstances in which they are uttered as well as the circumstances of the person who uttered them.

Id. at Tr. 567: 21-25; 568: 1-17 (emphasis added).

As we show below, that charge is indistinguishable from the instruction rejected in *Elonis.* Indeed, though it is not an element of his claim for relief on this motion, at the third trial, Defendant specifically requested changes to the Court's charge on that element, to make it clear to the jury that in deciding whether Turner's words were a threat, "'what [the defendant] thinks' does matter." *Elonis*, slip op. at 14. Specifically, at the third trial, Turner asked the Court to add the following language to the instruction's definition of a "threat":

> In addition, the defendant must also intend that the statement he makes be a threat, that is, he must actually intend that it express the intent to commit an act of unlawful violence. It is not enough that the defendant communicated words and inadvertently or negligently expressed what appears to be an intent to commit violence, without the actual intent to express that intent.

Dolan Decl., Exh. G.

Following then-controlling Second Circuit precedent, *see, e.g.*, *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999) ("the government need prove only that the defendant intentionally transmitted a communication in interstate commerce and that the circumstances were such that an ordinary, reasonable recipient familiar with the context of the communication would interpret it as a true threat of injury"), the Court declined to give the instruction Turner requested or to modify its instruction (quoted above), telling the jury instead that it had to determine whether Turner made a threat using a "reasonable person" standard, without regard to Defendant's knowledge or intentions.

ARGUMENT

Turner was tried and convicted on a one-count indictment charging him with "threaten[ing] to assault and murder three United States judges with intent to impede, intimidate and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the performance of official duties," in violation of 18 U.S.C. § 115(a)(1)(B). Section 115 is but one of the many federal statutes prohibiting the communication of threats against others, such as 18 U.S.C. § 875(c), the crime at issue in *Elonis*, and 18 U.S.C. § 871, the crime at issue in *United States v. Bagdasarian*, 652 F.3d

1113 (9th Cir. 2011). But none of those statutes defines the legal standard against which the Government's proof must be assessed to establish the alleged "threat."

In *Elonis*, the Supreme Court did not affirmatively define the standard, but decided only that the "reasonable person" standard that had been adopted by eight circuits, including the Second Circuit, is legally erroneous.

A. *Elonis v. United States*

The Supreme Court framed the issues presented in *Elonis* as follows:

> Federal law makes it a crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another." 18 U. S. C. § 875(c). Petitioner was convicted of violating this provision under instructions that required the jury to find that he communicated what a reasonable person would regard as a threat. The question is whether the statute also requires that the defendant be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing.

Elonis, slip op. at 1.

The jury instructions at Elonis's trial defined the "threat" element of the crime as follows:

> 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.

Elonis, slip op. at 7.

The Supreme Court noted that Section 875(c) "requires that a communication be transmitted and that the communication contain a threat. It does not specify that the defendant must have any mental state with respect to these elements. In particular, it does not indicate whether the defendant must intend that his communication contain a threat." *Id*. at 7-8.

The Government argued that Section 875 should not be read to require any intent, other than the intent to make the communication at issue, because "Section 875(c) should be read in light of its neighboring provisions, Sections 875(b) and 875(d). Those provisions also prohibit certain types of threats, but expressly include a mental state requirement of an 'intent to extort.'" *Elonis,* slip op. at 8. The Supreme Court rejected that argument:

> The fact that Congress excluded the requirement of an "intent to extort" from Section 875(c) is strong evidence that Congress did not mean to confine Section 875(c) to crimes of extortion. But that does not suggest that Congress, at the same time, also meant to exclude a requirement that a defendant act with a certain mental state in communicating a threat. The most we can conclude from the language of Section 875(c) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(c), but did not identify what mental state, if any, a defendant must have to be convicted.

Id.

Applying canons of statutory interpretation familiar in the context of criminal statutes, the Court then rejected the "reasonable person" standard as to which the district court instructed the jury:

> Section 875(c), as noted, requires proof that a communication was transmitted and that it contained a threat. The "presumption in favor of a scienter requirement should apply to *each* of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video,* 513 U. S. [64], at 72 [1994] (emphasis added). The parties agree that a defendant under Section 875(c) must know that he is transmitting a communication. But communicating something is not what makes the conduct "wrongful." Here "the crucial element separating legal innocence from wrongful conduct" is the threatening nature of the communication. *Id.*, at 73. The mental state requirement must therefore apply to the fact that the communication contains a threat.
>
> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct— *awareness* of some wrongdoing." *Staples*, 511 U. S., at 606–607 (quoting *United States v. Dotterweich*, 320 U. S. 277, 281 (1943); emphasis added). Having

> liability turn 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," *Jeffries*, 692 F. 3d, at 484 (Sutton, J., dubitante), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U. S. 35, 47 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U. S. 246).

