ORIGINAL

No. 20-7537

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER THIEME,
-- Petitioner,

v.

STATE OF NEW JERSEY,
--Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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PETITIONER PRO SE

QUESTIONS PRESENTED FOR REVIEW

1.) Is New Jersey's "cyber-harassment" statute, N.J.S.A. 2C:33-4.1, constitutionally invalid because it lacks a scienter requirement and relies on a "reasonable person" standard which dilutes the burden of proof and violates due process in the wake of Elonis v. United States, 575 U.S. 723 (2015).

2.) Is New Jersey's "cyber-harassment" statute constitutionally invalid for being "overbroad" and "void-for-vagueness" because of statutorily undefined terms proscribing "lewd, indecent, and obscene material" and the causing of "emotional harm" that are impermissibly vague and criminalize too wide a swath of protected expression?

3.) What is the definition of "lewd, indecent, and obscene material" and the boundaries of obscenity in the internet age? Could this specific statutory language in a state criminal statute survive free speech and due process scrutiny given this Court's holdings in FCC v. Fox, 556 U.S. 502 (2009), Reno v. ACLU, 524 U.S. 844 (1997), and Sable Communications v. FCC, 492 U.S. 115 (1989)?

4.) Is the publishing online of libellous material directed to the general public that neither directly harasses the victims so libelled or makes any threatening communication "protected expression"? How does the publishing of said libellous material as a public blog post online differ from a printed flier, a tell-all book, or other protected media, to permit the State of New Jersey to criminalize it chiefly because it is an online utterance? Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

5.) If a defendant facing sentencing is not provided with "victim impact statements" to either review himself and/or with counsel before sentencing but then those same victim impact statements are subsequently read several times and heavily considered by the sentencing judge, is this defendant denied a meaningful opportunity to allocate or confront the material pursuant to the protections of the Due Process and Confrontation clauses?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page, to wit:

1.) CHRISTOPHER THIEME, Petitioner.

2.) The STATE OF NEW JERSEY, Respondent, represented by the Attorney General of New Jersey.

RELATED CASES

For the underlying criminal conviction:

* State v. Thieme, Indictment No. 16-01-00114, before the Superior Court of New Jersey, Law Division - Criminal Part, Bergen Vicinage (Hackensack, New Jersey). Guilty plea entered July 6, 2018; sentencing hearing held August 3, 2018. Judgment of Conviction Order dated August 3, 2018.

On direct appeal:

* State v. Thieme, Docket No. A-3247-18T1, before the Superior Court of New Jersey, Appellate Division. Opinion affirming conviction filed September 11, 2020.

* State v. Thieme, Case No. 085016, before the Supreme Court of New Jersey, Order denying petition for certification dated January 26, 2021.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Statutes Cited

Cases Cited

Authorities Cited

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner CHRISTOPHER THIEME prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS AND ORDERS IN THIS CASE

This case derives in the state courts of the State of New Jersey.

The original conviction of the Petitioner was in the Superior Court of New Jersey, Law Division - Criminal Part, in the Bergen Vicinage. It was not reported, but the court's Judgment of Conviction, dated August 3, 2018, is set forth as pages D1 to D3 of APPENDIX D. That Court's Order denying a reconsideration of sentence dated December 7, 2018, is set forth as page C1 of APPENDIX C.

Petitioner appealed his conviction and sentence to the Superior Court of New Jersey, Appellate Division, which affirmed the Petitioner's conviction in an unpublished opinion dated September 11, 2020, which is set forth in pages A1 to A23 of APPENDIX A.

Petitioner then sought discretionary review to the Supreme Court of New Jersey, the state's highest court, which issued an Order denying certification dated January 26, 2021 that has been designated for publication but not yet reported, but is set forth at page B1 of APPENDIX B.

JURISDICTIONAL STATEMENT

The judgment of the highest state court, the Supreme Court of New Jersey, was entered on January 26, 2021. A copy of that decision, as indicated above, appears as APPENDIX B. Rehearing was not sought.

This petition for a Writ of Certiorari is timely filed within 90 days of that Order.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

x "In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation; to be confronted with the witnesses against him ...."

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> ".... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute under which the Petitioner was prosecuted and convicted was New Jersey Statutes Annotated, 2C:33-4.1 (the "cyber-harassment" statute) which reads, in pertinent part:

> "A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person ... knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person within the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person...."

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

I. COURSE OF PROCEEDINGS IN THE CASE NOW BEFORE THIS COURT

On January 17, 2016, a grand jury empanelled in Bergen County, New Jersey, indicted the Petitioner on five criminal counts--three fourth-degree counts of cyber-harassment and two fourth-degree counts of violating and restraining order--in a case then pending before the Superior Court of New Jersey, Law Division - Criminal Part, in the Bergen Vicinage, entitled The State of New Jersey v. Christopher Thieme, (or State v. Thieme). Petitioner, on July 6, 2018, entered a plea of guilty to counts 3 and 5, both for cyber-harassment in violation of N.J.S.A. 2C:33-4.1(a)(2) before the Honorable Christopher R. Kazlau, J.S.C. sitting in Hackensack, New Jersey. See Indictment 16-01-114, in Appendix E, pp. E1-E3).

On August 3, 2018, the court entered judgment and Petitioner was sentenced to eighteen (18) months imprisonment on each count set to run concurrently to each other and concurrently to an ongoing, unrelated federal sentence. (See Appendix D). The Petitioner filed a motion for reconsideration of sentence which was denied on December 7, 2018 (Appendix C).

