No. 21-

IN THE

Supreme Court of the United States

T.E.L., A MINOR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIRST DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Florida Statute § 790.162 (2007), which makes it a second degree felony to threaten to "throw, project, place or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property" violates the First Amendment?

2. Whether the 2017 Florida jury instructions, approved after the denial of certiorari in *Perez v. Florida*, 137 S.Ct 853, 197 L.Ed.2d 480 (2017) (Sotomayor, J. concurring in the denial of certiorari), perpetuated the First Amendment violation and violated due process of law by stating that the statute "requires that the threat convey an intent to do bodily harm or property damage, not necessarily that the defendant had the intent to actually do such harm or damage."?

3. Whether the Statute and jury instructions are contrary to the holdings in *Elonis v. United States*, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015); *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536 (2003); *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399 (1969)?

RELATED CASES

- *State of Florida v. T.E.L.*, 2019 CJ 000618 A, In Juvenile Court, Escambia County, Florida. Judgment entered December 12, 2019.

- *T.L. v. State of Florida*, 1D20-0208, Order of the District Court of Appeal of Florida, First District, entered February 22, 2021. Rehearing denied March 24, 2021

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T.E.L., a minor, petitions this Court to grant certiorari and address whether a conviction under Florida Statute §790.162 which dispenses with any *mens rea* requirement, violates the First Amendment.

OPINIONS BELOW

The opinion of the First District Court of Appeal for the State of Florida is referenced as *T.E.L. v. State*, 313 So.3d 1148 (Table), 2021 WL 672055 (Fla. 1st DCA 2021) (*reh'g denied* March 24, 2021). The decision and order denying rehearing are at Appendix 1a and 43a, respectively.

JURISDICTION

Review is sought pursuant to 28 U.S.C. §1257(a). The decision below – *T.E.L. v. State*, 313 So.3d 1148 (Fla. 1st DCA 2021) (Table), 2021 WL 672055 (*reh'g denied* March 24, 2021) App. 1a – is a decision of the highest state court having jurisdiction.

A timely Motion for rehearing, rehearing en banc, and motion for written opinion was denied by the Florida District Court of Appeal, First District, on March 24, 2021 (App. 43a). On July 19, 2021, this Court, by an administrative Order, stated "in any case in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for writ of certiorari remains extend 150 days from the date of

that judgment or order." This Petition is filed within 150 days of March 24, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I, 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.

United States Constitution, Amendment XIV, Sec. 1 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;

Florida Statute §790.162, Threat to throw, project, place, or discharge any destructive device, felony; penalty, provides:

> It is unlawful for any person to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person, and any person convicted thereof commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statute §790.162 - Jury Instructions Amended (2017), provides:

Jury Instructions 10.8 is amended to make clear that the offense as charged under section 790.162 Florida Statute (2017) (Threat to throw, project, place, or discharge any destructive device, felony; penalty), *requires that the threat convey an intent to do bodily harm or property damage, not necessarily that the defendant had the intent to actually do such harm or damage,* that the harm or damage was actually possible, or that there was an actual destructive device, citing *Valdes v. State* (1983) and *Reid v. State* (1981). (Emphasis supplied).

STATEMENT OF THE CASE

T.E.L. was a 12 year old 7th grade student in Escambia County, Florida, when, on September 26, 2019, he approached his teacher as she stood in the doorway of the classroom waiting for the 6th period bell to ring, and sought permission to go to the bathroom.

The teacher testified T.E.L. gestured toward the bathrooms while holding up another student's Chromebook case and said: "This is my bomb. I'm going to blow up the boy's bathroom." App. 12a. The teacher told T.E.L. to go inside the classroom and she called the school administrator. Asked if she thought he had a bomb, the teacher answered: "No, he - - no." App. 16a.

When questioned by the school's resource officer, T.E.L. wrote in a sworn statement: "I said I have a bomb and I'm finna [fixing to] blow up the bathroom." T.E.L. T.E.L. later testified at trial, saying that he was referring to having to go to the bathroom. App. 27a.

The middle school Dean said T.E.L. "told me that he had done something as a joke and he thought it would be funny, but it was not." App. 18, 28a.

On November 13, 2019, the State filed a Delinquency Petition charging T.E.L. with violating §790.162 Fla. Stat., a second-degree violent felony bomb threat charge punishable by up to 15 years in prison.

On December 12, 2019, a bench trial was held in Escambia County Circuit Court, Juvenile Division. Petitioner T.E.L. was represented by counsel.

