

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Sloan P. Stanley — PETITIONER
(Your Name)

vs.

State of Washington — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Washington State Division I Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sloan P. Stanley
(Your Name)
Walla Walla County Corrections Dept.
300 W. Alder St. (County Jail)
(Address)

Walla Walla, WA, 99362
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

- In any statute state or federal requiring a threats analysis, is a subjective intent standard in accord with the particular statute's mens rea of intent or knowing precluding any lower mens rea required above and beyond the objective reasonable person standard in proving a true threat?
- If the statute requiring a threats analysis is silent as to the required mens rea, is a subjective intent standard that requires that the communication was made with intent to threaten or with knowledge that the communication will be viewed as a threat required above and beyond the objective reasonable person standard in proving a true threat?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A	<i>Decision of State Court of Appeals</i>
APPENDIX B	<i>Decision of State Supreme Court Denying Review</i>
APPENDIX C	
APPENDIX D	
APPENDIX E	
APPENDIX F	

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

- *Watts v. U.S.*, 394 U.S. 705, 707, 89 S.Ct. 1939, 22 L.Ed.2d 664 (1969) | 17, 18
- *Virginia v. Black*, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) | 17, 18, 19, 20
- *Elonis v. U.S.*, - U.S. -, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015) | 17, 19, 20, 21, 23
25, 26, 27, 28, 29
- *State v. Trey M.*, 186 Wn.2d 884, 383 P.3d 474 (2016) | 16, 19, 20, 21, 22
23, 24, 25

STATUTES AND RULES

- RCW 9A.61.260 | 22
- RCW 9A.46.020 | 22, 23

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 1/3/2018
A copy of that decision appears at Appendix B.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Constitution amendment I

STATEMENT OF THE CASE

Sloan Stanley endured what the prosecutor in this case called a "horrific childhood," during which he was abandoned by his mother and tormented by his alcoholic father. RP(10/14/15) 313; ex. 8 at 12, 16, 44, 50, 67, 73, 77, 80. But he persevered, graduated from college, became a mechanical engineer, and moved to Seattle. RP(7/27/15) 803; ex. 18.

Mr. Stanley frequently went out to the neighborhood bars after work and on weekends. One of his standard destinations was the Atlantic Crossing Pub. He became acquainted with some of the other regular customers, including Alyson Gray, Miriam (or "Mia") Much, and Leah Mestford. He also got to know the bartenders, including Dionna Couch and Elizabeth ("Liz") Williams. RP(7/23/15) 519-20, 578-81; RP(7/27/15) 646-48.

Mr. Stanley remembers staying at the Atlantic Crossing well past closing on June 10-11, 2010. He has a memory of being there with Ms. Gray, Ms. Much, and Ms. Williams. He remembers all three expressing an interest in him sexually, after which he fondled and/or kissed each of them briefly. He also remembers telling them predictions of future events that ultimately occurred, while going in and out of a trance like state. He woke up at 5:30 am. in a haze with no recollection of prior events. Knowing he had to go to work he soon departed for

home as did Ms. Gray and Ms. Much going their separate ways. He went home slept for awhile, then went to work. Ex. 18.

Mr. Stanley only saw the women a few more times that summer, and they would not acknowledge the events of June 10. Ex. 18. Mr. Stanley's work took him to England in the fall of 2010. While there, he was beaten and robbed one night while waiting for a cab. He briefly lost consciousness, and the cab driver took him to the hospital. Ex. 19.

Although he was released in short order, the hit to the head caused lingering problems with his sense of smell, headaches, and memory. Ex. 4 at 6; ex. 20 at 4, 10. Mr. Stanley reflected on the night of June 10, and wondered what really happened. It was after the head injury that Mr. Stanley started having the bizarre memories of telling the women about future events, events that did happen. He was worried whether the head injury had caused him to make up memories. AP (7/29/15) 957-59.