This judgment was affirmed by the Superior Court of New Jersey, Appellate Division, in a direct appeal sought by the Petitioner titled State v. Thieme, in an unpublished opinion filed September 11, 2020. (See Appendix A). A petition for certification was filed to the Supreme Court of New Jersey under the title State v. Thieme and was denied by Order dated January 26, 2021. (See Appendix B).

This case continues by this petition to this Court seeking issuance of a Writ of Certiorari.

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION

This case stems from the unfortunate and bitter end of a romantic relationship. The Petitioner broke up with a young woman named Christina Majka in April 2014. In the aftermath of this break-up, the Petitioner became suspicious that a miscarriage that preceded the beginning of the end may have been a purposeful abortion. Both parties became angered and aggrieved, and bitter resentments followed. The Petitioner, at that time, was in the final year of a three-year supervised release stemming from his sentence in an unrelated 2007 state conviction. When Majka manipulated and used his parole status against him, weaponizing it in their disputes, and vengefully triggered two specious parole violations which briefly returned him to state prison, the Petitioner was understandably upset. When released a few weeks later, Petitioner noticed that Majka and her new boyfriend, Alvin A. Young, Jr., had libelled him online with comments about him and members of his family. Petitioner made efforts to have such material removed from various internet services which took several weeks. He filed two restraining orders against Majka because of Majka's and Young's comments online, and unsuccessfully pursued criminal charges against her. Petitioner was further embittered when police officers refused to investigate or file criminal charges against them, believing that they were disregarding his claims because of his status as a convicted felon.

Petitioner unwisely chose to air his grievances on the internet, countered Majka's and Young's libellous attacks with his own internet postings. His

posts presented statements that Majka was a promiscuous whore, had herpes, had abortions, and had severe psychological and anger problems amongst other statements. He posted them in a blog post written to a general audience--expecting that they'd be picked up by search engines when any person in the general public happened to search for her name. Petitioner further posted comments that Alvin Young was a convicted "sick faggot pedophile" who sexually assaulted young boys and his sisters for the same purpose. It is salient to note, search engine results do return hits for an "Alvin Young" as a convicted sex offender in Florida. However, and most importantly, the Petitioner never contacted Majka or Young to direct them to the postings. The two discovered them on their own in March 2015--approximately 2 months after the Petitioner had posted them in January 2015.

These two blog posts were the alleged actions behind counts 3 and 5 of the indictment (see Appendix E) on which the Petitiner was convicted for cyber-harassment.

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in a New Jersey state court of two counts of cyber-harassment in violation of a state statute, namely N.J.S.A. 2C:33-4.1(a)(2). A direct appeal was appropriately made before the Superior Court of New Jersey, Appellate Division; and a Petition for Certification subsequently placed before the Supreme Court of New Jersey, the highest court in that state.

IV. THE NEW JERSEY STATE COURTS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

This is a case about the limits of free expression in the hostile arena of

the internet. It questions whether the State has the power to proscribe speech that is essentially publicly posted libel published to a general audience based on its content. The targets of said libel were not directly harassed or threatened--only embarassed and angry when they discovered the postings over two months after their publication. Being embarassed or ashamed or angry is not a valid grounds for infringing upon free speech.

The State of New Jersey, in its attempts to proscribe this conduct, wrote a statute, N.J.S.A. 2C:33-4.1, that is fundamentally flawed and in direct conflict with long-held principles regarding due process and protected expression. To wit:

1.) N.J.S.A. 2C:33-4.1 relies on a "reasonable person" standard and lacks a scienter requirement. The net effect of this violation of due process is a diluting of the state's burden of proof in a way that this Court criticized in Elonis v. United States, 575 U.S. 723 (2015).

2.) N.J.S.A. 2C:33-4.1 proscribes the posting of "lewd, indecent, and obscene material" without defining what that means. This kind of statutory prohibition has been found overbroad and "void for vagueness" in many precedents of this Court, most notably FCC v. Fox, 556 U.S. 502 (2009), Reno v. ACLU, 524 U.S. 844 (1997), and Sable Communications v. FCC, 492 U.S. 115 (1989), amongst many others.

3.) N.J.S.A. 2C:33-4.1 holds as its benchmark the intent to cause "emotional harm" without defining what level of content or speech crosses that line--New Jersey has thus so lowered the bar for conviction that its statute may convict those who are engaging in protected expression, running head-on into conflict with several precedents of this Court.

4.) N.J.S.A. 2C:33-4.1 discriminates against free speech solely on its publication online--despite this Court routinely holding that the medium chosen does not allow sweeping limitations on First Amendment protected

speech. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

Finally, this is also a case where a sentencing judge denied the Petitioner the chance to meaningfully allocate or confront information at sentencing. Victim Impact Statements, which are usually provided to a defendant before sentencing as part of a "pre-sentence report" shared with the defendant and his counsel, were not available at the time the pre-sentence report was provided. They were submitted just before sentencing to the judge's chambers. The Petitioner never received them before sentencing and did not receive them at any time after sentencing--right up to the date of this petition. Petitioner has no clue what the judge repeatedly read and heavily considered from the submitted "victim impact statements" in violation of his Due Process and Confrontation Clause rights.

In reaching its decision to affirm, the state appellate court below decided that these settled principles and holdings were not to be applied to the case. Indeed, the state court gravely erred by not giving sufficient heed to the arguments concerning Petitioner's rights under the federal constitution. Petitioner thus argues that all aspects of the lower courts' decisions are erroneous and are in conflict with many long-standing decisions of this Court and constitutional protections as explained in the arguments hereinbelow.

