No. 18-949

IN THE
SUPREME COURT OF THE UNITED STATES

JAMAL KNOX,
Petitioner
V.
COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The petitioner, asserting that the court below found it irrelevant whether a reasonable person would find his song objectively threatening, asks whether the government, in order to establish that a statement is a true threat unprotected by the First Amendment, must show that a reasonable person would regard that statement as an actual threat, "or whether it is enough to show only the speaker's subjective intent to threaten."

But it is clear that the court did not find the objectively threatening nature of the song to be irrelevant—the matter was never even in dispute; thus, does the petitioner's mischaracterization of the court's decision itself preclude review? And even if not, should review be denied because the case does not allow this Court the opportunity to decide the precise level of intent necessary to sustain a threat conviction that does not run afoul of the First Amendment?

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The Orders and Opinions of the Court of Common Pleas of Allegheny County, Pennsylvania; the Superior Court of Pennsylvania; and the Supreme Court of Pennsylvania have been included as Appendices to the Petition for a Writ of Certiorari filed by the petitioner, Jamal Knox.

JURISDICTION

The petitioner has invoked jurisdiction under 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

A. Factual History

On April 17, 2012, City of Pittsburgh police officer Michael Kosko and his partner were patrolling a residential neighborhood when they observed a Jeep Cherokee that failed to employ its turn signal as it tried to maneuver into a parking space (NJT, 20-23, 26, 50-51, 62).[1] The officers pulled up alongside the Cherokee, and Jamal Knox—the driver of the vehicle and the petitioner in this matter—admitted to Officer Kosko that he did not have a valid driver's license

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[1] Numbers in parentheses preceded by the letter "NJT" refer to the pages of the petitioner's non-jury-trial transcript, which took place November 12 through November 21, 2013.

(NJT, 23-24, 53). Upon receiving that response, Officer Kosko started to exit the police vehicle, but as he did so, Knox sped away in the Cherokee (NJT, 24, 53). A brief vehicle pursuit ensued during which Knox struck a parked car and, ultimately, a chain-link fence that left the Cherokee disabled (NJT, 24-27, 54, 59). Knox attempted to run but was quickly taken into custody by Officer Kosko (NJT, 27-29, 43-44). A search incident to arrest revealed 15 stamp bags of heroin and $1489 in currency on Knox's person (NJT, 28-29, 39, 56). In addition, a loaded firearm, which had been stolen from a residence three months earlier, was recovered from the driver's side of the vehicle (NJT, 30-33, 39, 46, 55-56, 71, 74-75). Officer Kosko tried to ascertain Knox's name, but Knox told him that it was "Dante Jones" (NJT, 29).

As the vehicle pursuit had been going on, Detective Daniel Zeltner had been dispatched to the

scene, and upon his arrival, he observed Knox already seated in the back of the patrol car (NJT, 65-66). Detective Zeltner was advised that the person in the back seat of the car had said that his name was Dante Jones, but Zeltner, familiar with this individual from numerous past dealings, clearly recognized him as Jamal Knox (NJT, 66, 68). As a result of Knox's conduct that day, he was charged with various drug offenses, as well as carrying a firearm without a license, receiving stolen property, providing false identification, and several motor vehicle code violations (NJT, 8-10).

Seven months later, on November 15, 2012—a date on which the charges against Knox were still pending—Pittsburgh police officer Aaron Spangler was monitoring the Facebook page of an individual who used the name "Beaz Mooga"; on the page, there was a direct link to a YouTube video/rap song entitled

"Fuck the Police," which subsequent investigation determined had been uploaded onto YouTube a few days earlier (NJT, 178-79, 187-88, 216, 222, 227-28, 231, 257, 302).[2] "Fuck the Police," as well as another song included in a separate video that also had a link on that particular Facebook page, were voiced by Knox and Rashee Beasley—Knox's co-defendant at the instant trial—and the video content included a series of still photographs containing the images of both men (NJT, 186-87, 190-91, 225-27). In listening to the songs, Officer Spangler was able to glean that Knox used the rap name "Mayhem Mal" and Beasley went by the name "Soldier Beaz" (NJT, 206-07). In listening to "Fuck the Police" in particular, Officer

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[2] The Facebook page that Officer Spangler had been viewing was accessible to the public (NJT, 180).