Elonis, slip op. at 13.

For those reasons, the Court concluded: "In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error." *Elonis,* slip op. at 16.

B. Based on *Elonis,* Turner's Conviction Must Be Vacated

Section 115, under which Turner was convicted, required the Government to prove that Turner "threaten[ed] to assault, kidnap, or murder, a … United States judge … with intent to impede, intimidate, or interfere with such … judge … while engaged in the performance of official duties … or with intent to retaliate against such … judge … on account of the performance of official duties …." 18. U.S.C. § 115(a)(1)(B). With respect to the "threat" element, Section 115 is indistinguishable from Section 875(c), the threat statute at issue in *Elonis.* Like the additional intent elements required by Sections 875(b) and 875(d) (requiring proof of intent to extort), Section 115 requires proof of intent to "impede, intimidate, or interfere … or … retaliate" against a federal judge for "performance of official duties." Those additional requirements serve to narrow the application of Section 115, making only certain types of threats against United States judges violative of that statute, but do not alter the fact that the "threat" element requires proof of the same *mens rea* required in *Elonis.* Indeed, as noted above, in

Elonis the Supreme Court expressly rejected the Government's argument to the contrary based on Sections 875(b) and 875(d).

The jury instructions in this case used the same "reasonable person" standard in defining the "threat" element that the Supreme Court concluded allowed the jury to convict Elonis for conduct that was not criminal. Also as in *Elonis*, the jury instructions in this case told the jury that the Government need only prove that Turner intended to make a communication that qualified as a "threat" under the Court's "reasonable person" instruction, not that Turner intended his communication to be construed as a threat.[2]

For the same reasons that the conviction in *Elonis* could not stand, the conviction in this case also must be vacated.

1. Legal Framework: § 2255 Relief Based On An Intervening Change In Law

In *Davis v. United* States, 417 U.S. 333 (1974), the Supreme Court held that 28 U.S.C. § 2255 may be invoked to challenge a conviction on the grounds that an intervening change in law has rendered the conviction illegal. The petitioner in *Davis* sought to set aside his conviction after it was affirmed by the Ninth Circuit arguing that the Circuit later rendered a decision in another case establishing that Davis's "induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order." *Id.* at 346. The Supreme Court explained that such a claim is cognizable in a § 2255 petition:

> If [his] contention is well taken, then Davis's conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents

[2] In *Elonis*, the charge conveyed that element as follows: "A statement is a true threat when a defendant intentionally makes a statement" that a reasonable person would construe to be threatening. In this case, the Court's charge first told the jury that a "threat" is determined by applying the objective "reasonable person" standard, and then told the jury that "[t]he relevant intent is the intent to communicate the threat," *i.e.*, only the intent to make the communication.

> exceptional circumstances that justify collateral relief under § 2255.

Id. at 346-47 (internal quotation marks omitted).

Davis defined the "appropriate inquiry" in determining whether relief should be granted as "whether the error of law sought to be raised is 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t ... present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent."' *Rosario v. United States*, 2001 WL 1006641, at *4 (S.D.N.Y. Aug. 30, 2001) (quoting *Davis*, 417 U.S. at 346, but other internal quotation marks omitted).

a. A Change In Substantive Law Establishing That Conduct Previously Deemed A Crime Is In Fact Legal Applies Retroactively On Collateral Review

Davis stands for the proposition that "a substantive change in the law resulting in the possibility that a person might have been convicted for conduct that is not illegal is properly applied retroactively on collateral review." *Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997); *see also id.* (decisions retroactively applying a change in substantive law "rest on the Supreme Court's holding in [*Davis*] that a defendant suffers a fundamental wrong when punished for conduct that simply is not illegal"); *Rosario*, 2001 WL 1006641, at *4 (*Davis* "first established the principle that a substantive change in the law is applicable to cases on collateral review").