REASONS FOR GRANTING THE WRIT

I. THE STATE COURTS BELOW ERRED IN FAILING TO FIND THAT THE "REASONABLE PERSON" STANDARD OF N.J.S.A. 2C:33-4.1(a)(2) DOES NOT SATISFY THE SCIENTER REQUIREMENT OF THE FEDERAL CONSTITUTION

N.J.S.A. 2C:33-4.1(a)(2) employs a "reasonable person" standard to criminalize certain online speech. The United States Supreme Court in Elonis v. United States, 135 S.Ct. 2001 (2015), held that a conviction under the federal statute proscribing communication of threats in interstate commerce may not be based solely on a reasonable person's interpretation of a defendant's words. The Court determined that the reasonable person standard is "inconsistent with 'the conventional requirement for criminal conduct--awareness of some wrongdoing'." Elonis, supra, at 2011, quoting Staples v. United States, 511 U.S. 600, 606-607 (1994). Since N.J.S.A. 2C:33-4.1(a)(2) employs the same standard of proof, Mr. Thieme's convictions must be vacated.

Elonis was charged with violating 18 U.S.C. §875(c) which provides: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." Specifically, using Facebook posts, Elonis allegedly threatened his ex-wife, co-workers, a kindergarten class, the local police, and an FBI agent. At trial, Elonis moved to dismiss the charges arguing that the Facebook comments were not true threats and that he was an aspiring rap artist and the comments were a form of artistic expression. Elonis, supra, at 2007. The case went to trial and the federal district court instructed the jury that Elonis could be convicted if a reasonable person would foresee that the relevant posts would be interpreted as threats. Ibid.

The relevant jury instruction read: "A statement is a true threat when a

defendant intentionally makes a stement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be intepreted 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, supra, at 2007.

Chief Justice Roberts, writing for an 8-1 majority of the Court, found that, although the statute did not explicitly establish a mental state for communicating a threat, that "does not mean that none exists." Ibid at 2009.

> "We have repeatedly held that mere omission from a criminal enactment of any mention of criminal intent should not be read "as dispensing with it". This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the moral individual to choose between good and evil." The "central thought"is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge, and the like."

Elonis, supra, at 2009; quoting Morissette v. United States, 342 U.S. 246, 250-252 (1952). The Court determined that, since the critical element which distinguishes between innocent and wrongful conduct is the threatening nature of the communication, "the mental state requirement must therefore apply to the fact that the communication contains a threat." Elonis, supra, at 2011.

The Court held that having Elonis' conviction depend upon how his posts would be understood by a reasonable person is inconsistent with "the conventional requirement for criminal conduct--awareness of some wrongdoing. Ibid.; quoting Staples v. United States, 511 U.S. 600, 606-607 (1994). The Chief Justice rejected the reasonable person standard because it "'reduces culpability on the all-important element of the crime to negligence,' and we 'have long been reluctant to infer that a negligence standard was intended in

criminal statutes.'" Elonis, supra, at 2011 (citation omitted). The Court cited long-standing precedent for its analysis. See, e.g., Cochran v. United States, 157 U.S. 286, 294 (1895) (defendant could face "liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind").

The Elonis Court rejected the reasonable person standard as presented in a jury charge in the context of a statute which did not specify a state of mind for threatening words or conduct. The statute at issue, in the case at bar, N.J.S.A. 2C:33-4.1(a)(2) provides:

> "A person commits the crime of cyber-harassment if, while making a communication in an online capacity via any electronic device or through a social networking site and with the purpose to harass another, the person . . . knowingly sends, posts, comments, requests, suggests, or proposes any lewd, indecent, or obscene material to or about a person with the intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm to his person."

The elements of cyber-harassment are (1) an online communication; (2) made to harass another; (3) knowingly sending the communication; (4) with an intent to emotionally harm a reasonable person or place a reasonable person in fear of physical or emotional harm. "The 'presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.'" Elonis, supra, at 2011; quoting United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (emphasis added by the Elonis Court). The final element of N.J.S.A. 2C:33-4.1(a)(2), the intent to emotionally harm or cause fear of physical or emotional harm, is decided based on whether a reasonable person would be emotionally harmed or would be in fear of physical or emotional harm, irrespective of what the defendant thought. Because criminal liability is not based on a defendant's "Criminal" state of mind, the scienter requirement is not met.

While it is true that, in some instances, the legislature can decide to impose strict liability for a crime, the legislative history of this statute evinces no such intent. Importantly, the statute does not lack an intent standard for the element of causing emotional harm or fear of emotional or physical harm. However, the standard set by the state legislature lacks a scienter requirement and therefore violates the Petitioner's right to due process under the Fifth and Fourteenth Amendments of the United States Constitution and its co-extensive state analogue, Article I, Paragraph 10 of the New Jersey State Constitution (1948). See United States v. Wulff, 758 F.2d 1121 (6th Cir. 1985) (eliminating the element of criminal intent in a criminal prosecution violates the due process clause of the Fifth Amendment to the U.S. Constitution unless the penalty is relatively small and the conviction does not gravely besmirch the reputation of the defendant. This Court has recognized that "a conviction under an unconstitutional law 'is not merely erroneous, but is illegal and void and cannot be a legal cause of imprisonment.'" Montgomery v. Louisiana, 577 U.S. __, 136 S.Ct. 718, 730 (2016). Additionally, the issue goes to whether the statute requires an evil or criminal intent. "'Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.'" Morissette, supra, at 250 n.4; quoting Pound, Introduction to Sayre, Cases on Criminal Law (1927). The court should address this issue because it goes to the heart of the Petitioner's state conviction.