Spangler could hear the names of Detective Zeltner and Officer Kosko, colleagues of his whom Spangler knew had pending cases against both Knox and Beasley (NJT, 144-45, 192, 196).[3]

The lyrics to "Fuck the Police," which referenced Zeltner and Kosko right from the very first verse, included such lines as, "Your shift over at three and I'm gonna fuck you up where you sleep," "I know exactly who workin', and I'm gonna kill him with a Glock/Quote that," "We makin' prank calls, as soon as you bitches come we bustin' heavy metal," "Like

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[3] Beasley had been Knox's front-seat passenger on April 17, 2012, and, after fleeing the scene on foot, he, too, was taken into custody and charged with various offenses (NJT, 24, 29, 62-63, 399). In addition to that incident, Beasley, on September 26, 2011, had driven away from a vehicle stop initiated by Detective Zeltner; based on that particular conduct, Beasley had been charged with fleeing and eluding (NJT, 143-44).

Poplawski I'm strapped nasty,"[4] and "Let's kill these cops cuz they don't do us no good" (NJT, 146-47, 196-206; *see also* Appendix A to Knox's Petition for Writ of Certiorari, at 3a-5a). The lyrics also referenced the killing of police informants ("[T]hem informants that you got, gonna be layin' in the box"), and the sound of machine guns being fired could be heard at certain points during the song (*See id.*, at 3a, 5a).[5]

Immediately after having viewed the video, Officer Spangler informed Detective Zeltner and Officer Kosko, as well as his superior officers, of the video's existence, and both Zeltner and Kosko

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[4] On June 28, 2011, Richard Poplawski was convicted of three counts of first-degree murder and sentenced to death for the April 4, 2009 shooting deaths of three Pittsburgh police officers. *See Commonwealth v. Poplawski*, 130 A.3d 697 (Pa. 2015).

[5] A different video was posted subsequently in which Knox and Beasley acknowledged that they were indeed the authors and performers of the song (NJT, 208-10).

watched it on that date (NJT, 106-07, 145, 154, 170, 193, 230). As a result of the threats contained within the lyrics, Officer Kosko decided to leave the Pittsburgh Police and relocate (NJT, 108-09). Like Kosko, Detective Zeltner was also concerned for his own safety, as well as that of his family (NJT, 147). He was given time off from the job and, upon his return, was provided with an extra security detail; extra personnel had also been deployed throughout the department in order to deal with the threats made in the video (NJT, 147).

Detective April Campbell of the Pittsburgh Police, an expert in computer investigations, was able to determine that in the few days that the "Fuck the Police" video was online before being taken down, more than one thousand different users had viewed it (NJT, 244, 252-53, 312-13). Detective Campbell was also able to conclude that the "Beaz Mooga" Facebook

account on which the link to the video had been posted belonged to Rashee Beasley (NJT, 317-21).

B. Procedural History

As a result of the above-mentioned video/rap song, the Commonwealth of Pennsylvania filed a Criminal Information against Knox at No. CC 201303870, charging him with two counts of terroristic threats, in violation of 18 Pa. C.S.A. §2706(a)(1); two counts of intimidation of witnesses or victims, in violation of 18 Pa. C.S.A. §4952; two counts of retaliation against witnesses or victims, in violation of 18 Pa. C.S.A. §4953(a); and one count of criminal conspiracy, in violation of 18 Pa. C.S.A. §903(a)(1) (*see* Appendix C to Petition for Writ of Certiorari, at 71a).