In an effort to gain understanding, Mr. Stanley obtained the contact information for Ms. Gray and exchanged e-mail messages with her starting in December of 2010. Ex. 4 at 1. They discussed work, school, and other activities. Ex. 4 at 3-5. Mr. Stanley told Ms. Gray about the head injury he had sustained while he was in England. He asked Ms. Gray out, but she told him she was

seeing someone. Ex. 4 at 6-9. Mr. Stanley also asked Ms. Gray about the events of June 10, 2010, but Ms. Gray said she did not remember anything about that night. Ex. 4 at 5, 11. Mr. Stanley became very frustrated. He asked Ms. Gray to help him "clear up these memories" because "it might help me clear up some fog on the events of the night my head got hit." Ex. 4 at 14.

Ms. Gray stopped responding to Mr. Stanley's messages, and Mr. Stanley became irate. He said, "This is not a [expletive] game. This has been eating away at me for some time and now more than ever. I don't know what your [expletive] problem is and why you are lying about this night but I assure [you] I will not [expletive] let this go." Ex. 4 at 15.

Ms. Gray eventually asked Mr. Stanley to stop contacting her right after she said his memories were fantasy after claiming she did not remember any night. She responded by saying she had "no recollection" of the night he described, and again to stop contacting her. Ex. 4 at 22. This upset Mr. Stanley because he wanted to know what happened the night of June 10, 2010 for his own sanity and piece of mind. Mr. Stanley insisted that he only wanted to know what happened:

Please I'm begging you, just level with me. I don't understand what the big deal is. I'll do anything

in return if you just level with me. Please, I just want to put these memories to rest. There is [no] way I could [have] dreamed it up and I'm not making it up.

Ex. 4 at 24. He sent a few more messages, but Ms. Gray did not respond.

Mr. Stanley hoped one of the other woman would be able to help him clear up his memories. He emailed Ms. Much and explained, "All I want is someone to help me with memories of that Thursday night you know which one I'm talking about, we were there til 5:30 in the morning... Alyson makes it sound like I'm making it up."

Ex. 20 at 2. Ms. Much did not respond, but Mr. Stanley kept e-mailing her and asking her what happened that night in question.

Ex. 20 at 3, 7. When he did not receive any response, he called her names. Ex. 20 at 8, 12.

In the meantime, Mr. Stanley continued to e-mail Ms. Gray. He told her she and her friends were being "cruel" by ignoring his requests for help, and he repeatedly begged her to reveal what happened. Ex. 4 at 28, 29. When she didn't answer, he called her names. Ex. 4 at 30. He also became despondent, and talked about killing himself. Ex. 4 at 42. He said, "Oh, how I wish you could explain to me what is going on." Id. On July 7, 2011, Ms. Gray again asked Mr. Stanley not to contact her, and advised him to seek professional help. Ex. 10 at 43.

In August, Mr Stanley again asked Ms. Much to tell him what happened that night over a year earlier. He said, "Can't you see I just want help with my memories. I'm not going to cause any trouble I just want to know what memories are real or not." Ex. 20 at 10. He became more despondent, and in September wrote that the ordeal was making him "physically sick." Ex. 20 at 11. He called Ms. Much names, and used expletives liberally. Ex. 20 at 12. But he also begged for help and said he was suicidal: "You [re] killing me. Is that what you want you want me to kill myself? I can't function anymore. This is too much. Please make it stop. Please, I'm begging you. My head can't handle this." Ex. 20 at 12. He continued to send messages to Ms. Much asking her to tell him what happened on June 10 of 2010, and saying that not knowing what happened gave him terrible headaches and made him feel crazy. Ex. 20 at 13. He repeatedly lamented that he was in emotional pain and felt like committing suicide. Ex 20 at 14.

Ms. Gray and Ms. Much called the police in January of 2012. RP (7/23/15) 589. The responding officer observed that Mr. Stanley appeared to use these communications as an "outlet," but told the women they could obtain restraining orders. RP (7/27/15) 828. Ms. Gray and Ms. Much decided not

to take that step, and instead deleted or stopped using the accounts at which they had received messages from Mr. Stanley. RP (7/23/15) 584-90.