II. THE STATE COURTS BELOW ERRED IN FAILING TO INVALIDATE N.J.S.A. 2C:33-4.1 AS OVERBROAD AND "VOID-FOR-VAGUENSS" FOR VIOLATING FREE SPEECH AND DUE PROCESS PROTECTIONS IN THE FEDERAL CONSTITUTION

New Jersey's cyber-harassment statute, N.J.S.A. 2C:33-4.1 is void-for-vagueness. It does not provide any objective, sufficient, or clear definition of several of its elements in order to properly notify a person of what expressive conduct is prohibited by law versus what has been deemed permissible and protected. The cyber-harassment statute is thus impermissibly vague because it does not provide any ascertainable or discernible definition of what specifically constitutes "lewd, indecent, or obscene material", or any specific criterion by which such conduct could be examined. Further, it does not establish what constitutes a criminally culpable level of "emotional harm" in order to justify criminalizing what has heretofore been grounds for a civil tort of libel. Because of this vagueness, N.J.S.A. 2C:33-4.1 should be held unconstitutional, invalidated, and the Petitioner's conviction should be vacated, as it violates the defendant's right to due process protected by the Federal and State constitutions.

A statute is presumed to be valid unless a challenger meets the burden of establishing its unconstitutionality. Cf. State v. Muhammad, 145 N.J. 23, 41 (1996); State v. One 1990 Honda Accord, 154 N.J. 373, 377 (1998). The vagueness doctrine is a check on a criminal statute simply because due process insists on giving "fair warning" to a person that a statute prohibits a person's conduct. State v. Badr, 415 N.J.Super. 455, 470 (App.Div. 2010); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (laws should give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly"). It is a

fundamental principle that laws regulating persons "must give fair notice of what conduct is required or proscribed". Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); United States v. Williams, 553 U.S. 285, 304 (2008) (requiring invalidation of impermissibly vague laws). In Connally, the United States Supreme Court held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Ibid. at 391. A defendant challenging a statute "must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standardd, but rather in the sense that no standard of conduct is specified at all". Hoffman Estates, supra, at 495 n.7.

That the N.J.S.A. 2C:33-4.1 renders the words as "lewd, indecent, and obscene material" in the disjunctive implies each has a separate meaning and application. While a dictionary can guide, it is the statute itself which must sufficiently define its terms and reach. The statute does not define what "lewd material" is, what "indecent material" is; or what "obscene material" is vis-a-vis what constitutes and act of cyber-harassment. Without an objective, reliable definition, and without a criterion to separate proscribed conduct from permissible expression, how can a state prosecution establish a sufficiently reliable factual basis for conviction? Petitioner asserts it cannot and that this vagueness allows the state to overreach into permissible expression.

Comparatively, New Jersey in N.J.S.A. 2C:14-4, prohibits lewdness when a non-consenting viewer is "affronted or alarmed" when he or she is exposed to graphic images or an in-person display of genitalia or of a sexual act--an act

of "irregular indulgence of lust whether public or private". See Application of Fortenbach, 119 N.J.Super. 124, 126 (Law Div. 1972) (an expungement petition after lewdness charges were dismissed); citing State v. Baldino, 11 N.J.Super. 158, 162 (App. Div. 1951). In the case at bar, the state has not established how the Petitioner's conduct--the posting of text, no photos or graphic images--was "lewd" because the cyber-harassment statute does not define what material is or is not quantifiably "lewd". No such graphics, videos, or photos were displayed. The only photos posted on the Petitioner's blog were entirely inoffensive photos saved from the alleged victims' public facebook and social media postings--which continue to be posted by the alleged victims on their online social media presence.

The lack of a definition for what constitutes "indecent material" is similarly troublesome. There is no comparable state statute for "indecency" and likewise nothing within state statutes to provide fair warning or guidance on what is prohibited or permissible in the realm of "indecent". Indecent normally refers to nonconformance with accepted standards of morality. See FCC v. Pacifica Foundation, 438 U.S. 726, 739-740 (1978); cf. FCC v. Fox, 569 U.S. 239, 249 (2012) (which criticized Pacifica, and vacated FCC action against the broadcast of nudity and expletives proscribed as "indecent" was held void for vagueness in a statutory construction banning broadcast of any "obscene, indecent, or profane langauge"). Further confusing the mix is that sexual expression which is indecent but not obscene is presently protected by the First Amendment. See Sable Communications v. FCC, 492 U.S. 115, 126 (1989). Considering this, without an objective definition "indecent" or "obscene" no distinction can be made when the examination demanded by due process to weigh what is "indecent but not obscene" (permitted) from what is "indecent and

obscene" (proscribed).

Further, despite decades of litigation on the question of obscenity, we are no closer to a definition now than we were decades ago when Associate Justice Stewart lamented that the Supreme Court was "faced with the task of trying to define what is indefinable" before he admitted that he "could never succeed [in defining it] intelligibly" but paradoxically proclaiming "I know it when I see it". See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). We still, epistemologically speaking, struggling with what "it" is.

New Jersey has struggled with defining the words "obscenity" and "obscene" as well. No state statute definites what these terms mean. Only a few other criminal statutes deal with obscene conduct, in particular with the "public communication of obscenity", N.J.S.A. 2C:34-2, which gives an equally vague, uninformative reliance on proscribed conduct that is "patently offensive". This statute would not pass constitutional scrutiny today because the United States Supreme Court has held "regulation of transmission and display of patently offensive material ran afoul of the First Amendment". Reno v. ACLU, 521 U.S. 544 (1997). "Patently offensive" should not be used as a standard here because of significant concerns of impermissible overbreadth. In Reno v. ACLU, this Court undermined the potency of the "Miller test" put forward in Miller v. California which used a "patently offensive" standard to separate obscene from not obscene. However, even in Miller, the court stated that standards for proscribed conduct be "specifically defined by applicable state law".

