No. _____

In The

Supreme Court Of The United States

DANIEL KIM,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS
Respondent.

On Petition For Writ Of Certiorari
To The Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state court is prohibited from unilaterally determining whether a defendant's written speech on his blog is protected or criminal, without having to submit that issue/defense to the jury.
2. Whether a state court must instruct a jury on the federal definitions of *fighting words* and *true threats* as well all federal standards for determining whether speech is criminal or protected when a defendant raises the First Amendment as a defense.

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APPENDIX

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OPINION BELOW

The memorandum and order of the Massachusetts Appeals Court is reported at 101 Mass. App. Ct. 1124, 199 N.E.3d 887 (2022), and is reproduced in the Appendix.[1] [App. 5]. The order of the Massachusetts Supreme Judicial Court denying the petitioner's request for further appellate review is reported at 491 Mass. 1103, 201 N.E.3d 709, and is reproduced in the Appendix. [App. 4].

STATEMENT OF JURISDICTION

The order of the Massachusetts Supreme Judicial Court affirming the petitioner's conviction and the denial of his petition for further appellate review entered on January 13, 2023. The petitioner seeks review of a judgment by the highest State court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, Free Speech Clause provides: "Congress shall make no law ... abridging the freedom of speech ...."

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right

[1] Citations to the appendix will be referred to by "App." followed by the page number. Citations to the trial transcripts will be referred to by volume number, or date of a pretrial hearing, followed by the page number.

to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution, Section 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; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. INTRODUCTION

The issues raised are paramount matters for this Court to resolve. The facts of this case are straightforward; the defendant made disparaging written remarks against the complainant, a family friend on his online blog. The Commonwealth of Massachusetts indicted him in significant part, on his online written speech. Trial counsel asked the court in a pre-trial motion to dismiss the indictments premised on his online speech claiming the First Amendment protected the disfavored speech. The motion court denied the motion without discussing the First

Amendment defense. The trial judge took up the First Amendment issue after the Commonwealth had presented its case. The prosecutor argued the speech was not protected and that the motion judge had already decided the constitutional issue. Defense counsel requested a jury instruction as to the First Amendment defense. This exchange then brought to the court the issue whether the First Amendment question "is an issue for a jury or is this simply a question of law for the Court." The trial judge determined "that the Court can rule on that [whether specific speech is protected or not] as a question of law," holding that the defense isn't necessarily "entitled to a jury instruction on it [the First Amendment]." [Tr. **6**, 108-09]. Defense counsel argued that it was the right of the jury to decide the free speech issue.

The trial judge then ruled that the jury had no place making a determination of the free speech issue, stating that "if it's protected speech as a matter of law that [the motion judge] should have allowed the [dismissal] motion and [the trial court] should have allowed your motion [for required finding of not guilty]." [Tr. **7**, 14]. The trial judge prohibited defense counsel from raising the First Amendment/protected speech defense in his closing argument before the jury, and the trial court did not accordingly instruct the jury on the elements of protected speech or the First Amendment. Meaning, the Commonwealth easily obtained its convictions.

B. PROCEDURAL HISTORY

On September 30, 2014, a Norfolk County grand jury returned indictments against the defendant, Daniel Kim, for violating G.L. c. 265, § 43(a) (Stalking), c. 265, § 13H (Indecent A&B On Person 14 Or Over), c. 268, § 13B (Witness Intimidation), c. 265, § 43A(a) (Criminal Harassment), and four counts of violating c. 258E, § 9 (Violating a Harassment Prevention Order) (1482CR00816). [App. 17-18, 20, 35-42]. The defendant pled not guilty to the charges on October 17, 2014. [App. 20].

The defense filed a motion to dismiss on July 22, 2016, and the Commonwealth filed it opposition on August 17th. [App. 23, 48, 66]. The matter was taken up by Judge Cannone at a hearing on August 18, 2016. The court denied the motion in a brief memorandum of law issued on September 9, 2016. [App. 23, 85].

Trial commenced before Judge Cosgrove and a jury on May 15, 2018. [App. 20, 28]. At the conclusion of the Commonwealth's case, and again at the close of all the evidence the defense moved for a required finding of not guilty, which the court denied. [App. 29, 107-119]. On May 23, 2018, the jury returned a verdict of guilty on all counts. [App. 30, 120-27]. The defense then filed a motion for a required finding of not guilty after the verdict, which was again denied. [App. 31, 128].

Judge Cosgrove sentenced the defendant on Count 1 (Stalking) to a 4 to 5 year prison sentence. On Count 2 (Indecent A&B), the sentence given was a 3 to 5 year prison term, to be served consecutively with Count 1, with a credit of 287 days. As to Count 3 (Witness Intimidation), the Court sentenced the defendant to 20 years probation, with conditions and where the defendant was incarcerated, the probation would be unsupervised and supervised upon release. On the remaining counts, Count 4 (criminal harassment), and Counts 5-8 (violation of harassment prevention order), the Court sentenced the defendant to 20 years probation, with conditions, concurrent with Count 3, again unsupervised while incarcerated and supervised upon release. [App. 31-32]. The defendant filed a timely Notice of Appeal on June 13, 2018. [App. 33, 130]. On November 10, 2022, the Appeals Court affirmed the defendant's conviction in an unpublished opinion. [App. 5-15]. The defendant sought further appellate review of the decision rendered by the Appeals Court from the Massachusetts Supreme Judicial Court. That petition was denied on January 12, 2023. [App. 5].