Thus, in *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988), the Second Circuit affirmed the grant of a § 2255 petition and vacated a conviction for mail fraud because, after the conviction had become final, the Supreme Court held that the defendant's conduct was not within the scope of the mail fraud statute. In *Ingber*, the jury was instructed, in accordance with Second Circuit precedent, that to establish mail fraud the Government had to prove that Ingber, a Town

Supervisor, defrauded the town's citizens of "'an intangible right, namely, the right to a fair and impartial electoral process,'" or in the alternative, that he defrauded them through a scheme "for the purpose of obtaining money or property—specifically, the salary, powers and privileges" of his office—under false pretenses." *Ingber*, 841 F.2d at 451-452. In *McNally v. United States*, 483 U.S. 350 (1987), decided after Ingber's conviction had been affirmed on direct appeal, the Supreme Court "overruled established Second Circuit precedent" and held that the mail fraud statute "was directed solely at deprivations of property rights," not of intangible rights. *Ingber*, 841 F.2d at 451-452. On that basis, the Supreme Court reversed a mail fraud conviction where the jury instruction "allowed the jury to find guilt if they determined that the citizens had been deprived of their right to honest government." *Id.* at 453.

The Second Circuit recognized that in light of *McNally*, defendants convicted under its "erroneous view that deprivation of intangible rights not related to money or property was criminally punishable under the mail fraud statute" were "convicted of conduct that was not a crime." *Id.* at 453. This "compel[led]" the Court to conclude that "*McNally* should apply retroactively to Ingber's conviction." *Id.* at 453.

Under *Davis*, *Ingber*, and subsequent cases, an intervening controlling decision establishing that conduct previously believed to be a crime was in fact legal applies retroactively on collateral review of the conviction. *See also Bilzerian*, 127 F.3d at 242 (intervening Circuit decision that "redefined § 1001(a)(2) to legalize certain conduct previously thought to be criminal" must be "applied retroactively on collateral review"); *Ianniello v. United States*, 10 F.3d 59, 63 (2d Cir. 1993) (Circuit's intervening *en banc* decision "redefined the substance of a RICO violation, placed conduct beyond the reach of punishment, and is retroactively applicable on collateral review"); *United States v. Reguer*, 901 F. Supp. 515, 518, 519 (E.D.N.Y. 1995) (granting writ of coram nobis and vacating guilty plea and conviction, based on Supreme Court decision issued after petitioner's guilty plea, which "added an element of knowledge to the crime to which Reguer pleaded guilty," since "no evidence was elicited by the Court [in accepting the plea] about petitioner's state of mind").

b. *Elonis* Applies Retroactively To Turner's Conviction

Accordingly, *Elonis* applies retroactively to Turner's conviction. *Elonis* redefined the substance of a threat offense, such that conduct previously treated as criminal is no longer a crime. Before *Elonis*, in this Circuit and elsewhere a defendant could be convicted and punished for making a threat if the jury found that a reasonable person would have interpreted the defendant's communication as a threat. *See, e.g., United States v. Turner,* 720 F.3d 411, 420 (2d Cir. 2013) ("This Circuit's test for whether conduct amounts to a true threat 'is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury.'") (citing *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006), and *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994)), *cert. denied*, 135 S. Ct. 49 (Oct. 6, 2014). As explained above, *Elonis* rejected that "reasonable person" standard. The Supreme Court left open the issue whether a heightened *mens rea* standard is required for a conviction to comport with the First Amendment, but noted that "there is no dispute" that the statute's mental state requirement "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."[3] Slip op. at 16.

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[3] In his concurring opinion in *Elonis,* Justice Alito urged the Court to reach the constitutional issue and decide whether the statute's *mens rea* requirement was sufficient to satisfy the First Amendment. The Court declined that invitation, preferring to leave the issue open for further development in the lower courts.

2. Turner Was Convicted And Imprisoned For Conduct That Is Not Criminal

Given the Supreme Court's holding in *Elonis*, the conduct for which Turner was convicted is not a crime. Consistent with Second Circuit precedent, the jury in Turner's case was given a "reasonable person" charge, which told the jury that whether Turner made a criminally punishable threat was governed by an "objective standard," and did not require any consideration of Turner's knowledge or subjective intentions. As in *Elonis*, the charge (as well as the Government's summation) told the jury that Turner's mental state was irrelevant. The effect of that erroneous charge was to omit an essential element of the crime Turner was charged with: the *mens rea* that had to be found before his words, which he called political commentary, could be deemed a criminal threat. At a minimum, and subject to whatever additional element might be required by the First Amendment, a jury instruction correctly framing the statutory elements of the crime would have told the jury that, to find Turner guilty of violating 18 U.S.C. § 115(a)(1)(B), it had to find that Turner made the statements posted on his website either "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." *Elonis,* slip op. at 16.[4]

In finding Turner guilty, the jury necessarily determined only that his criminal conduct consisted of making a communication that "a reasonable person hearing or reading the statement and familiar with its context would understand" as a threat. Dolan Decl., Exh. F, at Tr. 567: 24-25. Under *Elonis*, this conduct, for which Turner served almost three years in prison, is not a crime. Accordingly, Turner's conviction must be vacated.