New Jersey state courts previously struck down an obscenity statute for not sufficiently defining the proscribed conduct required for conviction. See State v. DeSantis, 65 N.J. 462, 468-469 (1974). Further, indictments charging

defendants with obscenity have been held defective for their failure to reach an essential element of the offense scienter--a knowledge of the nature of the material. See State v. Wein, 80 N.J. 491, 495 (1979). The New Jersey Supreme Court held in Adams Theatre Co. v. Keenan, 12 N.J. 267, which scrutinzed an obscenity law repealed in 1971, that the mere fact that sexual life was the theme of the presentation did not make it obscene and that the question was whether "its dominant note was erotic allurement tending to excite lecherous desire--dirt for dirt's sake". Ibid. at 272. Without a specific statutory definition, even a dictionary definition cannot save the day or be sufficiently revealing. This Court, in Yates v. United States, 354 U.S. 298, 308-309 (1957), vacated a conviction for advocating the Communist overthrow of the Federal government because the statute hinged on an undefined element of what it meant by "organize". The Yates Court stated "dictionary definitions are of little help, for, as those offered us show, the term is susceptible of both meanings attributed to it by the parties here". Ibid. at 308-309. In a country of 330 million people, you will have 330 million vague ideas about obscenity that still fall short of an objective definition--they "know it when they see it" and all will be different. This is not the stuff a criminal conviction should be made of.

Because the cyber-harassment does not specifically define the critical terms discussed above proscribing the publishing of "lewd, indecent, or obscene material", it is impermissibly vague. It's vagueness has the unconstitutional result of prohibiting and impacting a wide swath of protected speech. Nothing the Petitioner stands convicted of publishing rises beyond the potential level to sustain culpability for the civil tort of libel--it falls short of criminal liability. In another case that worked its way through the New Jersey courts in 2016 and 2017, the Appellate Division and the state Supreme Court vacated a harassment conviction and invalidated part of the

state's harassment statute. In State v. Burkert, the appellant was convicted of harassment for circulating fliers detailing his wife's promiscuity, sleeping with inmates, and other information directed to the general public as a warning of her infidelity and vengefulness. These printed fliers were circulated in the parking lot at a shared workplace, Union County Jail, where Burkert and his estranged wife worked. Yet, the court found that the state failed to prove he intended to harass his wife and that the harassment statute was not meant to recriminalize libel. See State v. Burkert, 231 N.J. 257 (2017) and State v. Burkert, 444 N.J.Super. 591 (App. Div. 2016).

In Burkert, the State Supreme Court noted that the New Jersey legislature decided to repeal criminal libel in 1979, and that it "signaled that the criminal law would not be used as a weapon against defamatory remarks". Burkert, 231 N.J. at 274-275. Further, the court mentioned that the Model Penal Code, on which New Jersey's criminal statutes are largely modelled, did not think libel should be a criminal offense, stating:

> "The MPC commentaries reveal that a criminal libel provision was not included in the MPC because 'penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit.' Model Penal Code (MPC Tentative Draft), 250.7, comment 2 (Am.Law.Inst. Tentative Draft no. 13, 1961). Criminal laws are usually reserved 'for harmful behavior which exceptionally disturbs the community's sense of security', not for 'personal calumny'. State v. Browne, 86 N.J.Super. 217, 228, 206 A.2d 591 (App. Div. 1965) (quoting MPC tentative draft 250.7 cmt. 2)."

--Burkert, at 275. Unfortunately, New Jersey's cyber-harassment statute seems to be a backdoor attempt to re-criminalize defamatory speech and what the Model Penal Code drafters deemed (and accordingly dismissed) as an overreach. N.J.S.A. 2C:33-4.1 seems to re-criminalize libellous expression by casting a wide dragnet through undefined, vague elements that open the door for the criminalizing of all types of expression--even expression that courts have

repeatedly held to be protected speech. Thus, New Jersey's cyber-harassment statute runs afoul of the First Amendment because of its overbreadth. Further, the First Amendment protects even false statements, like libel, to make "breathing room" for free expression. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and NAACP v. Button, 371 U.S. 415 (1963).

A Court's first task is to determine whether an enactment reaches a substantial amount of constitutionally protected conduct. Hoffman Estates, supra, at 494; Also, Town Tobacconist v. Kimmelman, 94 N.J. 85, 98 (1983); State v. Badr, supra; and Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). A statute is overbroad when it permits "police and other officials to wield unlimited discretionary powers in its enforcement". State v. Lashinsky, 81 N.J. 1, 16 (1979). Further, it "provides officials with power so broad that the exercise of constitutionally protected conduct depends on their own objective views as to the propriety of the conduct. Ibid.

The Appellate Division has held that "a conveyed opinion, even if stated in crude language, is not harassment". State v. Burkert, 444 N.J.Super. at 601; citing State v. L.C., 283 N.J.Super. 441, 450 (App. Div. 1995). Further, this Court held that "disgust is not a valid basis for restricting expression". Brown v. Entertainment Merchants Assn., 180 L.Ed..2d 708 at 720 (2011). Quite clearly, government lacks the power to restrict expression because of its message, ideas, subject matter, or content. Ashcroft v. ACLU, 535 U.S. 524, 573 (2002).