At a bench trial that concluded on November 21, 2013, the trial court found Knox guilty of both

counts of terroristic threats and both counts of intimidation of witnesses, as well as the lone conspiracy count, and in so doing, rejected his argument that the song was protected speech under the First Amendment; the court found instead that Knox had communicated a true threat with the specific intent to terrorize Detective Zeltner and Officer Kosko and had also intimidated or attempted to intimidate those officers with the intent that such conduct would impede or impair the administration of justice (NJT, 462-64; *see also* Appendix C to Petition for Writ of Certiorari, at 72a, 86a-87a). Knox subsequently received concurrent sentences of 12 to 36 months' imprisonment, plus two years' probation, at each of the terroristic threats and intimidation of witnesses counts (*see id.*, at 72a).

On August 2, 2016, the Superior Court of Pennsylvania affirmed Knox's judgment of sentence,

although it did so without deciding whether the song constituted protected speech; rather, the court ruled that Knox's claim that the video was improperly admitted into evidence because it was protected speech was waived because no objection to its admission had been made at trial (*see* Appendix B to Petition for Writ of Certiorari, at 68a-69a).

On January 23, 2017, the Supreme Court of Pennsylvania granted Knox's petition for allowance of appeal in order to address the issue of "whether the First Amendment of the United States Constitution permits the imposition of criminal liability based on the publication of a rap-music video containing threatening lyrics directed to named law enforcement officers" (*see* Appendix A to Petition for Writ of Certiorari, at 1a-2a). All seven of the Justices agreed that the Constitution allows states to criminalize threatening speech that is specifically intended to

terrorize or intimidate and that the trial court's finding as to Knox's specific intent in the instant matter was supported by competent evidence; thus, Knox's convictions and judgment of sentence were affirmed (*see id.*, at 21a-22a, 28a-30a).[6]

On January 18, 2019, Knox, through Lisa S. Blatt, Esquire, filed with this Honorable Court the instant Petition for a Writ of Certiorari, which was docketed at No. 18-949. On February 4, 2019, this Court requested the Commonwealth of Pennsylvania, through the Allegheny County Office of the District Attorney, to file a response to Knox's petition.

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[6] Two Justices, in a concurring and dissenting opinion, differed from the majority only in their belief that the court should have decided "whether the First Amendment *requires* proof of a specific intent, or whether the Amendment would tolerate punishment of speech based upon proof of only a lesser *mens rea* such as recklessness or knowledge" (*see* Appendix A to Petition for Writ of Certiorari, at 30a-31a) (emphasis in original).

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT OF PENNSYLVANIA DID NOT, AS THE PETITIONER CLAIMS, ADOPT "A PURELY SUBJECTIVE TRUE-THREAT STANDARD"; THUS, HIS PETITION RELIES UPON A FALSE PREMISE. REGARDLESS, THE INSTANT SITUATION DOES NOT WARRANT REVIEW BECAUSE IT DOES NOT PROVIDE THIS HONORABLE COURT WITH THE OPPORTUNITY TO DECIDE THE PRECISE LEVEL OF INTENT NECESSARY TO SUSTAIN A THREAT CONVICTION THAT IS NOT VIOLATIVE OF THE FIRST AMENDMENT.

Jamal Knox contends that his petition for writ of certiorari should be granted because the decision of the Supreme Court of Pennsylvania, which he asserts set forth "[a] purely subjective true-threat standard allowing convictions based solely on the speaker's subjective intent…without regard to whether the speech was objectively threatening," is, in his words, "wrong" and at odds with principles of the First Amendment and precedent of this Honorable Court

(*see* Petition for Writ of Certiorari, at p. 14). But the Commonwealth of Pennsylvania would respectfully submit that Knox's argument rests on a false premise, as the court below did not do what Knox says that it did.

