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Supreme Court of New Jersey

DOCKET NO. 086617

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal as of Right Pursuant to Rule 2:2-1(a)(1) from a Final Judgment of the Superior Court of New Jersey, Appellate Division.
v.	:	
CALVIN FAIR,	:	Sat Below: Hon. Clarkson S. Fisher, Jr., P.J.A.D. Hon. Heidi Willis Currier, J.A.D. Hon. Patrick DeAlmeida, J.A.D.
Defendant-Respondent.	:	

RESPONSE BRIEF ON BEHALF OF
THE ATTORNEY GENERAL OF NEW JERSEY AMICUS CURIAE

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PRELIMINARY STATEMENT

Counterman v. Colorado sets forth a clear rule: the State must establish the defendant's subjective mens rea in prosecutions for true threats, but "a mental state of recklessness is sufficient." Defendant and his amici believe this Court should deviate from Counterman's approach, although they diverge on how to do so. But none of them address the State v. Hunt factors, which specifically address when this Court diverges from the interpretation of cognate federal rights. They identify nothing in New Jersey's unique history or legal tradition to support their result. They do not identify special state concerns on the subject. Nor do they supply sound policy reasons to reject Counterman's middle-ground approach to threats cases, particularly given that their rule would also hinder important civil tools that protect the public.

Even taken on their terms, this Court should reject the array of approaches defendant and his amici provide. Amicus ACLU-NJ says that this Court should adopt a bright-line rule that threats cases always require specific intent primarily because that is the rule for incitement. But the law has distinguished threats and incitement for decades, and Counterman explains the substantially greater risks to First Amendment values that incitement cases pose. Defendant, for his part, argues instead that this Court should deviate from recklessness on these specific facts. But changing the mens rea based on the particular facts is not workable.

Instead, the careful balance Counterman struck protects First Amendment values and allows the State to civilly and criminally sanction dangerous threats. Under that test, N.J.S.A. 2C:12-3(a)'s prohibition on terroristic threats survives.

ARGUMENT

POINT I

THIS COURT SHOULD REJECT A CATEGORICAL SPECIFIC-INTENT-TO-THREATEN RULE.

This Court should decline the invitation to categorically require a specific-intent-to-threaten in every threats case—a position that none of the opinions in Counterman[1] adopted. Compare (ACLUsb8) (urging this Court require purpose mens rea for "all prosecutions for communicative acts," including threats cases), with (AGsb12-13) (explaining that none of the Counterman opinions took this approach). The ACLU-NJ argues that it can be hard to distinguish threats from incitement, and that because incitement requires purpose, true threats must too. But that argument is inconsistent with both precedents and principles.

As an initial matter, the law has long distinguished incitement and threats. As the Counterman majority explained, since 1791, "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas'" that "are 'long familiar to the bar' and perhaps, too, the general public." 143 S. Ct.

[1] Counterman v. Colorado, 143 S. Ct. 2106 (2023).

at 2113-14 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)). Those decisions have long treated incitement and true threats as separate exceptions. See, e.g., Virginia v. Black, 538 U.S. 343, 359 (2003); United States v. Alvarez, 567 U.S. 709, 717 (2012) (plurality); State v. Burkert, 231 N.J. 257, 281 (2017). Indeed, this well-worn distinction goes back decades. Compare Brandenburg v. Ohio, 395 U.S. 444 (1969) (canonical case setting forth incitement), with Watts v. United States, 394 U.S. 705, 707 (1969) (same for true threats).

Courts have distinguished the two because both the elements and purposes are distinct. True threats represent "serious expressions conveying that a speaker means to commit an act of unlawful violence"; they cannot be "jests, hyperbole, or other statements that when taken in context do not convey a real possibility that violence will follow." Counterman, 143 S. Ct. at 2114 (cleaned up); see also Black, 538 U.S. at 359 (same). Barring "true threats protects 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." Black, 538 U.S. at 359. Incitement, by contrast, does not require any expression that a speaker will cause someone harm; it is advocacy "directed to inciting or producing imminent lawless action and [that] is likely to incite or produce such action." Counterman, 143 S. Ct. at 2114; see also Black, 538 U.S. at 359.[2]

[2] Amicus's effort to blur this line falls short. The ACLU-NJ cites just two cases