In the case at bar, the Petitioner posted potentially libellous statements on the internet in the form of a blog post. It was available to the general public and written as such. Petitioner did not advertise it. Petitioner did not let anyone know he wrote it or where to find it. Search

engines eventually added it to their search results through their various SEO algorithms and content-seeking webcrawling and indexing programs. The alleged victims did not discover the blog posts until over two months after they were published. They only found them by likely repeatedly checking search results for their names--something everyone does now and then. Petitioner did not contact the victims to communicate any link or otherwise direct them to the blog post's content. In State v. Burkert, comparatively, the means of communication was a photocopied flier posted in a workplace shared with his victim. In Burkert, the victim came across the fliers haplessly while walking across the workplace's parking lot after they had been distributed to a general audience. Burkert did not contact the victim direct her to the material. However, in the Petitioner's case, it is proscribed. In Burkert, the state courts vacated his conviction and invalidated the statute. The state courts cited that despite their "vulgarity and meanness", the fliers' content was constitutionally protected speech. Burkert, 231 N.J. at 263. These two cases are cogently comparable. The basic principles of freedom of speech "do not vary...with a new a different communication medium". Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). The First Amendment covers any communication regardless of how many adults might be a part of the audience to the communication. See Burkert, 444 N.J.Super. at 602; citing Eugene Volokh "One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws and Cyberstalking", 107 N.W.U.L.Rev. 731, 732-734, 774 (2013).

Merely speaking or writing bad things about another person is not prohibited expression. Sang Lau v. Time Warner, Inc., 2013 U.S.Dist LEXIS 56816 (2nd Cir. April 19, 2013), citing People v. Bethea, 781 N.Y.S.2d 626, 1 Misc.3d 909[a] (Bronx Criminal Court, 2004). Language which is merely found

offensive by a sensative hearer cannot be prohibited consistent with the Constitution. Cohen v. California, 403 U.S. 15, 19 (1971); State v. Rosenfeld, 62 N.J. 594, 602-603 (1973) (offensive speech cannot be made criminal unless it created danger of immediate breach of the peace); cf. Burkert, 231 N.J. at 281 (speech cannot be criminalized merely because others see no value in it. The First Amendment generally prevents from proscribing speech or even expressive conduct because of disapproval of the ideas expressed). Associate Justice Douglas put it clearly: "the censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprive the states of any power to pass on the value, the propriety, or the morality of a particular expression." A Book v. Attorney General, 383 U.S. 413 (1966).

In Burkert, New Jersey's Appellate Division pointed out that many forms of expression are protected despite our disapproval:

> "United States Supreme Court precedent repeatedly holds expressions remain protected even where the content hurts feelings, causes offense, or evokes resentment. See, e.g., Snyder v. Phelps, 562 U.S. 443, 452 ... (2011) (quoting Connick v. Myers, 461 U.S. 138, 145 ... (1983) ('speech on public issues occupies the highest run on the hierarchy of First Amendment values, and is entitled to special protection'); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55-56 ... (1988) (reviewing an advertisement parody caricature of a minister in an incestuous rendezvous with his mother); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 ... (1982) ("speech does not lose its protected character, however simply because it may embarass others"); Hess v. Indiana, 414 U.S. 105, 107-108 ... (1973) (allowing expletives during a demonstration); Org. for a Better Austin v. Keefe, 402 U.S. 415, 415-420 ... (1971) (vacating prior injunction prohibiting the distribution of leaflets alleging a local businessman was engaging in "blockbusting" by spreading rumors minorities were moving into certain neighborhoods); Cohen v. California, 403 U.S. 15, 20 ... (1971) (permitting wearing of jacket bearing words "fuck the draft"); Garrison v. Louisiana, 379 U.S. 64, 77-79 ... (1964) (rejecting view defamatory speech could be punished based on motives of speaker, even if speaker expressed malice);...

--Burkert, 444 N.J.Super. at 601-602.

Petitioner asserts that the New Jersey Supreme Court's holding in Burkert, and repeated in the case at bar, that the state's cyber-harassment statute was comparatively more "precise and exacting" does not mean it is valid. As argued herein, the statute lacks definition for several key terms. Even with the court's assurance that it "limits the criminalization of speech mostly to those communications that threaten to cause physical or emotional harm", it fails to recognize that "emotional harm" is neither a precise or exacting standard even in civil law where it would otherwise be the backbone of a libel tort claim. Here, however, in the state cyber-harassment statute, the "intent to emotionally harm" or placing one "in fear of ... emotional harm" is constitutionally infirm. In the case at bar, there were no imminent threats of physical harm. The only claim of "emotional harm" is embarassment and humiliation because of the Petitioner's allegedly libellous statements. It seems to fall far short of this Court's requirement "that the term 'threat' be limited to a narrow class of historically unprotected communications called 'true threats'. To qualify as a threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely 'political hyperbole', 'vehement, caustic, and sometimes unpleasantly sharp attacks', or 'vituperative, abusive, and inexact' statements." Elonis, supra, 192 L.Ed.2d 1, 23-24 (Thomas, J. dissenting); quoting Watts v. United States, 394 U.S. 705, 708 (1969). Here, in the case at bar, embarassment or humilitation, even anger at the Petitioner's online comments is not enough. The test of imminent danger to the State or any person has not been met. See Whitney v. California, 279 U.S. 357, 378 (1927); also Dahnke-Walker Mill Co. v. Boudurant, 257 U.S. 282 (1921).

Because the Petitioner did not make any threats of physical harm or violence, and his conduct was only the use of vulgar and libellous statements as argued above, this is not a "true threat" that renders his speech without protection. Further, because "emotional harm" is a vague term concerning such a wide range of behavior, and best suited for liability in a civil tort context not a criminal proceeding, this statute gives police and prosecutors too much power to react with the "very power of the State" to criminalize what has been held to be permissible speech. It would be arbitrary to draw distinctions based on subjective beliefs on "levels of vulgarity" in this situation. Such arbitrary judgments are generally antithetical to the First Amendment. See Cohen v. California, supra at 25 (noting "one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials cannot make principled distinctions in the area that the Constitution leaves matters of taste and style largely to the individual"). The potential "emotional harm" of anger, frustration, shame, embarassment, or humiliation stemming from defamatory statements is simply government's overreach into territory many courts have held permissible and protected speech. Free speech is not defined by the wilting flowers. The First Amendment often requires an unwilling or unhappy adult to absorb the first blow of offensive yet protected speech when they are in public before turning away. See Erzonzik v. Jacksonville, 422 U.S. 205 (1975). The internet, and a blog post, is a "public space", no different from a billboard, a jacket, or a photocopied flier.