At the start of the trial, T.E.L.'s counsel "[i]n lieu of an opening . . . in preparation for my request for judgment of acquittal . . ." said "when the government rests, my judgment of acquittal argument will address the fact that there is no actual device, it will further address arguments about mens rea." App. 9a.

After the State presented its case, T.E.L.'s counsel formally moved for a judgment of acquittal. App. 19a. His counsel pointed out the lack of evidence of mens rea; that there was no "device" and no evidence constitute[ing] a prima fascia case of guilt." App. 19-20a. After the close of all evidence, the motion was renewed and denied. App. 36a.

The State argued that it had to prove only two elements in the jury instructions, beyond a reasonable doubt, and that it was not required that the State need to prove intent or that the teacher believed T.E.L.'s words were a threat. The prosecutor said:

> She [the teacher] said she was concerned that he said that, but, yeah – I mean, she didn't think that he had a bomb because he's a 12-year-old-kid, of course, but that's not what – that's not one of the elements that I have to prove. The only elements I have to prove is that the threat conveyed an intent to do . . . damage to the property of others.

App. 38-39a.

T.E.L.'s counsel again urged the judge to consider whether T.E.L.'s words alone – without an intent to convey a threat or do damage to property – were sufficient to sustain a conviction. App. 39a.

Citing the language of Fla. Stat. §790.162 along with the jury instructions and case law thought by the court to be relevant, the trial judge concluded that the State had interpreted the statute correctly: "[I]t is not necessary for the State to prove the defendant had the actual intent to cause harm or damage, or that he had the ability to carry out the threat, or that there was an actual destructive device." App. 40-41a.

T.E.L. was found guilty. App. 41a. The trial court withheld adjudication of guilt and placed T.E.L. on 7 years of probation. App. 4a. The Court imposed

"$186 in court costs, $100 costs of prosecution. . . . 50 hours of community service . . . [letters of] apology to the principal of the school and [teacher]. . . . and a 500-word essay. . . . App. 4-5a.

T.E.L. was required to attend school every day, no tardiness, no unexcused absences, no referrals, no trouble anywhere including on the bus, the bus stop, the cafeteria, or after school. He was ordered to report to the school resource officer every week, and to truthfully answer any and all questions from the probation officer and to comply with all instructions. App. 5-6a.

A disposition order was entered reflecting the above terms and conditions. A timely notice of appeal was filed in February 2020. The First District Court of Appeal affirmed the lower court's conviction, *per curiam*, on February 22, 2021. App. 1a. A motion for rehearing, rehearing *en banc*, and a written opinion was filed on March 2, 2021. The motion was denied on March 24, 2021. App. 43a.

T.E.L.'s 7 year probation sentence was terminated in March 2021. Pursuant to Florida Statute §985.04(1)(b), a record of the juvenile proceedings remains extant.

REASONS FOR GRANTING THE PETITION

The decision below – a per curiam affirmance of a felony conviction and seven year probation of a 12 year old boy for showing a Chromebook computer case and saying "This is my bomb" and "I'm going to blow up the boy's bathroom" – conflicts with the First

Amendment principles set forth in *Elonis v. United States*, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015); *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536 (2003); *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399 (1969).

A. The Clear Rejection of *Elonis v. United States*

The Florida Statute under which T.E.L. was convicted, and the applicable jury instruction leave no doubt that words alone – without the need to show that a defendant had an intent to actually do harm or damage, is/was sufficient for conviction. Indeed, the trial court convicted T.E.L. on words alone:

> THE COURT: All right. In reviewing the statute and the case law and jury instructions provided to the Court by the [Florida] supreme court, there are two simple elements to be proven beyond a reasonable doubt:
>
> Did he threaten to throw, place, or project, or discharge a destructive device?
>
> Did that threat convey an intent to do bodily harm or property damage?
>
> ***
>
> The First District Court of Appeal 36 years ago in *Valdes* [*v. State*, 443 So.2d 221 (Fla. 1st DCA 1983)] in a case that still appears to be good law from the Court's review, and is still part of the jury instruction, and was followed in *Reid* [*v. State*, 405 So.2d 500 (Fla. 2d DCA 1981)] by the Second D.C.A. or – actually, that

> came first – it is not necessary for the State to prove the defendant had the actual intent to cause harm or damage, or that he had the ability to carry out the threat, or that there was an actual destructive device. There are other statutes that deal with possession of destructive devices.
>
> Here, the evidence showed, and the video as well, defendant not only made a comment, but made a gesture, was carrying an item and made words that were a threat that he had a bomb, which is a destructive device by definition, and that he threatened to blow up the bathroom, and damage the property of Ferry Pass Middle School.
>
> Now, the consequences of that, the Court will determine at sentencing. But it appears to the Court that beyond a reasonable doubt, the elements of the offense have been proven.
>
> ***
>
> I am finding him guilty.