C. FACTS PRESENTED AT TRIAL

LK,[2] the victim in this case came to know the defendant, Daniel Kim when her parents bought a printing business from the defendant's

[2] In accordance with Massachusetts court practice, a pseudonym consistent with the indictments has been used for the complainant.

parents in Brookline, MA. [Tr. **3**, 58]. John and Susan Kelley bought the business from Dae Sik Kim in 1985. [Tr. **3**, 55-56, 59-60; **5**, 85]. At this time the defendant was 40 years of age and LK was 16. [Tr. **3**, 58; **5**, 87]. The two families became friendly with one another. [Tr. **3**, 60]. The defendant maintained friendly relationship with the Kelley's and because the Kim family initially lived behind the Kelley's business, the defendant would perform odd jobs like helping set up computer systems. [Tr. **3**, 60, 62-64; **5**, 88-90]. As the years progressed the defendant continued visit the Kelley's. For example, it was not unusual for the defendant to leave work and go to the Kelley's for dinner. [Tr. **5**, 91]. In 1999 the Kelley's moved the business to Canton. [Tr. **3**, 64; **5**, 89]. Even after the move the defendant continued to visit the business as a friend, and would help out with whatever was needed as far as networking or computer problems. [Tr. **3**, 64; **5**, 90].

The Kelley's didn't keep specific details on the defendant whereabouts but recalled that he moved to Virginia at one point for a period of time and they lost contact for a while when he was out of state. [Tr. **3**, 64-65]. Around this time the defendant married, and the Kelley's attended the wedding in Virginia. [Tr. **3**, 65]. Mr. Kim's wife passed away sometime thereafter. [Tr. **3**, 121].

When LK was in high school, she would often assist her parents at their Canton business beginning around 2006. [Tr. **3**, 66-67]. Around

this same time period the defendant returned to Massachusetts and continued, on occasion (a couple times a year) assisting the Kelley's at the business. [Tr. **3**, 67; **4**, 18-19]. As before, the defendant would regularly visit the Kelley's home in Avon, specifically to seek out LK. [Tr. **3**, 68; **5**, 92]. He would also help out around the house with household projects, for example he offered to repair the family's faulty clothes dryer or work on fixing problems with the TV and the WiFi. [Tr. **3**, 68; **5**, 91]. He would often be at the Kelley's home for hours. [Tr. **5**, 92]. During the years that LK was in high school, the defendant would also visit the Kelley's home on Cape Cod, again to visit the family or to assist with needed household projects, like to set up a security camera system for that house. [Tr. **3**, 69]. At this time Mr. Kelly thought that the association between the defendant and LK was a "respectful," adult/child relationship and/or a "friendship." [Tr. **3**, 69-70]. During this time period both parents testified there was nothing unusual about his interactions with their daughter; no red flags that came up in that time. [Tr. **3**, 70; **5**, 92].

LK herself testified that growing up she didn't really know the defendant, she just kind of knew of him. [Tr. **4**, 18]. When she got a bit older and entered high school, LK began assisting in the Canton business, and she would see him "sporadically." [Tr. **4**, 18].

During her high school years, LK would also see the defendant outside of work when he occasionally made the effort to be involved in the family's activities. [Tr. **4**, 19]. LK described it as he would "sort of show up uninvited." [Tr. **4**, 19]. She characterized her interactions with the defendant during her high school years as "polite and like just trying to keep her distance without jeopardizing her parents' working relationship." [Tr. **4**, 20]. She testified that she kept a distance from him because he made her extremely uncomfortable, calling him "creepy" since he would look at her, or make inappropriate comments, or touch her, which to her seemed inappropriate. [Tr. **4**, 20-22]. But when she needed someone to help her fulfill her required driver's education hours, she did allow the defendant to drive with her. [Tr. **3**, 121-22; **4**, 20-21].

Mrs. Kelly testified that in April of 2010, on her daughter's birthday, the defendant showed up at their business. [Tr. **5**, 93]. Without being invited, the defendant showed up at the restaurant where the family was celebrating and was described as very happy to be there and he sat right next to LK. [Tr. **4**, 22-23; **5**, 94].

LK began college in the fall of 2010 and lived in a dorm on campus. [Tr. **3**, 70; **4**, 24; **5**, 94-95]. After each academic year that followed, LK bounced between the family homes in Avon and the Cape, and worked over the summer. [Tr. **3**, 70-71; **4**, 24-26; **5**, 95]. The summer following her freshman year, during the summer of 2011, the defendant

went to the Kelley's home on the Cape. [Tr. **3**, 71-72]. The defendant's sister also had a place on Cape Cod and sometimes he would stop by the Kelley's home on his way to or from his sister's home. [Tr. **3**, 72]. When the defendant would visit the Kelley's home on the Cape, he would often bring an ice coffee for LK. [Tr. **5**, 97].

During the summer of 2011, between her freshman and sophomore years, LK testified that she encountered the defendant when he did I.T. work for her parents at their business or when he did household improvement projects at either the Avon or Cape homes. [Tr. **4**, 26]. She characterized the defendant's "aggressive" behavior toward her that summer as "distressing and overwhelming," and that it made her feel "uncomfortable." [Tr. **4**, 26]. For example, when the defendant was fixing the family clothes dryer at their Avon home, she had worked late into the evening as a waitress, and the defendant would sometimes wake her up in the morning by going into her room and poke her or hold something cold (like an ice coffee) up against her to "startle" her awake. [Tr. **4**, 27-28]. She also testified that he would follow her around the house regardless of what she was trying to do. [Tr. **4**, 29]. He would just "sort of bother" her and he "would just chatter constantly about anything." [Tr. **4**, 29]. LK tried to avoid the defendant, and also described that the defendant would engage in what he termed a "tickle fight" where he would "sort of pounce" on and "attack" her and try to

tickle her. She would respond by trying to "push him away" because she didn't like that. [Tr. **4**, 29-30]. He would also "spank" as a jest but that action "was never taken as a joke" by LK. [Tr. **4**, 30-31]. He also made statements to her that her family members were "incapable of loving" her and "they don't care about" her and that she should not want to "wind up like them," that they were "basically a lost cause." [Tr. **4**, 31-32]. He would also say that all of her "friends were losers and that" she "could do better," and that "they weren't going to support" her "or be there for" her "and that everyone was trying to bring" her "down." [Tr. **4**, 32]. LK testified that she "tried to limit any back and forth" discussion with him because she "didn't want to believe those things were true." [Tr. **4**, 33].