Petitioner asserts that New Jersey's cyber-harassment statute is too vaguely and broadly worded to pass constitutional scrutiny. Quite clearly, N.J.S.A. 2C:33-4.1 "does not put a reasonable person on sufficient notice of

the kinds of speech that the statute proscribes. The statutes vagueness also gives prosecuting authorities undue discretion to bring charges related to permissive expressive activities". If this was true before the New Jersey Supreme Court in Burkert in 2017, it should have been applicably true here. Because the cyber-harassment statute is not more narrowly defined, it "has the capacity to chill permissible speech". Bergen County's prosecutors acted to charge the Petitioner only because they were disgusted by libel and relied on a new, untested statute that overcriminalizes protected expression.

We are a nation of "trolls". The internet has become a vehicle for airing our true feelings, angered opinions, and even vile statements about each other and sometimes they are quite hurtful. Our public discourse is filled with the crudest comments and vituperative. Words barbed flow from the poisoned pen and tend to feel validating and cathartic in an age where everyone seems more narcissistic, selfish, frustrating, and inconsiderate of each other. While this might not be socially acceptable or palatable, and while we might wince when it catches our attention, it remains constitutionally protected.

III. THE STATE COURTS ERRED BY FAILING TO VACATE AND REMAND FOR RESENTENCING WHICH IS REQUIRED BECAUSE THE SENTENCING COURT RELIED ON VICTIM IMPACT EVIDENCE NOT PROVIDED TO THE PETITIONER AND HIS DEFENSE COUNSEL. AS NEITHER PETITIONER NOR HIS COUNSEL RECEIVED VICTIM IMPACT EVIDENCE, HE WAS DENIED A MEANINFUL ALLOCUTION OR CHANCE TO CONFRONT SAID EVIDENCE. ALSO, SENTENCING JUDGE ERRED BY CONSIDERING DISMISSED CHARGES.

N.J.S.A. 2C:44-6b acknowledges the right of victims to provide a statement for inclusion in the presentence report (PSR). The statement "may include the nature and extent of any physical harm or psychological or emotional harm or trauma suffered by the victim, the extent of any loss to include loss of earnings or ability to work suffered by the victim and the effect of the crime upon the victim's family."

Inclusion of a victim's statement in the PSR assures the defendant and defense counsel will review the statement and have the opportunity to address the information in the statement. However, HERE, in the case now raised before this Court, the victims statements were not included in the PSR provided to the Petitioner and his defense counsel. Pages 15 and 16 of the PSR document the Probation Department's efforts to contact Victim #1 (Christina Majka) and Victim #2 (Alvin A. Young, Jr.). The Probation Officer reported that the victims had not responded, stating:

> "Contact information was received from the victim office on 7/26/2018. A letter was mailed to the victim on 7/27/2018. A phone call was unable to be made as the cellphone had no answer and no voicemail. If any response is received prior to sentencing it will be given to the judge's chambers."

The Probation Department apparently forwarded the victim impact statements to the sentencing judge prior to sentencing. Both the State and the sentencing judge relied heavily on the information contained in the letters from the

victim. The prosecutor began his sentencing remarks "Briefly, Judge, Your Honor, has the victim impact statements. The victims' words sort of speak more than anything I can do.", adding that they "obviously speak to the emotional trauma that has been suffered". The sentencing judge acknowledged that he had the victim impact statements and "had the opportunity to read them" and that they had a strong impact "In fact, I read them more than once before - in preparing for today." Clearly, the victim impact statements were the most important information considered by the court in imposing sentence.

The Petitioner, in a motion for reconsideration of sentence filed after sentencing, raised the issue of the victim impact statements and argued that he should be afforded a resentencing because the victim impact statements were "not provided to the defense" and that he did not know "what exactly the sentencing judge had read and considered". Thus, he was denied the opportunity to address, correct, or dispute the information in the victims' statements. Judge Kazlau denied that request for resentencing. Judge Kazlau, in December 2018, remarked that the Petitioner "probably wanted some more time to review them" and "I have also considered the fact that Mr. Thieme has now had the benefit of reviewing the victim impact statements in this case as well as prior to the Court's reconsideration of sentence."

The sentencing judge's comments are erroneous. Petitioner never received the victim impact statements. Not before sentencing, not after sentencing, not before the court hearing his sentence reconsideration motion in December 2018 (which he could not be produced for after being transported back to federal prison in West Virginia). Petitioner continues to assert here--he has not received any victim impact statements or evidence that the judge relied upon at sentencing. Further, the court wrongly believed the fact that Petitioner

may have received the statements at some point after sentencing cured the defective sentencing procedure. Both the Sixth Amendment to the Federal Constitution and its co-extensive state analogue, Article I, Section 10 of the New Jersey State Constitution, require a defendant to be provided victim impact statements prior to sentencing. To do otherwise would violate due process and the right to confront such information.

Moreover, the fact that the Petitioner did not have victim impact statements infringed upon his right of allocution. New Jersey Court Rules, Rule 3:21-4(b) states:

> "Before imposing sentence the court shall address the defendant personally and ask the defendant if he or she wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his or her attorney."