As a framework for his argument, Knox tries to set up a conflict between the five-member majority of the Pennsylvania Supreme Court and the two concurring and dissenting Justices, but the conflict that he relies upon simply does not exist. Knox maintains that while the minority opinion would have opted for a two-pronged test—one in which his rap song would first be evaluated to determine whether an objective, reasonable person would have found it to be a threat and then as to whether the speaker, subjectively, had a specific intent to threaten the victims—the majority "found it irrelevant whether a reasonable person would find the song threatening in

context" (*see id.*, at pp. 1; *see also* pp. 7-8). He added that while the two concurring and dissenting Justices concluded that the song was both objectively and subjectively threatening, the majority did not do so and "would not have found the song objectively threatening" (*see id.*, at p. 23). Unfortunately for Knox, his characterization of the majority opinion—and the disagreement with it by the concurrence/dissent—is not accurate.

Nowhere in the majority opinion does the court state that it was irrelevant to its analysis whether an objective, reasonable person would find threatening the lyrics of Knox's "Fuck the Police," wherein Knox stated that he was going to murder two named officers who had pending cases against him while also mentioning that he knew where those officers lived and what time their shifts ended. Nor did the court state, or even hint, that it had not found the song

objectively threatening. The Commonwealth submits that the objective nature of the threat contained in the song was never at issue, as Knox at no time in these proceedings even attempted to argue that his song did not constitute an objective threat.[7] And, lastly, Justice Wecht, after stating in his concurring and dissenting opinion that requiring the government to prove the speaker's specific intent serves to prevent the prosecution of protected speech, wrote that, "*like the Majority*, I also would hold that consideration of a speaker's mindset *is only part of the analysis*," the other part being the objective nature of the speech

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[7] The fact that the objectively threatening nature of the song was not in dispute is further evidenced by the manner in which the majority framed the issue that it was deciding; namely, whether the First Amendment allowed for the imposing of criminal liability on a rap video that "contain[ed] threatening lyrics directed to named law enforcement officers" (*see* Appendix A to Petition for Writ of Certiorari, at 1a-2a).

itself (*see* Appendix A to Petition for Writ of Certiorari, at 37a) (emphasis supplied).[8] Thus, because the argument offered by Knox fails on its face, he certainly cannot be said to have offered a compelling reason for the granting of his petition. *See* U.S.Sup.Ct. Rule 10, 28 U.S.C.A. ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."). For this reason alone, Knox's petition should be denied.

Knox further asserts that "[f]or all the reasons

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[8] The actual nature of the disagreement between the majority and the concurrence/dissent is that while the majority, given the facts of the instant case, left open the question of whether a statute that criminalizes threatening statements spoken with a lower scienter threshold than specific intent might survive First Amendment scrutiny (*see* Appendix A to Petition for Writ of Certiorari, at 21a), Justice Wecht would *insist* on a finding of the speaker's specific intent in order for the speech to constitute criminal conduct unprotected by the First Amendment (*see id.*, at 38a).

this Court granted certiorari in *Elonis* [*v. United States*, 135 S.Ct. 2001 (2015)], it should do so here" (*see* Petition for Writ of Certiorari, at p. 8), and he adds that the matter requires this Court's resolution just "as Justice Sotomayor explained last Term [in her concurrence in *Perez v. Florida*, 137 S.Ct. 853 (2017)]" (*see* Petition for Writ of Certiorari, at p. 9). But the issue advanced by Knox, as has been set forth above, is not the same one that was referenced in those two cases, and, regardless, the circumstances of the instant situation do not warrant consideration of the issue framed but not addressed in *Elonis* and urged to be reviewed by Justice Sotomayor in *Perez*.