[4] Although Turner's trial lawyers were not required to propose a jury charge at odds with settled Second Circuit law—*i.e.*, to "prognosticate" that five years later the Supreme Court would overrule years of Second Circuit precedent, *Ingber*, 841 F.2d at 454—Turner in fact objected to the erroneous jury instruction, and proposed a charge that would have told the jury Turner could be found guilty of making a threat only if he acted with a culpable mental state. *See supra* at 5-6.

3. The Erroneous Jury Instructions Were Not Harmless

The Second Circuit has applied harmless error analysis to claims such as Turner's in this petition. *See Bilzerian*, 127 F.3d at 242; *Ianniello*, 10 F.3d at 63. However, under no view of the trial evidence was the erroneous "reasonable person" instruction harmless. The standard for evaluating the effect of the erroneous jury instruction is weighted in the petitioner's favor: "Where there is doubt as to whether a conviction is predicated on an impermissible ground, that doubt must be resolved in the defendant's favor and the conviction vacated." *Ingber*, 841 F.2d at 456.

It bears noting again that that case was tried *three times* before a jury was able to reach a verdict. Even with an erroneous instruction highly favorable to the Government, essentially asking the jury to focus on whether three federal judges were "objectively reasonable" in their assessment of Turner's blog post, the first two juries were unable to agree. That fact alone demonstrates that this was a close case. Nor are we aware of any case in which a court has found that the evidence to support conviction was so overwhelming that an error in the jury instructions on an essential element was harmless beyond a reasonable doubt, where the first two juries to hear the Government's evidence were unable to reach a verdict.

The trial record is bereft of evidence to support a finding that Turner posted the allegedly threatening statements on his website for the purpose of making a threat or with the knowledge that his commentary would be viewed as a threat. The supposed threat was posted on a public website—one dedicated solely to Turner's reporting and commentary on public issues. Turner's commentary—his rants—were his stock in trade: Turner was a shock jock, who used his blog to publish commentary "in such an inflammatory and antagonistic way as to shock the audience and entertain them." Dolan Decl., Exh. F, at Tr. 288: 3-5. The comments at issue were part of his commentary on the Seventh Circuit panel's decision in a gun control case, an issue of civic importance that is marked by passionate advocacy on both sides of the debate. In tone and diction the statements were similar to Turner's other postings that took issue with official conduct of Government actors, as well as private actors he viewed as having too much power. *See* Dolan Decl., Exh. H.

Turner's testimony was that he viewed his blog post as "criticizing, strongly criticizing what these men [the three judges] had done because I believe they shredded the Constitution … I wanted to shout from the rooftops that our freedoms were being eroded by the very men we pay to protect our freedoms." Dolan Decl., Exh. F, at Tr. 254: 25; 255: 1-4. Turner testified flatly that he "absolutely [did] not" intend for anybody to act on his words, *id.* at Tr. 255: 6, nor did he believe that anyone would ("It's an opinion. People don't act on opinions."). *Id.*, at Tr. 255: 8.

Turner did not send a private letter to the judges, or attempt in any way to contact them. He was not a prison inmate who had encountered them in a case, or other person with a history of violence. *Compare, e.g., United States v. Parr*, 545 F.3d 491, 494, 496 (7th Cir. 2008) (evidence regarding defendant's background was "highly relevant to the jury's 'true threat' determination," including that defendant knew how to make bombs, liked to read bomb-making books, experimented with explosives, and admired Timothy McVeigh and other domestic terrorists); *United States v. D'Amario,* 330 Fed. Appx. 409, 413 (3d Cir. 2009) (evidence sufficient where Judge who received threatening letter knew that defendant had been convicted of crimes of violence, violated supervised release, and previously threatened to murder federal judge). Indeed, Turner worked for years *for* the government as an FBI informant, on assignments meant to help the FBI against white supremacist groups. Dolan Decl., Exh. F at, *e.g.*, Tr. 180-185; 202-214; 238-240; 414-424; 438-441.