As Counterman explains, those differences are why a different mens rea is entirely appropriate. See 143 S. Ct. at 2118 ("It is not just that our incitement decisions are distinguishable; it is more that they compel the use of a distinct standard here."). As Justice Kagan explained, whereas "incitement to disorder is commonly a hair's-breadth away from political 'advocacy'—and particularly from strong protests against the government and prevailing social order," "[f]or the most part, the speech on the other side of the true-threats boundary line … is neither so central to the theory of the First Amendment nor so vulnerable to government prosecutions." Ibid. Furthermore, a "strong intent requirement" in incitement cases was further justified by "the Court's failure, in an earlier era, to protect mere advocacy of force or lawbreaking from legal sanction," a concern unique to incitement. Id. at 2118. Proscribing true threats—"even though" they

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noting that in some applications, the incitement and true threats exceptions are not hermetically sealed. See State v. Carroll, 456 N.J. Super. 520, 542 (App. Div. 2018); United States v. Wheeler, 776 F.3d 736, 745 (10th Cir. 2015). But the fact that some conduct can satisfy the elements of more than one exception—like child pornography and obscenity—is hardly surprising. Nor does it suggest that treating these exceptions as distinct will be difficult in the run of cases. In fact, Wheeler is a perfect example: despite recognizing that "[e]xhorting groups of followers to kill specific individuals" may "at first blush appear to be closer to incitement," the court found that it could be punished as a true threat because it "can produce fear in a recipient no less than more traditional forms of threats." 776 F.3d at 745. What matters are the elements: where the individual is charged with inciting lawless action, the State must establish specific intent, but where the individual is charged with communicating his own serious intent to do harm to another, a floor of recklessness applies. And as explained infra, a jury found that this defendant made precisely those sorts of communications.

are "sometimes political"—only prohibits communications that evince a serious expression that the speaker will do violence, and thus does not implicate the same risk of subjugating speech against the government that prosecutions based on a speaker inciting others to action would. Ibid.

That is why Counterman properly understood that the incitement cases on which the ACLU-NJ relies actually support the recklessness standard for threats instead. See 143 S. Ct. at 2118 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), Hess v. Indiana, 414 U.S. 105 (1973), and Brandenburg, 395 U.S. 444). Nor do defendant's and amici's other cases help them. Their reliance on Black is puzzling, see (Dssb6-7; ACLUsb3-4), because Counterman already determined that Black "did not address whether the First Amendment demands such a showing [of intent], or why it might do so." 143 S. Ct. at 2114 n.3; see also id. at 2137-38 & n.4 (Barrett, J., dissenting) (same).[3] Neither the principles underlying incitement, nor the exception's elements and purposes, suggest that specific-intent must be an element of the true threats analysis.

[3] Defendant's supposition that Watts v. United States, 394 U.S. 705 (1969)—which involved a threat at an antiwar protest to kill President Johnson—would have come out differently under a recklessness standard, see (Dssb9), misreads that decision. Watts did not reach the question of whether the defendant had a willful intent under the relevant statute; instead, it looked at the "context" of the remark, its conditional phrasing, and the listener reactions to conclude that the statement was "political hyperbole," and not a true threat. Id. at 708. Under any standard of intent, the result in Watts would be the same because the statement at issue did not objectively rise to the level of a true threat.

Finally, a categorical specific-intent requirement would work tremendous harms. Amici focus extensively on the harms they fear will follow from chilling allegedly political speech, harms that a recklessness mens rea already drastically reduces. See Counterman, 143 S. Ct. at 2119 (discussing the "breathing space" that recklessness provides to avoid such chill); see also (AGsb6-7). But they ignore that a heightened mens rea "makes prosecution of otherwise proscribable, and often dangerous, communications harder," and they ignore the need to strike a "balance between those two effects." Counterman, 143 S. Ct. at 2117. In both civil and criminal cases, requiring the State to establish purpose would undercut the State's "capacity to counter true threats," including by those who knew their promises to harm another might be taken seriously. Id. at 2118; see (AGsb9-10) (discussing school and domestic-violence contexts). These concerns—which do not feature in incitement cases—are central to evaluating true threats. Not only does this categorical rule lack support from the traditional Hunt factors, but the argument for blanket specific-intent falls short on its own terms too.

POINT II

THIS COURT SHOULD REJECT ANY RULE THAT VARIES MENS REA ON THESE SPECIFIC FACTS.

This Court should likewise reject defendant's argument that a heightened mens rea is required if a specific threat implicates "dissenting political speech." See (Dssb5, 7, 8); see also (Dssb9-10) (citing three factual scenarios that would

allegedly qualify and thus trigger a heightened mens rea). That approach is both unworkable and unjustified, including in this very case.