Mr. Stanley continued sending messages to Mrs. Mueh, Ms. Mesford as well and later Ms. Williams. Exs. 4, 5, 8, 10, 20. Some Messages were abhorrent; for example, he said "I will [expletive] kill you [expletive]." Ex. 4 at 58; see also ex. 4 at 49-50, 58; ex. 8 at 6, 57, 67; ex. 10 at 11. There were also many messages in which Mr. Stanley called the women terrible names, but did not threaten them. See, e.g., ex. 4 at 15, 21, 28, 53, 60; ex. 5 at 8; ex. 8 at 1, 13, 26, 33, 36, 47, 54, 58, 64; ex. 10 at 4, 25, 26, 29, 30, 32.

But the frightening messages were surrounded by dozens of messages that were cries for help. RP (7/27/15) 674-75, 707, 722; ex. 4 at 16, 17 ("Please can you find it in your heart to help me resolve this?"), 24 ("Please, I just want to put these memories to rest"), 42, 44, 51, 52 ("please help me"), 53 ("please help me. I don't [know] what to do. I can't go on anymore."), 55, 55 ("I am scared. Please help me. Please."), 58 ("I want to be free of this. Please."), 62 ("I am really hanging on to life by a thread. I don't [know] what to do anymore. Please listen and help. Please."); ex. 5 at 2 ("please just tell me what happened. I really am in a lot of pain because of this.

Please.), 5 ("you could help to give me my life back."), 7 ("please help me. Please ... please the pain is too much."), 8 ("oh please do something. Please."), 9 ("oh Liz, please don't hate me. Please care about me. I just am really having a hard time."), 11, 12, 13, 14 ("I'm begging."), 15, 17 ("please Liz, please put away your hatred for me and just help me with these memories. Please do something Liz, please."), 18, 19 ("help me."), 24 ("please. Oh please just end this."), 28 ("just help me Liz. Please."), ex. 8 at 12 ("please I'm begging you just talk to me"), 13 ("Please Leah"), 14 ("please make this end. I feel sick. ... I need your help with this. Please."), 19 ("I wanna ... die. Please help me."), 20, 22 ("please just help me, please. ... I am in so much pain. ... please help me. Please I beg you."), 25, 39 ("please give me some hope ... Please Leah! Please Leah!"), 40, 42 ("please care. Do something please. ... I am hurting more than ever. Please help me."), 52, 53, 56, 58, 72, 75, 76; ex 10 at 12 ("please help I can't take anymore. Please."), 13 ("please just help me. ... I am really hurting from all this."), 14, 18, 22, 23, 25, 31, 32 ("please help me. Please help me. I can't deal with life anymore. Please Mira help me."), 34.

Many messages were akin to diary entries, and the recipients even described them as such. RP (7/27/15) 782

("I felt so much like he was almost journaling to me in a way"). See also ex 4. at 42, 47; ex 5 at 3, 4, 8, 9, 10, 11, 12, 15, 16, 20, 21; ex 8 at 5, 14, 17, 30, 31, 33, 39, 43, 44, 45, 59; ex. 10 at 7, 8, 15, 18, 19, 34.

Notwithstanding the mixed context, the State charged Mr. Stanley with nine counts felony cyberstalking: three with Ms. Gray as the alleged victim, three with Ms. Much as the alleged victim, two with Ms. Mesford as the alleged victim, and one with Ms. Williams as the alleged victim. CP 48-51. Mr. Stanley was dissatisfied with his appointed counsel, so he made a successful motion to proceed pro se. RP (3/27/15) 120-27; RP (4/1/15) 131-35.

Mr. Stanley told the jury that he did not mean to threaten anyone but just wanted to know what happened that night in June of 2010. RP (7/29/15) 957. The women testified that Mr. Stanley's messages scared them, but also acknowledged that many messages were cries for help. RP (7/23/15) 587-88, 592; RP (7/27/15) 654, 704, 721-22, 777-82.

Mr. Stanley asked the court to instruct the jury that the State must prove he intended his statements to be taken as true threats or knew that they would be taken as true threats, in accord with the recent Elonis ruling. In short, asking for "a subjective intent standard."

above and beyond the objective reasonable person standard. RP (7/27/15) 179-85; 203-16; RP (7/30/15) 1124; CP 145. The court rejected his proposed instructions, and instead instructed the jury using the negligence standard for true threats. CP 158; RP (7/30/15) 1118, 1124. Mr. Stanley was convicted of all nine counts as charged. CP 175-83.