She also testified that one morning he related a dream he had where she was on his boat with him and also present were some children, and they were riding into the sunset "or something to that effect." During that conversation with the defendant about the dream she never told him that she wanted to be married and to have children with him. [Tr. **4**, 34-35].

LK also specifically recalled that around June 10, 2011, she was in her living room. [Tr. **4**, 35]. As she was watching TV he attacked her in a "tickle fight." As she laid on the couch, he pinned her down and started touching her with his hands. She tried to push him off and told

him to "stop," and to "get off" her. [Tr. **4**, 36-37]. As he had her pinned, he used his hands and fingers to tickle her and then he "grabbed" her breast over her clothes, squeezing "really hard" which caused a "surge of anger and disgust." She pushed him off and ran into the bathroom off of the living room and locked the door and waited until he left. [Tr. **4**, 37-39]. The defendant subsequently contacted LK repeatedly that summer through a bombardment of "emails and texts," and through social media accounts. [Tr. **4**, 39].

There was also testimony that in the summer in 2011 the defendant arrived at the Kelley's Cape home around 8 or 8:30am inquiring about LK. [Tr. **3**, 72-74; **5**, 98]. The defendant's demeanor was described as "frantic," and "agitated." [Tr. **3**, 74; **5**, 98]. He had a letter he wanted to give to LK. [Tr. **3**, 74; **5**, 99-100]. The defendant left and Mr. Kelley called his daughter letting her know her that the defendant had left their house and was going somewhere. [Tr. **3**, 75-76**5**, 100]. There was further testimony that the defendant then showed up at the Kelley's Avon home and began ringing the doorbell. [Tr. **4**, 47, 49-51]. LK called her parents to tell them that the defendant was at the home. [Tr. **4**, 51-52]. Mr. Kelley called the defendant and he left the home. [Tr. Tr. **3**, 77; **4**, 52-54]. This episode made LK feel "scared," "intimidated," "very alarmed" and "like [she] was in danger. [Tr. **3**, 78; **4**, 55].

About a week or two after that episode the defendant returned to the Avon house. Both LK's parents observed the defendant at the bottom of the outside stairs early in the morning. [Tr. **5**, 100-02]. When confronted, he stated that he wanted to see LK and that he "wanted to hear from her, himself, that she didn't want to see him." [Tr. **5**, 102]. He then walked away, as though he had parked his vehicle away from the house. [Tr. **5**, 103].

Over the course of that summer of 2011, the family became aware of the defendant's blog, titled "Adrift at Sea" associated with his website, www.dankim.com. [Tr. **3**, 103]. In the blog the defendant used LK's real name but usually referred to her under the pseudonym "Elie." [Tr. **3**, 103-04]. On August 10, 2011, LK went to Stoughton District Court and received a temporary harassment prevention order. The following week, the order was extended a year. [Tr. **3**, 104; App. 161]. LK returned to court each year and had the order extended. [App. 161-68].

On January 18, 2012, the defendant reached out to Kyle Black who oversaw the dorm where LK lived during the school year. [Tr. **6**, 49-53]. The meeting lasted 30-40 minutes. [Tr. **6**, 54]. The defendant identified LK and showed some Facebook and Twitter printouts and at one-point informed Mr. Black that he had been in a romantic relationship with LK. [Tr. **6**, 55]. Mr. Black reviewed the printed social media posts and believed that they looked to him like "pretty average

college behavior." [Tr. **6**, 56-57]. The following week the defendant left two voice mails for Mr. Black stating that he "wanted to check on the progress of anything about" LK. [Tr. **6**, 56-57]. Mr. Black did not return the calls, but he did write a report documenting the meeting, which was not standard practice. [Tr. **6**, 57-58]. Because of the unusual nature of the meeting, Mr. Black spoke with the college police about the meeting, but did not speak with LK. [Tr. **6**, 58-59].

In January 2012, an officer with the college police thereafter contacted the defendant via telephone and read a no trespass letter to him that he would no longer be allowed to come onto the campus and would be subject to arrest. [Tr. **6**, 62-65]. The campus police had become aware of the non-harassment order.[3] [Tr. **6**, 64]. Later that same year, on October 22, 2012, a college police officer met with LK to inform her that he had become aware of the defendant's blog that was referencing her. [Tr. **6**, 65-67]. The posts intimated that LK had drug and alcohol issues, "and that she was basically out of control." [Tr. **6**, 67]. Having been shown the blog posts LK appeared "to be quite upset," and "was teary eyed," and "seemed to be concerned." [Tr. **6**, 67].

On August 8, 2013, the defendant mailed a package to the Kelley's Avon home addressed to the Kelley's other, younger daughter, Bridget.

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[3] Later, on August 16, 2012, the harassment prevention order was amended to prohibit the defendant from entering the college campus. [App. 161-62].

[Tr. **3**, 109-10]. The package contained a thumb drive, a letter explaining what was on the thumb drive, and a couple of self-help type books. [Tr. **3**, 110-16]. One of the books appeared to be for Alcoholic Anonymous. [Tr. **3**, 116-17]. The parents alerted LK about the package. [Tr. **3**, 117]. At the time that the package arrived in the mail, there was an upcoming court hearing scheduled to extend the harassment order. [Tr. **3**, 118]. The package and its contents were taken to the court hearing and later to the Avon Police Department. [Tr. **3**, 118-19].