In fact, the Government's sole evidence of the allegedly criminal nature of Turner's supposed threat was precisely tailored to the Second Circuit's "reasonable person" standard that the Government knew would be reflected in the jury instructions: the testimony of the three judges. Each judge testified, repeatedly, that he interpreted Turner's *National Rifle Association* commentary as a "threat." *Id.*, at Tr. 68: 9-22; 69: 22-25; 70: 19-21; 91: 2-7; 120: 17-20; 121: 3-8; 122: 7-11; 123: 24-25; 124: 1. The judges had never heard of Turner before learning of the commentary, were not aware of the commentary until someone else told them about it, *id.*, at Tr. 89: 20-25; 90: 1; 65: 3-9; 75: 19-24; 120: 7-15, and did not reconcile their understanding of Turner's commentary as a threat with his role as a shock jock. Nonetheless, the Government's questioning focused on eliciting that their understanding was reasonable, though the judges struggled to provide testimony to support that element, as the following response from Judge Bauer shows:

Q. Why did you interpret it as a threat?

A. Because it says so.

Id., at Tr. 91: 6-7; *see also* Tr. 80: 11-18 (Judge Posner testifying that he was "impact[ed]" by the fact that Turner's statements appeared on the internet, while admitting that "[o]f course I have no idea who - I have no idea who reads or who reads [sic] his message").

The Government called six other witnesses, all law enforcement agents. But none of their testimony bore remotely on Turner's knowledge or subjective intent:

- FBI Agent Mark Wallshlaeger established that Turner was the sole author of the commentary and identified it as having been taken from Turner's website (*id.*, at Tr. 33: 19-20; 34: 10-17);

- FBI Agent Joseph Raschke described the FBI's investigation of Turner's website (*id.*, at Tr. 132: 5-25; 133: 1-24). Among other things, Agent Raschke admitted that although the home addresses of Judges Posner, Easterbrook, and Bauer were found on Turner's computer, Turner never published the information anywhere (*id.*, at Tr. 138: 1-7; 23-25), undermining the notion that Turner intended to threaten the judges;

- FBI forensic examiner Justin Poirier confirmed that the computer material he gave to Agent Raschke was extracted from Turner's computer (*id.*, at Tr. 107: 6-25; 108: 3-9);

- James Elcik, a supervisory inspector with the U.S. Marshals Service, testified about the agency's procedures in responding to a threat against a federal judge, but did not testify that the Marshals Service took any steps in response to Turner's commentaries (*id.*, at Tr. 144: 18-25; 145: 1-14; 143: 4-8);

- On rebuttal the Government presented the testimony of Sgt. Leonard Nerbetski of the New Jersey State Police, who was assigned to the FBI's joint terrorism task force, and FBI Special Agent Stephen Haug, Turner's principal handler when he worked for the FBI. Their testimony was limited to Turner's work as an FBI informant. (*See generally id.*, at Tr. 215, 360-499).

Special Agent Haug, moreover, gave testimony that *undermines* any finding that Turner posted his commentary intending to threaten the judges, when he testified that Turner "wasn't a danger to any individual" and "was not going to go out and commit any acts of violence." *Id.*, at Tr. 499: 4-7.

In short, this is not a case like *Ianniello v. U.S.*, in which, upon applying the intervening Supreme Court decision on collateral review the Second Circuit nonetheless allowed the petitioner's conviction to stand because "the evidence demonstrate[d] beyond a reasonable doubt the missing element in the jury instruction," namely, the relatedness of the petitioner's predicate acts, because there were 44 of them and they were "densely related." 10 F.3d at 63. Likewise in *Bilzerian*, though the Circuit applied its intervening decision retroactively, it declined to vacate the petitioner's conviction because "the evidence overwhelmingly demonstrated that Bilzerian would have been convicted even if the jury had been given the issue of materiality":

> The jury returned a special verdict form in each of the two counts of securities fraud *specifically finding that the misrepresentations Bilzerian made were material.* The underlying facts in the securities fraud counts are identical to the underlying facts in the §

> 1001 counts. No rational juror could conclude, on the one hand, that the misrepresentations were material for two counts, but, on the other, those same misrepresentations were not material for other counts.

Bilzerian, 127 F.3d at 242 (emphasis added).

Here, by contrast, two juries deadlocked after hearing essentially the same evidence proffered by the Government at the third trial, and in all events there is *no* evidence in the record to demonstrate the element missing from the jury instruction defining a threat, namely, evidence that Turner intended to make a threat against the judges, whether because that was his purpose or because he knew his commentary would be viewed as a threat. The erroneous jury instruction therefore cannot be harmless.

CONCLUSION

For the reasons set forth above, the Court should vacate Defendant's conviction, and grant Defendant such other relief as the Court deems just and proper.

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Respectfully submitted,

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