In the opening brief, Mr. Stanley argued the trial court violated his First Amendment rights by instructing the jury using the negligence standard for true threats. The Washington State Supreme Court later rejected the same argument in Tray M., which the Court of Appeals followed. Slip Op. at 6-8.

NOTE: It should be noted that the foregoing Statement of the Case is by in large verbatim of my appellate attorney's Statement of the Case for the petition of review to the Washington State Supreme Court. Due to my current incarceration I am very limited as to what I can do. It would be with great difficulty and too time consuming to obtain and review the record. Because it was already done, and done concisely with quotations of specific portions of the record pertinent to the facts with specific reference to the places in the record where the matter appears. I prudently decided to use

this Statement of the Facts done by my appellate attorney for petition of review to the Washington State Supreme Court, of which review was denied.

I also find it worthy to note that I represented myself in an extremely prejudicial trial that was very unfair. I did not have any witnesses in my case in chief besides myself and I had originally decided not to testify but had no choice being my only witness. Because of this I was not allowed to bolster my position to the jury in the case. I do feel I was slighted in this matter.

Also, the state's brief is extremely inaccurate disregarding the totality of the evidence, blatantly so. It takes everything out of context. The appeals court opinion is basically verbatim of the state's brief with the same issues mentioned above.

I ask and I hope that this court will take close examination of the record dissecting the truth from it.

REASONS FOR GRANTING THE PETITION

The question posed before this court in its most basic form asks simply if a subjective intent standard is required to prove a true threat? While this court has most certainly implied it does, it has not specifically said so, and lower courts have been divided on this issue. This has caused much confusion and conflict all over our nation in this matter.

The importance of ruling on this case is to clarify this confusion and more importantly to stop wrongful convictions for mere negligent speech. Convictions such as my own.

I requested a subjective intent jury instruction and was denied. Notwithstanding the fact the particular statute required a mens rea of intent. I raised this same issue on appeal and was denied. I was denied based off a ruling of a similar case that asked for a subjective intent requirement for a threats statute that contained a mens rea of knowing. This case, State v. Trey M., 186 Wn.2d 884, 383 P.3d 474 (2016), ruled upon by the Washington State Supreme Court, declined to abandon their own precedent of applying an objective test for what constitutes a 'true threat' under the First Amendment, denying any subjective intent requirement.

The Trey M. ruling is erroneous and at complete odds with the logic laid

forth by this court.

Threats cases have no doubt a long history with our nation. Throughout this history there have been numerous cases involving threats. Of all those cases the most significant for what they say are: Watts v. U.S., 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969); Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003); and Elonis v. U.S., — U.S. —, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015). However, these cases are also most significant for what they do not say.

While these case may lay forth impeccable logic for why subjective intent is required they fall short of addressing the all important First Amendment question. Thus, leaving confusion amongst the lower courts. However, what is of most importance is that these cases have paved the way for a ruling of a subjective intent requirement.

Starting with Watts it exemplifies the importance of the First Amendment. It states that any statute that criminalizes a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. This is rightfully so. For freedom of speech, which is extremely vital to the existence of a free society, must be given breathing room to exist in its

fullest capicity. Watts also goes on to include that threats must be analyzed taking into account the entire context of all statements and all circumstances surrounding the statements. It also differentiates statements that are hyperbole no matter how vehement, vituperative or repugnant, and statements said in jest, idle talk or political argument. All this in turn was to differentiate negligent speech from speech that was meant to engender fear. Lending itself to a subjective intent requirement.

In Black, presented was a case that determined if cross-burning was prima facie evidence of an intent to intimidate and thus was not asked the all important First Amendment question. However the lead opinion in Black, addressing the intent to intimidate provision of the Virginia Statute at issue, opined that "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Black, 538 U.S. at 360. Ultimately lending itself to a subjective intent requirement.