Avon Police Officer Peter Hutchings received the package and reviewed the materials, which included a letter, an envelope that was in with the letter and a thumb drive or a removable disc drive and two books. [Tr. **6**, 5-7]. The thumb drive contained several folders. [Tr. **6**, 8]. One file folder was titled "About [LK]" that contained some articles and some Tweets, related to LK. [Tr. **6**, 10]. These materials were as follows: a Brockton Enterprise article about sex at D.W. Field Park, and an article titled, "The communication is key," [Tr. **6**, 12]; the Fall 2010 and Fall 2011, Dean's List, of the college that LK attended, [Tr. **6**, 12]; an article from the Hingham Journal on marijuana arrests, [Tr. **6**, 12]; a vine, which is a video of LK, [Tr. **6**, 12]; a letter titled "Saving Ellie," [Tr. **6**, 12]; snapshots of a Tweet narrative LK posted, [Tr. **5**, 12]; and a video of LK from 2008 playing Scrabble. [Tr. **6**, 12-13].

Another folder was titled "Articles I think you must read." [Tr. **6**, 14]. The documents contained within that file folder were described as articles mostly about addiction recovery. [Tr. **6**, 15-16]. Another folder was titled "From the blog." [Tr. **6**, 16]. In that folder were forty-two "Adrift at Sea" blog entries. [Tr. **6**, 16-17]. The August 8, 2013, blog entry titled "Stand up for yourself," caught the attention of Officer Hutchins. [Tr. **6**, 17; App. 157-60]. There was also a folder on the thumb drive called "Videos." [Tr. **6**, 23]. At the time Officer Hutchings reviewed the material he was aware that there was an upcoming court hearing at the Stoughton District Court to extend the harassment prevention order. [Tr. **6**, 19-20]. Officer Hutchins also visited the blog online and testified that one did not have to enter a password to access the blog. He met with LK on August 31, 2014, at the police station. [Tr. **6**, 21]. At that meeting she provided thee officer with two printed out blog posts, dated August 1, 2014 and August 15, 2014. [Tr. **6**, 22-23; App. 131-156].

REASONS FOR GRANTING THE WRIT

I. A State Court Is Prohibited From Unilaterally Determining Whether A Defendant's Written Speech On His Blog Is Protected Or Criminal, Without Having To Submit That Issue/Defense To The Jury

The trial court created a structural error[4] by unilaterally determining that the defendant's written speech was not protected

[4] A structural error, affects the framework within which the trial proceeds, and defies harmless error analysis. Thus, when a structural

under the first amendment and then keeping from the jury its right to pass on the whether the defendant's speech is protected expression or criminal. That has always been and must remain for the jury to determine. Prevailing professional judges think admirably of the modern-day efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. But it would do well for professional judges to remember that the courts are part of the State. This Court must place particular emphasis on the role of the jury as a check on the government generally. Conducting a jury trial is a check on the exercise of judicial power, and the court cannot infringe on the province of the jury. *See Blakely v. Washington*, 542 U.S. 296, 308 (2004) (jury trial is not a limitation on judicial power; jury power limits judicial power when the judicial power infringes on the province of the jury).

Both the U.S. and Massachusetts Constitution's guarantee the right to a jury trial in criminal prosecutions. *See* U.S. Const., Amend. 6th, 14th; Mass. Const., Pt. 1st, Art. 12. This right has been incorporated against the states. *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). Both the U.S. and the Massachusetts Constitutions also protect a

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error is objected to and then raised on direct review, the defendant is entitled to relief without any inquiry into harm. *See Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 1902-03 (2017). *See also Neder v. U.S.,* 527 U.S. 1, 8 (1999) (collecting examples).

defendant's right to present his defense. *See* U.S. Const., Amend. 6; Mass. Const., Pt. 1, Art. 12. Though this right is admittedly not absolute. The right to present a defense, allows the defendant to present his version of the "facts to the jury so it may decide where the truth lies." *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). The defendant has "the right to present his own ... defense. This right is a fundamental element of due process of law." *Taylor v. Illinois*, 484 U.S. at 409.

Under the First Amendment, a citizen has the right to free expression of ideas through speech or other communications. *See* U.S. Const., Amend. 1st. This provision has also been incorporated against the states. *See Gitlow v. New York*, 268 U.S. 652, 654 (1925). "Freedom of speech is a cornerstone of our society, and the First Amendment" should protect the defendant's right to use words like the speech at issue here. *Iancu v. Brunetti*, ___ U.S. ___, 139 S.Ct. 2294, 2318 (2019). In this case the defense was, as the Commonwealth outlined, that the defendant has a First Amendment Right "to say [LK] is a drug addict alcoholic" on his blog. [Hr. Tr. **5/14/18**, 6]. The defendant contends blogs are today's equivalent of a bulletin board that one is free to disregard, in contrast to, for example, emails or phone calls directed to a victim. *See U.S. v. Cassidy***,** 814 F. Supp. 2d 574, 586 (D. Maryland 2011). *See also Snyder v. Phelp*s, 562 U.S. 443, 459 (2011) (in most circumstances, the First Amendment does not permit the government to decide which

types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer; rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes).