In *Elonis*, the defendant, who had posted graphically violent rap lyrics on his Facebook page directed toward, among others, his wife, his coworkers and law-enforcement officials, was found guilty of violating a federal statute that made it a

crime to transmit "any communication containing any threat…to injure the person of another." *See* 135 S.Ct. at 2004-07. At trial, the defendant had requested an instruction that the government must prove that he intended to communicate a true threat; that request was denied, and the prosecution was able to argue to the jury that it was irrelevant whether the defendant had intended the postings to be threats. *Id.* at 2007. On appeal, the defendant renewed his contention that the jury should have been required to find that he intended his posts to be threats, but the Third Circuit Court of Appeals disagreed, finding that the only intent required by the statute was the intent to communicate words that the defendant understands and that a reasonable person would view as a threat. *Id.* This Honorable Court granted certiorari on the question of whether the statute required that the defendant be aware of the threatening nature of the

communication and, if not, whether the First Amendment required such a showing. *Id.* at 2004, 2008. Given the disposition of the matter, however—this Court ruled that the defendant's conviction could not stand because the federal statute required proof of a *mens rea* greater than negligence—the Court found no reason to reach any issues pertaining to the First Amendment. *Id.* at 2012-13.

Subsequently, in *Perez*, a case in which a defendant's petition for writ of certiorari was denied, Justice Sotomayor noted in her concurrence that this Court's prior decisions in *Watts v. United States*, 394 U.S. 705 (1969), and *Virginia v. Black*, 538 U.S. 343 (2003)

> make clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words—*some* level of intent is required. And these two

> cases strongly suggest that it is not enough that a reasonable person might have understood the words as a threat—a jury must find that the speaker actually intended to convey a threat.

137 S.Ct. at 855 (emphasis in original). Justice Sotomayor went on to state that "[i]n an appropriate case…[t]he Court should…decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*." *Id.*

As is clear from the above, Justice Sotomayor believes that this Court's precedents establish that, in order to sustain a conviction against someone in Knox's position that does not run afoul of the First Amendment, the prosecution must have proven that he had some level of intent to convey a threat. The Pennsylvania Supreme Court agreed, stating that the decision in *Black* does indeed "necessitate[ ] an inquiry into the speaker's mental state [when a First

Amendment analysis is being undertaken]" (*see* Appendix A to Petition for Writ of Certiorari, at 19a-20a). But in this case, the terroristic threats statute under which Knox was convicted made it a crime if anyone "communicates, either directly or indirectly, a threat to…commit any crime of violence *with intent to terrorize*" 18 Pa. C.S.A. §2706(a) (emphasis supplied). Thus, the speaker's subjective intent is an element built right into the statute, and Knox could not have been found guilty at his non-jury trial had not the trial court concluded that he had acted intentionally. And with regard to Knox's conviction for intimidation of witnesses—for which a person is guilty of the offense "if, *with the intent to or with the knowledge* that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim…," *see* 18 Pa. C.S.A.

§4952(a) (emphasis supplied)—the trial court expressly found that Knox had specifically intended to intimidate the two officers so as to obstruct justice, a fact acknowledged by the Pennsylvania Supreme Court in its decision (*see* NJT, 463 *and* Appendix C of Petition for Writ of Certiorari, at 86a-87a; *see also* Appendix A of Petition for Writ of Certiorari, at 8a).

Thus, because the prosecution was deemed to have proven that the lyrics to Knox's song were uttered by him with the highest level of *mens rea* possible—namely, a specific intent to terrorize and intimidate—the court below, after noting that the Constitution allows states to criminalize such speech, found it unnecessary to decide whether the First Amendment might also offer protection to "threatening statements spoken with a lower scienter threshold, such as knowledge or reckless disregard of their threatening nature," as that was not the

situation before the court (*see* Appendix A of Petition for Writ of Certiorari, at 21a-22a). For that same reason, there is no basis for this Court to grant Knox's petition, as the instant matter does not present the occasion to decide the precise level of intent that suffices under the First Amendment. Because the instant case does not involve a statement spoken with something less than specific intent, any such pronouncement on the subject by this Court would be nothing more than dicta. In other words, this is *not* "[the] appropriate case" spoken of by Justice Sotomayor in *Perez*, and, therefore, Knox's petition should be denied for this additional reason.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Court deny the Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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