Although fixed by court rule, the right of allocution originated in the common law. State v. Zola, 112 N.J. 384, 428-429, 431-432 (1988). When a defendant is not afforded the right of allocution, the error is structural and no prejudice need be shown. State v. Cerce, 46 N.J. 387, 396-397 (1966). While the court asked Petitioner if he had anything to say, he was denied a meaningful opportunity to allocute because he did not have the opportunity to review and at least address the victim impact statements which the court weighed heavily.

After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing hearing that is fundamentally fair. Betterman v. Montana, 578 U.S. __, 194 L.Ed.2d 723 (2016). A defendant's due process rights at sentencing includes requiring the prosecution to produce witness statements. See, e.g., United States v. Rosa, 891 F.2d 1074, 1079 (3rd Cir. 1989); e.g. Brady v. Maryland, 373 U.S. 83, 87 (1963). A defendant enjoys due process rights not to have his sentence

enhanced based on "inaccurate information", United States v. Reynoso, 254 F.3d 467, 473 (3rd Cir. 2001), citing United States v. Nappi, 243 F.3d 758, 763 (3rd Cir. 2001); "clearly erroneous facts", United States v. Wise, 515 F.3d 207, 218 (3rd Cir. 2008); Gall v. United States, 552 U.S. 38, 51 (2007), "material false information", United States v. McDowell, 888 F.2d 285, 290 (3rd Cir. 1988); and/or "unsupported speculation", United States v. Berry, 553 F.3d 273, 281 (3rd Cir. 2009). Further, courts computation of a potentially higher sentence exposure resulting from such a due process violation "too seriously affects the fairness, integrity, or public reputation of judicial proceedings to be left uncorrected". See United States v. Saferstein, 673 F.3d 237, 244 (3rd Cir. 2012); United States v. Tai, 750 F.3d 309, 320 (3rd Cir. 2014); also United States v. Higgs, 713 F.2d 39, 41-42 (3rd Cir. 1983) (that such withheld evidence is "obviously of such substantial value to the defense that elementary fairness require[d] it to be disclosed").

The lack of victim impact information violated Petitioner's basic Fifth and Sixth Amendment rights for due process and to confront the state's evidence. It was an unfair surprise that gave the state an unfair advantage against an defendant unprepared by never receiving statements used by the State and Court to impose sentence.

Finally, the sentencing judge erred in considering dismissed or acquitted conduct. In State v. Farrell, 61 N.J. 99, 107 (1972), the New Jersey Supreme Court held that unproven allegations of criminal conduct should not be considered by a sentencing judge." In an earlier case, State v. green, 62 N.J. 547, 571 (1973), the state Supreme Court said that a trial court may "consider" arrests which have not resulted in conviction, but "shall not infer guilt as to any underlying charge with respect to which the defendant does not

admit guilt". Later, in State v. Brooks, 175 N.J. 215, 229 (2002), the state Supreme Court said that a trial judge could consider arrests that resulted in dismissed or diverted charges for the limited purpose of "whether the arrest or dismissed charges should have deterred the defendant from committing a subsequent offense. However, in State v. K.S., 220 N.J. 190, 199 (2015), which involved the denial of an application for pre-trial intervention (a diversionary prosecution program), the Court specifically "disapproved... those statements in Brooks and Green because deterrence is directed at persons who have committed wrong acts". Thus, unless there are "undisputed facts of record"..."prior dismissed charges may not be considered for any purpose". Ibid. Here there are several criminal offense arrests listed on the Petitioner's jacket--that he was not convicted of and resulted in dismissal or acquittal. The sentencing judge clearly considered dismissed charges when he stated "[Defendant] has multiple other arrests involving similar conduct, although not resulting in a disposition of conviction, certainly, certainly, give this Court great concern and certainly evidences that Mr. Thieme is a risk to commit another offense." The sentencing court's consideration of dismissed charges impacted the court's view of the defendant and requires that the matter be remanded for resentencing if the conviction is not vacated for other grounds presneted hereinabove.

Further, the use of dismissed or acquitted conduct has significant Fifth and Sixth Amendment implications--essentially punishing a defendant for what they have not been convicted of. That should not be acceptable in the United States as it is a constitutionally unjust practice. This question allows this Court to review whether United States v. Watts, 519 U.S. 148 (1997) was appropriately decided and if this unjust practice continues on both the

federal and state levels.

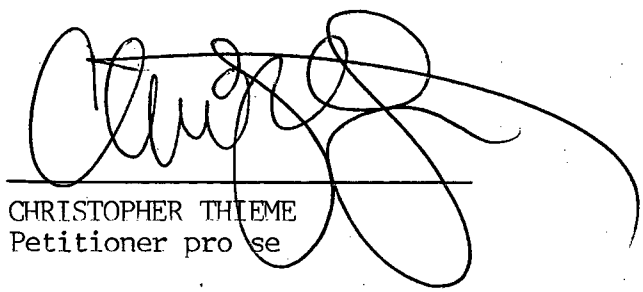
CONCLUSION

This case presents significant questions of limitations of free speech, due process, and confrontation clause issues that can extend the precedents of this court and contribute to the development of the law. Unfortunately, the State Courts in New Jersey offer case law that is contradictory and conflict with itself in such a way that this Court should correct and clarify. In the Petitioner's case and appeal below, the courts ignored long-standing state precedents, and ignored long-standing holdings of this Court and other federal courts regarding substantial questions concerning the denial of the Petitioner's rights.

For the reasons set forth above, Petitioner respectfully requests that this Court grant and issue a Writ of Certiorari and bring this case before the Court for review.

I declare under penalty of perjury that the foregoing is true and correct. Executed March 11, 2021.

Respectfully submitted,



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