Content-based speech restrictions only fall into a few narrow exceptions like fighting words, or incitement to imminent lawless activity. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words), *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam* - incitement to imminent lawless activity). *See also U.S. v. Ackell*, 907 F.3d 67, 75-76 (1st Cir. 2018) (true threat and/or speech integral to criminal conduct falls outside of the First Amendment's protections). The difficulty with current precedence, is that "a court faced with speech it finds intolerable may be sorely tempted to find a way to escape free speech strictures."[5] "In reality, courts regulate a great deal more speech by excluding it from the scope of the First Amendment. Thus, despite the strong protection afforded free speech under the First Amendment, courts can punish some disfavored speech by characterizing it as crime, steeling to action, or 'speech brigaded with action'".[6]

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[5] Benjamin Means, *Criminal Speech and the First Amendment*, 86 Marquette Law Review, 501, 505-07 (2002).
[6] *See* Means, *Crim. Speech and the 1st Amendment*, 86 Marquette Law Review, at 507, *citing Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

Where this is a purely legal issue, the Court reviews conclusions of law *de novo*, subjecting constitutional interpretations to plenary review. *See Ornelas v. U.S.,* 517 U.S. 690, 698-99 (1996). The petitioner advances the simple position that a state court cannot unilaterally determine what speech is protected or criminal and exclude the jury from deciding on whether speech is protected when raised as a defense.

The freedom of speech issue was first raised in a motion to dismiss all indictments but Court 2 (Indecent A&B) filed by defense counsel in July 2016. She specifically argued in her motion that any writing the Commonwealth relied upon from "the blog postings at www.dankim.com" are "speech which is protected by the First Amendment to the U.S. Constitution." [R. App. 54]. At the hearing defense counsel again asserted that defense. [Hr. Tr. **8/18/16**, 5, 8]. When the motion judge denied the pleading on September 9, 2016, there was no mention of the constitutional argument in the memorandum of opinion. [App. 85-87]. The ADA later affirmed that the defendant's argument from the beginning was that he had a First Amendment Right "to say [LK] is a drug addict alcoholic" on his blog. [Hr. Tr. **5/14/18**, 6]. This is correct.

The First Amendment issue was not again raised until the close of the Commonwealth's case at a discussion of the motion for required finding. The court invited the ADA to say something "about the First

Amendment, protected speech argument." [Tr. **6**, 98]. The ADA reminded the court that the issue had been raised and denied in the earlier motion to dismiss. [Tr. **6**, 98]. The Commonwealth suggested that there was not a free speech issue based on the "surrounding circumstances of all of the defendant's conduct towards [LK] and the dark language that he uses, I think that it was clearly a threat." [Tr. **6**, 98]. The court then denied the motion for required finding. [Tr. **6**, 99]. Defense counsel then requested that the court create a jury instruction "as to what protected speech is and what the government has to show." [Tr. **6**, 107]. This exchange then brought to the court the issue whether the First Amendment question "is an issue for a jury or is this simply a question of law for the Court." [Tr. **6**, 108]. The trial judge was not persuaded that the jury should be so instructed. [Tr. **6**, 108]. The judge believed "that the Court can rule on that as a question of law, it doesn't necessarily establish that [the defense is] entitled to a jury instruction on it." [Tr. **6**, 108-09]. Defense counsel argued that both the court could pass on the First Amendment (pre and during trial), and so too the jury. [Tr. **6**, 109-12].

The next day before the jury charge, the ADA argued that the First Amendment issue was a purely legal issue, and it had been decided in the motions to dismiss and for a required finding. [Tr. **7**, 12-13]. The ADA further moved that "no such language be given to the jury and also

that counsel be prohibited in his closing from making any or raising a First Amendment defense." [Tr. **7**, 11-12]. The ADA again stressed that the free speech issue had "already been determined to not be a valid defense in this case and it could result in essentially a jury nullification based on a defense that he doesn't have." [Tr. **7**, 12]. Judge Cosgrove, specifically ruled that the jury had no place making a determination of the First Amendment issue, stating, "if it's protected speech as a matter of law that Judge Cannone should have allowed the *McCarthy*[7] motion and I should have allowed your motion ... for required finding at least to the extent that the Commonwealth is relying on the particular speech …." [Tr. **7**, 14]. The ADA again reiterated that whether that's protected speech or not, the issue had "already been decided by the Court and it's not for the jury to re-question that conclusion." [Tr. **7**, 17]. While defense counsel again strongly disagreed, [Tr. **7**, 18-20], he abided by the court's order to not raise in his closing a First Amendment defense.

With the exception of Count 2 (Indecent A&B) each of the crimes charged contains a possible speech element. Stalking requires "a threat with the intent to place the person in imminent fear of death or bodily injury." G.L. c. 265 § 43. Witness intimidation requires a threat, or

[7] A motion attacking an indictment. *See Commonwealth v. McCarthy*, 385 Mass. 160, 163-64 (1982).

intimidation,[8] or harassment.[9] *See* G.L. c. 268 § 13B. Criminal harassment requires conduct (speech or otherwise) which seriously alarms the person and would cause a reasonable person to suffer substantial emotional distress. *See* G.L. c. 265 § 43A(a). And the violation of a harassment prevention order is premised, in whole or part by the defendant's speech.[10] *See* G.L. c. 258E, § 9. [App. 17-18, 43-47, 53-64].

The petitioner deems these criminal statutes cannot be applied to his constitutionally protected verbal or written communication (even over social media). The "fear or apprehension of actual harm" in the case of intimidation or the "substantial emotional distress" in the case of harassment must be a true threat or fighting words as defined by federal precedence. The Massachusetts courts have already recognized this concerning the stalking statute.

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[8] "Intimidation" in G.L. c. 268, § 13B, does not require that the victim be placed in fear or apprehension of actual harm. *See Commonwealth v. Gordon*, 44 Mass. App. Ct. 233, 235 (1998).

[9] "'Harass', to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress." G.L. c. 268 § 13B. [Tr. **7**, 88, 97].

[10] The two action that the defendant took were going to LK's college in January 2012, and mailing the package in August 2013. According to the Commonwealth's Bill of particulars, the action of mailing the package went to Count 1 (stalking) and Count 7 (violating the HPO in 2013). [App. 49-50].