1. Initially, the Attorney General agrees with the ACLU-NJ that any rule varying the requisite mens rea based upon whether the facts involve "dissenting political speech" is "not very workable at an operational level when a trial judge must decide how to charge a jury." (ACLUsb7). As amicus explains, "[a] court cannot choose between recklessness and intentionality based upon its own unilateral determination of whether the communication at issue constituted bona fide political advocacy…. Such subjective characterization of the content and value of speech would itself raise new constitutional infirmities." (Ibid.) While the Attorney General disputes the ACLU-NJ's claim that the proper bright-line mens rea is purpose, see supra at 2-6, amici agree a clear rule is needed.

Indeed, the workability concerns are profound. Instructing trial judges to police what is and is not "dissenting political speech" just to decide what mens rea to instruct would produce inconsistent determinations based on an individual judge's subjective view of the value of certain speech. It would assign intensely factual questions from the jury to a judge. It would also make it exceptionally difficult for defendants and the government to know when a violation could be established, if they cannot know what mens rea will need to be satisfied. And it would pose grave consequences for civil laws, see supra at 6 (explaining true

threats doctrine limits civil sanctions), as the availability of those measures would likewise turn on this fact-by-fact analysis as well.

Not only is this approach unworkable, but it lacks sufficient justification. While it is true that not every threat is identical, Counterman builds in two key protections to prevent the risks of deterring "dissenting political speech" in such cases. First, under the First Amendment, a true threat must objectively threaten violence, which means mere political hyperbole is already not enough. Second, the speaker must also act recklessly—that is, a jury must find that the defendant was "aware that others could regard his statements as threatening violence" yet "deliver[ed] them anyway." 143 S. Ct. at 2117. So any individual engaging in political advocacy who does not believe there is a serious risk that others would construe his words as threatening violence cannot be convicted, even sanctioned civilly. In short, the risk of chill in such cases is why the Counterman majority adopted recklessness—to give "breathing space" to political speech. Id. at 2119. It is not a reason to deviate from that standard on a fact-by-fact basis.

2. Contrary to defendant's and amici's repeated claims, the facts of this very case would not support a special carve out for "dissenting political speech." On the day of the offense, police were summoned to defendant's home in response to a 911 call regarding a domestic-violence incident in progress. (4T59-4 to 61-19; Pa3). Defendant was fully cognizant of the reason for the

police presence, and in his anger at Officer Sean Healey, warned the law enforcement officer to "[w]orry about a head shot." (Pa8). Hours later, defendant subsequently ranted about the officers on Facebook, stating "YU WILL PAY WHOEVA HAD ANY INVOLVEMENT" and "I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT." (Pa9, 27). In other words, the defendant here (1) threatened to shoot a particular law enforcement officer, and (2) hours later claimed to know where that officer lives. And he made the second statement hours after the police left, demonstrating the sincerity of his threat and dispelling the notion that his words expressed mere "fleeting anger." Model Jury Charges (Criminal): N.J.S.A. 2C:12-3a (Terroristic Threats) (rev. 9/12/2016), at 2.

Read in context, defendant's statements were not political speech by any measure. Threatening to shoot a specific person in the head and then hours later claiming to know where he lives does not contribute to the marketplace of ideas. And that the person targeted was a police officer does not transform defendant's violent threat into protected political speech. See, e.g., McGuire v. State, 132 N.E.3d 438, 445 (Ind. Ct. App. 2019) (defendant's message stating police officer "better watch out" as he was on "rampage and ready to shoot to kill" constituted constitutionally proscribable threat). That is, while defendant may be a "critic" of police tactics, he was certainly not charged for criticism. He was charged for

threatening to shoot Officer Healy, and the jury found that he committed a true threat only after considering the words of his threat and the context in which it was made, and only after finding he "consciously disregard[ed] a substantial and unjustifiable risk" of causing terror. N.J.S.A. 2C:12-3(a); see also Model Jury Charges (Criminal), "State of Mind" (approved Jan. 11, 1993).[4] The objective and subjective safeguards will protect individuals who engage in mere hyperbole or political speech. But the jury found defendant was not one of them.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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[4] The ACDL-NJ in particular fights the factual conclusion that defendant acted recklessly. See (ACDLsb7-8); see also (Dssb2; ACLUsb19). But disputes over the facts of this particular case are effectively a (misguided) sufficiency-of-the-evidence attack. They have no bearing on which mens rea applies in true threats cases (or in a subset of true threats cases) as a matter of law.