The statute in concern regarding Black required an intent to intimidate so as subjective intent was already

read into the statute. While this Court did not reach the First Amendment issue it did make a good showing for it. The case outlines distinctively how an expression can have two meanings, one sufficiently innocuous while the other clearly malicious. A cross burnt at a rally for ceremonial purposes versus a cross burnt in someone's yard meant to intimidate. This most certainly lends itself to a subjective intent requirement as is most distinguishably implied throughout Black. However the Black ruling only generated confusion in the lower courts.

This can be seen in the opinion by Washington State Supreme Court in Trey M. stating: "Finally, after Black, there continued to be disagreement among the federal circuit courts regarding the appropriate test for determining whether speech rises to the level of a true threat. This disagreement stems from the various readings of the Supreme Court's opinion in Black. As raised by Black. See Elonis, 135 S.Ct at 2012. Given the continuing disagreement and lack of definitive guidance from the Supreme Court, it cannot be said that the test this court employs is incorrect and harmful." (quoting Trey M., 186 Wn.2d at 902).

The statute in Elonis was silent on the required mens rea and due to this fact this Court decided the case on statutory construction instead of the

First Amendment issue. Relying on the fact that wrongdoing must be conscious to be criminal.

This is echoed by Justice McCloud, dissenting in Trey M.: "White Black alone compels us to reverse Trey M.'s conviction; reversal is also supported by the U.S. Supreme Court's recent decision in Elonis, 135 S.Ct. 2001. As noted above and by the majority, Elonis addressed 18 U.S.C. § 875(c), the federal statute "making it a crime to transmit in interstate commerce 'any communication containing any threat... to injure the person of another,'" 135 S.Ct. at 2004 (second alteration in original) (quoting 18 U.S.C. § 875(c)); majority at 10-97. Applying the principle -- rooted in common law notions of basic justice -- that "wrongdoing must be conscious to be criminal," the Elonis Court read an actual (subjective knowledge) requirement into 18 U.S.C. § 875(c). 135 S.Ct. at 2010. This requirement -- that the government must prove an "evil mind" before imposing the stigma and disabilities of a felony conviction -- stands at the heart of the U.S.'s conception of criminal justice. Staples v. U.S., 511 U.S. 600, 605, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994). ("[T]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." (alteration in original) (quoting, U.S. v. U.S. Gypsum Co., 438 U.S. 422, 436, 98 S.Ct.

2864, 57 L.Ed.2d 854 (1978))). " (quoting, Trey M., 186 Wn.2d at 915-916).

This logic led the court to the premise that the reasonable person objective standard was not sufficient to support a conviction under section 875(c), being it was a negligent standard. And, mere negligence is not conscious of wrongdoing.

It further stated that, " There is no dispute that the mental state requirement in section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." (quoting, Elonis, 135 S.Ct. 2001). Thus lending itself to a subjective intent requirement.

However because it did not expressively set forth a subjective intent requirement, stopping short of the First Amendment issue. It now leaves open the same dangers in which it addressed as to the negligent objective standard. This can be seen by the courts denial of subjective intent in Trey M. and in other courts denial of this same issue.

" ("No case reported thus far extends Elonis's holding beyond [18 U.S.C.] § 875(c).") As the Fourth Circuit Court of Appeals has explained, "[I]mportantly, the Court's holding in Elonis was purely statutory; and having resolved the [case] on statutory grounds, the court declined to address whether

a similar subjective intent to threaten is a necessary component of a 'true threat' for purposes of the First Amendment."

U.S. v. White, 810 F.3d 212, 220 (4th Cir. 2016), cert denied, 136 S.Ct. 1833 (2016) "(quoting, Trey M., 186 Wn.2d at 896.)

The statute for the case at hand and the Trey M. case both require subjective intent from the statutory language. One requiring a mens rea of 'intent' and the other requiring knowing. They are as follows, for the case at hand, in part:

ACW 9A.61.260 - Cyberstalking

- (1) A person is guilty of cyberstalking if he or she, with intent to harass, intimidate, torment, or embarrass any other person, and under circumstances not constituting telephone harassment, makes an electronic communication to such other person or a third party;
- (c) Threatening to inflict injury on the person called or any member of his or her family or household.