A conviction for stalking, where there is verbal or written communication (even over social media), must be a "true threat," meaning the communication is made with the intent to place the person in imminent fear of death or bodily injury, and therefore is not entitled to protection under the First Amendment. *See Commonwealth v. Walters*, 472 Mass. 680, 690 (2015). *See also Van Liew v. Stansfield*, 474 Mass. 31, 37 (2016) ("true threats," these include "direct threats of imminent physical harm," as well as "words or actions that—taking into account the context in which they arise—cause the victim to fear such [imminent physical] harm now or in the future."), *citing O'Brien v. Borowski,* 461 Mass. 415, 425 (2012).

The free speech right excludes speech that is expressed in two categories of constitutionally unprotected speech, "fighting words" and "true threats." *Van Liew v. Stansfield*, 474 Mass. at 37, *citing O'Brien,* 461 Mass. at 425, and *Seney v. Morhy,* 467 Mass. 58, 63 (2014). *See Commonwealth v. Welch*, 444 Mass. 80, 98-99 (2005) (criminal-harassment statute cannot be applied to punish constitutionally protected speech). To qualify as "fighting words" the speech "must be a direct personal insult addressed to a person, and they must be inherently likely to provoke violence." *Van Liew v. Stansfield*, 474 Mass. at 37, *citing O'Brien,* 461 Mass. at 423. The First Circuit requires that in determining whether a communication is a true threat an objective

standard must be used. *See U.S. v. Whiffen*, 121 F.3d 18, 20 (1st Cir. 1997) ("whether a communication is a "true threat" is determined objectively from all the surrounding facts and circumstances, rather than from the defendant's subjective purpose."); *U.S. v. Fulmer*, 108 F.3d 1486, 1502 (1st Cir. 1997) (objective standard of a "true threat"). *See also* D. Brock Hornby, 2009 Revisions to Pattern Criminal Jury Instructions for the District Courts of the First Circuit § 4.18.875 (2009) (example instruction). A *true threat* is one that a reasonable recipient, familiar with the context of the communication, would find threatening and that a defendant reasonably should have foreseen would be taken as a threat. The government does not have to prove that the defendant subjectively intended the recipient to understand the communication as a threat. Since there is a real objective standard to true threats, it is for a jury and not the court to determine. "Fighting words," are also considered using the objectively reasonable standard. *See Nolan v. Krajcik*, 384 F.Supp.2d 447, 461 (D. Massachusetts 2005); *Byrnes v. City of Manchester, NH*, 848 F.Supp.2d 146, 157 (D. New Hampshire 2012). The fact that fighting words and true threats are to be viewed objectively is clearly indicative of a jury passing on these terms and not the court. *See Silva v. Norfolk & Dedham Mutual Fire Insurance Company*, 91 Mass. App. Ct. 413, 417 (2017) (when courts use an objective test it

requires fact-finder to determine whether a reasonable person, with knowledge of the relevant facts and law, would probably conclude).

The trial court instructed the jury as to stalking that the defendant's pattern of conduct (his speech and actions) "would [have to] cause a reasonable person to suffer substantial emotional distress," and the subjective standard that the victim did "become seriously alarmed or annoyed." [Tr. **7**, 82-83]. This objective-reasonable-person standard was also part of the jury instructions as to criminal harassment. [Tr. **7**, 84, 86]. No objective-reasonable-person standard was part of the instructions as to violating the Harassment Prevention Order, criminal harassment, or witness intimidation.

Again, for verbal or written communication to form the basis of a stalking conviction it must be a "true threat," *see Commonwealth v. Walters*, 472 Mass. at 692; *Van Liew v. Stansfield*, 474 Mass. at 37. But in the stalking instruction the court failed to discuss the free speech defense even though the act was based on his written blog. In the instruction discussing criminal harassment, the court did discuss speech, informing the jury "[s]peech, even offensive speech, enjoys broad protection under the First Amendment, subject to narrow exceptions." [Tr. **7**, 84]. While the court told the jury, where the Commonwealth solely relies on pure speech to satisfy the element, that speech "must consist of threats or so- called fighting words that directly conveyed to

the alleged victims face." [Tr. **7**, 85]. The court failed to define either the term *threat* or *fighting-words*. While the jury was told that the defendant's conduct had to objectively cause substantial emotional distress, they were not told that the speech had to be a "true threat" meaning to place the person in imminent fear of death or bodily injury. *See Virginia v. Black,* 538 U.S. 343, 347-48 (2003) (state, consistent with the First Amendment, may only ban intimidating speech, that is most likely to inspire fear of bodily harm); *Chaplinsky v. New Hampshire*, 315 U.S. at 573 (defining "fighting words"). The Fourteenth Amendment's Privileges and Immunities Clause, the Due Process Clause, and the Equal Protection Clause requires that these national definitions be told the jury when a free speech defense is used.

Where the trial court first deemed Mr. Kim's blog posts to be non-protected speech, it only had to instruct on whether an objectively reasonable person would suffer mere substantial-emotional-distress. But had the court allowed the issue of speech before the jury, the instruction must add informing the jury that the speech must be either a *true threat* or *fighting words*, meaning objectively seen by the jury as speech that places the person in *imminent fear of death or bodily injury*, or direct personal insult addressed to a person, and it must be inherently *likely to provoke violence*. No court can take upon itself the improper authority to simply deem speech criminal at its whim.

Defense counsel was effectively gagged and precluded from raising the First Amendment freedom of speech defense to the jury. But counsel did state in his closing argument;

> The blog itself is speech. He said he's saying something. It's not an action. A writing of the blog, I suppose i[t']s an action, but the speech is what we're talking about here. He wrote something down that he felt or thought. And that's what a diary is.