App. 41a.

From the outset of the trial defense counsel had "in preparation for my request for judgment of acquittal" told the court that "mens rea" was an issue under "statute 790.162." App. 9a. At the end of the State's case the Court said "I'm going to deny the judgment of acquittal." App. 24a. At the end of the case, the Court said: "All right. I am going to deny the motion for judgment of acquittal." App. 36a.

The Initial Brief on appeal to the First District Court of Appeal presented, *inter alia*, these two arguments:

> II. THE TRIAL COURT ERRED IN FAILING TO GRANT THE MOTION FOR DISMISSAL AND IN FAILING TO ACQUIT APPELLANT BECAUSE THE TRIAL COURT WAS REQUIRED TO READ A MENS REA INTO THE STATUTE
>
> III. §790.162 FLORIDA STATUTES IS UNCONSTITUTIONAL ON ITS FACE BECAUSE IT VIOLATES SUBSTANTIVE DUE PROCESS PRINCIPLES

The body of the appellate brief relied extensively on "*Elonis v. United States*, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015)."

The Florida District Court of Appeal, First District affirmed T.E.L.'s conviction per curiam: "Per Curiam Affirmed." App. 1a.

B. The Conflict with This Court's Decisions As Explained by Justice Sotomayor

Justice Sotomayor concurred in the denial of certiorari in *Perez v. Florida*, 137 S.Ct. 853, 197 L.Ed.2d 480 (2017), which involved the same statute (§790.162 (2007)), writing: "In my view, however, the jury instruction—and Perez's conviction—raise serious First Amendment concerns worthy of this Court's review. But because the lower courts did not reach the

First Amendment question, I reluctantly concur in the Court's denial of certiorari in this case." *Id.* at 854 (Sotomayor, J. concurring).

However, in *this* case, the trial court and the Florida appellate court reached the First Amendment question – and rejected it. The trial court, by denying the motion for judgment of acquittal, and the Florida First District Court of Appeal, by per curiam affirming the trial court, have presented the Constitutional question which Justice Sotomayor presciently identified.

Justice Sotomayor discussed the decisions which supported her view that:

> The jury instruction in this case relieved the State of its burden of proving anything other than Perez's "stated" or "communicated" intent. This replicates the view we doubted in *Watts* [*v. United States*, 394 U.S. 705 (1969)], which permitted a criminal conviction based upon threatening words and only "'an *apparent* determination to carry them into execution.'" 394 U.S., at 707, 89 S.Ct. 1399. And like the prima facie provision in *Black* [*Virginia v. Black*, 538 U.S. 343 (2003)], the trial court's jury instruction "ignore[d] all of the contextual factors that are necessary to decide whether a particular [expression] is intended to intimidate." 538 U.S., at 367, 123 S.Ct. 1536 (plurality opinion).
>
> Context in this case might have made a difference. Even as she argued for a 15–year

> sentence, the prosecutor acknowledged that Perez may have been "just a harmless drunk guy at the beach," Sentencing Tr. 35, and it appears that at least one witness testified that she did not find Perez threatening, Pet. for Cert. 8. Instead of being instructed to weigh this evidence to determine whether Perez actually intended to convey a threat—or even whether a reasonable person would have construed Perez's words as a threat—the jury was directed to convict solely on the basis of what Perez "stated."
>
> In an appropriate case, the Court should affirm that "[t]he First Amendment does not permit such a shortcut." *Black*, 538 U.S., at 367, 123 S.Ct. 1536 (plurality opinion). The Court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*.

Id. at 855.

This is the appropriate case.

In *Elonis*, the defendant "requested a jury instruction that 'the government must prove that he intended to communicate a true threat.'" The District Court denied the instruction. The government argued "that it was irrelevant whether Elonis intended the postings to be threats – 'It doesn't matter what he thinks.'" 575 U.S. at 732. Elonis raised the issue in the Court of Appeals "contending that the jury should have been required to find that he intended his quotes to be threats." *Id.* The Court of Appeals "disagreed, holding

that the intent required . . . is only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat." *Id.*

This Court reversed, holding that "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil. . . . '" *Id.* at 740 (citing *Morisette v. United States*, 342 U.S. 246, 252 (1952)).

The proceeding against T.E.L. violated that principle. The conflict with *Elonis* is clear.

CONCLUSION

For the foregoing reasons the Court should grant the Petition.

Respectfully submitted,

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