[Tr. **7**, 37]. Since the court told the jury that unprotected speech consisted of threats or fighting words, [Tr. **7**, 85], it may have been helpful for court to define these important terms for the jury. But since the jury was *not* being asked to judge whether the speech was or was not true threats or fighting words, it seems the court deemed it a fairly superfluous instruction segment. The important language for the jury was that of *speech that violates a no contact order, is not protected*. [Tr. **7**, 85]. But blogs are public speech and here should not be considered contact. *See U.S. v. Cassidy*, 814 F. Supp. 2d at 582 (1st Amend. protects speech even when expression is uncomfortable and not in good taste, or classified emotionally distressing or outrageous).

The jury got the point that in each of the charges, the First Amendment was not an issue in this case. The judge did instruct on threat (for non-First Amendment purposes), being: "the word 'threat' means an act language by which another is placed in fear of injury or damage and encompasses an implied as well as an express threat." [Tr.

7, 96]. But a "true threat" where free speech is concerned is only unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm. The protected status of the threatening speech is not determined by whether the speaker had the subjective intent to carry out the threat; rather, to lose the protection of the First Amendment and be lawfully punished, the threat must be intentionally or knowingly *communicated* to either the object of the threat or a third person. But the jury was not told this because the First Amendment was not an issue in this case because the trial court simply deemed the speech at issue non-protected, and deprived the jury of its function.

While the defendant does have this important right to freedom of speech, and while his speech should not have been susceptible to criminal action, he may be subject to civil suit under the tort of defamation. [Hr. Tr. **8/18/16**, 12-15]. *See generally White v. Blue Cross and Blue Shield of Massachusetts, Inc.*, 442 Mass. 64, 66 (2004) (to prevail on a claim of defamation, a plaintiff must establish defendant was at fault for publication of a false statement capable of damaging plaintiff's reputation that either caused economic loss or is actionable without proof of economic loss). The test for whether a publication is defamatory is whether, in the circumstances, the writing discredits the plaintiff "in the minds of any considerable and respectable segment in

the community." *Tropeano v. Atlantic Monthly Co.,* 379 Mass. 745, 751 (1980). Where a communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury. *See Jones v. Taibbi,* 400 Mass. 786, 792 (1987). This should have been a civil defamation case, not criminal.

Generally, it is the application of the standard of facts that determines constitutional issues. For example, in a dispute as to whether certain speech is protected or criminal, the jury must read/listen-to the speech and determine through a unanimous vote that the speech is or is not a true threat, or fighting words. *See Commonwealth v. Bigelow*, 475 Mass. 554, 565 (2016) (letters sent to selectman contained protected political speech, but jury could find that letters sent to wife contained speech that could qualify as true threats). Just as a jury in a civil defamation case gets to determine whether a communication is defamatory, in the criminal context no court can justify taking that role as fact-finder away from the jury, and take it for itself. This Court has stated that the "ultimate issue—whether the speech is protected—is a question of law." *Rankin v. McPherson*, 483 U.S. 378, 385 n.9 (1987), *citing Connick v. Meyers,* 461 U.S. 138, 148, n.7 (1983). But a free speech right also evokes the right to a defense (and it is undeniable that a defendant has a constitutional right to present a defense), which suggests a right to have the jury pass on that defense.

See Johnson Chemical Co. v. Condado Center, Inc., 453 F.2d 1044, 1046 (1st Cir. 1972) ("Supreme Court held that in federal court the jury must pass on the defense.").

Whether speech is harassment, meaning a true threat or fighting words; whether stalking is a true threat is viewed from the perspective of a reasonable person *in the victim's position*, this standard requires a fact-finder, in this case the jury, to view the conduct/speech. Simply put, even though courts view speech as a question of law to be determined by the judge, when raised as a defense by a criminal defendant, the court must stand aside per the 6th Amendment, which requires the jury determine whether the speech is protected. The mere guilty verdict by the jury in this case must be void where it was not properly instructed on *true threats* or *fighting words*.

At worst the substance of these blog posts is kind of creepy, but there is not a hint of a threat in any of these posts. The first post is merely a lament because the defendant perceived that he had lost her to her addictions to drugs and alcohol. [App. 131-35]. The other post is in anticipation of the renewing of the harassment order. From the defendant's point of view his love interest, LK is being pressured to perjure herself to extend the order. [App. 147-49]. Again, appropriate adjectives to describe the post could be sad, pathetic, delusional, but certainly not a threat, not advocating violence. Where this Court allows

this petition, the petitioner will happily provide the many hundreds of pages with a challenge for this Court to read all the posts, and see for itself that no threat is ever used; never is any of the language advancing violence.

The First Amendment must mean that a person has the fundamental right to think the way he wants, to advocate ideas he sees as legitimate, even if he is the only one who espouses such beliefs. Where the speech is defamatory, civil courts can supply a forum and possible remedy. Where the speech is a true threat, criminal courts may appropriately punish. But there must be no gray area for the criminal law to take speech that is bothersome, annoying, or even defamatory and criminalize the behavior. Language that is merely insulting should never be criminalized. The clear problem with the criminalizing of bothersome, annoying, or even defamatory speech is that too many things can be interpreted as such. *See U.S. v. Cassidy*, 814 F. Supp. 2d at 582. Criticism is easily construed as insult by certain parties. Ridicule is easily taken as defamatory. Sarcasm, unfavorable comparison, merely stating an alternative point of view to the orthodoxy can be interpreted as annoying and offensive. So many things can be interpreted as such in our modern society, this is why clear bright legal lines muse be reinforced.

II. A State Court Must Instruct A Jury On The Federal Definitions Of *Fighting Words* And *True Threats* As Well All Federal Standards For Determining Whether Speech Is Criminal Or Protected When A Defendant Raises The First Amendment As A Defense

The problem here is that the trial court had predetermined that the First Amendment didn't apply and the jury was free to determine the elements, but was not instructed on the First Amendment, the definition of *fighting words* or *true threat*, and was not allowed to decide the defense, namely whether the speech was protected. And since the defendant is not very sympathetic, it was easy to convict. When a jury is instructed on the First Amendment and is placed between the Commonwealth and the defendant to make objectively reasonable determinations of speech, the individual juror will not be so quick to call everything a threat or harassment. They will use their *communal standard* to view the speech in light of the importance of free speech to our society.

Trial by jury in serious criminal cases has long been regarded as an indispensable protection against the possibilities of governmental oppression. *See Brown v. Louisiana*, 447 U.S. 323, 330 (1980), *citing Williams v. Florida*, 399 U.S. 78, 87 (1970). *See also Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (purpose of trial by jury is to prevent oppression by government by providing a safeguard against corrupt or overzealous prosecutor and against complaint, biased, or eccentric judge).

Even if this Court does not hold that the errors raised are structural, the petitioner should still succeed under the harmless-error standard of review. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (reviewing court to consider, not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand), *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

The defendant had a right raise his free speech defense with his jury and to have that jury pass on his First Amendment argument, to determine whether his speech in his blog posts were true threats and/or fighting words. *See Commonwealth v. Bigelow*, 475 Mass. at 559 (jury should determine if speech qualifies as true threats or speech); *U.S. v. Clemens*, 738 F.3d 1, 13 (1st Cir. 2013) (whether defendant's statements constituted a threat to injure was an issue of fact for the jury).[11] Because the issue was whether the defendant's speech was criminal, the court couldn't rule as matter of law that the speech was unprotected, but such decision must be left to the jury. *See Bacon v. Boston Elevated Ry. Co.*, 256 Mass. 30, 34 (1926) ("Ordinarily when, in a jury trial, an issue of fact is to be proved and the evidence respecting it is contradictory, it

[11] Other circuits agree. *See U.S. v. Stock,* 728 F.3d 287, 298 (3rd Cir. 2013); *U.S. v. White,* 670 F.3d 498, 512 (4th Cir. 2012); *U.S. v. Parr,* 545 F.3d 491, 497 (7th Cir. 2008); *U.S. v. Malik,* 16 F.3d 45, 49 (2nd Cir. 1994); *U.S. v. Alkhabaz,* 104 F.3d 1492, 1496 (6th Cir. 1997).

cannot be ruled as matter of law that the fact has or has not been proved, but such decision must be left to the jury.").

The First Amendment was the defense the defendant wished to raise in this case. The lower court precluded the jury from passing on the issue which allowed it to not have to instruct the jury as to whether the speech in question was objectively a true threat for fighting words. As far as being an error, the Court has held that "a jury instruction that omits an element of the offense" is not structural error. *See Neder v. U.S.,* 527 U.S. at 8. But the omitted elements required by the First Amendment, are the definition of *true threat* and *fighting words*, and an objectively reasonable instruction, which encapsulate the defense that must be deemed essential for any claim to protected speech. Preventing a defendant from arguing a legitimate defense theory must constitute structural error. *See U.S. v. Miguel,* 338 F.3d 995, 997 (9th Cir. 2003), and *Conde v. Henry,* 198 F.3d 734, 741-42 (9th Cir. 2000). *See also Holmes v. South Carolina*, 547 U.S. 319, 328-29 (2006) (exclusion of defense evidence in light of strong forensic evidence of defendant's guilt, denied defendant fair trial; trial court had focused on the strength of the prosecution's case, rather than the probative value or the potential adverse effects of admitting the defense evidence); *Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (exclusion of confession deprived defendant of a fair trial; manner in which confession was obtained is often highly

relevant).

The exclusion of the First Amendment defense from the jury and the lower court's failure to so instruct has to be structural error, and a new trial must be ordered so the jury may decide the speech issue. *See U.S. v. Read*, 918 F.3d 712, 720 (9th Cir. 2019) (denial of right to choose defense is a structural error, and the proper remedy is a new trial). While the criminal harassment statute includes within its reach constitutionally unprotected "fighting words" and "true threats" that does not place a person in imminent fear of death or bodily injury, s*ee O'Brien v. Borowski*, 461 Mass. at 425-26, such speech harassment must be considered with other evidence. *See Commonwealth v. Brennan*, 481 Mass. 146, 150 (2018). But a defendant must still be allowed to raise his defense and the jury to pass on that defense based upon all the facts and circumstances.

Last the Mass. Appeals Court engaged in some doublespeak when deciding this case. It first affirmed that the fact-finder determines what constitutes a true threat or fighting words. [App. 7]. It then held that there was evidence "sufficient for a jury to find that the defendant's blog posts contained true threats made to place the victim in reasonable fear of death or bodily injury." [App. 7]. The opinion omits the fact that the jury was never instructed that it had to find the speech place the victim in reasonable fear of death or bodily injury. But then the opinion went

on to say that trial judges "have considerable discretion in framing jury instructions, both in determining the precise phraseology used and the appropriate degree of elaboration." [App. 9]. The law cannot have it both ways, that is not fair.

Even this evidence, even in the light most favorable to the government, there are simply no true threat in the defendant's writings, he never used fighting words or other violent incendiary speech. Where the blog posts were used to convict, those counts must be dismissed.

This case presents an important issue for appellate review.

Conclusion

The Massachusetts court's rejection of standards articulated by the First Amendment affected the outcome of the petitioner's case and will no doubt continue to affect cases of other similarly situated defendants in state and federal courts. Where the fundamental rights of countless criminal defendants are at stake and will continue to be compromised as a result of the confusion on this issue, the writ should be granted and the case briefed and set down for argument.

Respectfully submitted,

Daniel Kim,
By his attorney,

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