For the statute in Trey M., in part:

ACW 9A.46.020 - Harassment

- (1)(a)(i) Without lawful authority, the person knowingly threatens:
 - (i) to cause bodily injury immediately or in the future to the person threatened or to any other person.

(b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.

The statutory language of these statutes read in the requirement of a subjective intent. However, the courts deny that a subjective intent is required to prove a 'true threat'. This essentially drops the mens rea down to mere negligence.

"Having liability turn on whether a 'reasonable person' regards the communication as a threat — regardless of what the defendant thinks — 'reduces culpability on the all important element of the crime to negligence,'" Jeffries, 692 F.3d, at 484 (Sutton, J., dubitante), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," Rogers v. U.S., 422 U.S. 35, 47 (1975) (Marshall, J., concurring) (citing Morissette, 342 U.S. 246). " (quoting, Elonis, 135 S. Ct.)

In Trey M. the court concedes to the fact that, "the statute requires that 'the defendant must subjectively know that he or she is communicating a threat of intent to cause bodily injury to the person threatened or to another person.'" Thus, one who writes a threat in a personal diary or mutters a threat unaware that it might be heard does not knowingly threaten." (quoting, Trey M., 186 Wn.2d 186 at 895.)

"This court has explained that the harassment statute requires that the perpetrator knowingly threaten to inflict bodily injury by communicating directly or indirectly the intent to inflict bodily injury; the person must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim; and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out. J.M., 144 Wn.2d at 482." (quoting, Trey M., 186 Wn.2d at 905).

"The person to whom the threat is communicated may or may not be the victim of the threat." J.M., 144 Wn.2d at 488.

"[T]he person threatened must find out about the threat although the perpetrator need not know nor should know that the threat will be communicated to the victim." Id. at 482 (emphasis added). (quoting, Trey M., 186 Wn.2d at 906.)

As noted in Justice McCloud's dissent in Trey M.: "This court's decision in State v. Ch M., 144 Wn.2d 472, 482, 28 P.3d 720 (2001), and State v. Kilburn, 151 Wn.2d 36, 84 P.3d 1215 (2004), severely limited the reach of the modifier 'knowingly.' Those cases held that to commit felony harassment, a person must know he is communicating -- that is, he may not be convicted for muttering a threat under his

breath or recording it in a private journal -- but need not know or intend that (1) this communication will actually reach the subject of the threat or (2) the subject will actually feel threatened." (quoting, Trey M., 186 Wn.2d at 909-910).

"What must a defendant 'know' in order to trigger liability under the felony harassment statute? And with respect to that question, Elenis is directly on point. It holds that in context of threat prosecutions the knowledge separating innocent from wrongful conduct is the defendant's actual 'knowledge that the communication will be viewed as a threat,' Elenis, 135 S.Ct. at 2012" (quoting, Trey M., 186 Wn.2d at 916 (McCloud, J., dissenting)).

Justice McCloud opens the dissent in Trey M. with the following: "I agree with the majority that these convictions were permissible under our current precedents; we have interpreted the felony harassment statute, ACW 9A.46.020, to reach statements like Trey M.'s therapeutic disclosures. But the time has come to abandon that precedent. To the extent that it allows felony convictions for merely negligent speech, this precedent violates First Amendment protections, conflicts with fundamental precepts of Anglo-American criminal justice, and -- as this case amply demonstrates -- establishes bad policy. U.S. Const. amend. 1. I therefore dissent." (quoting, Trey M., 136 Wn.2d at 909)

Without a subjective intent requirement it becomes too easy to reduce statutes that contain culpabilities of intent and knowing down to mere negligence. Having just an objective standard to prove a threat confuses the requirement of intent or knowing. It makes an intent to communicate something or knowingly communicating something a crime, which neither one is a crime nor ever should be. This concept is most clearly distinguished in Elonis. And, is the major principle in Elonis stating that, "wrongdoing must be conscious to be criminal."

To strengthen this concept this Court in Elonis drew on Morissette v. U.S., 342 U.S. 246, 250 (1952); U.S. v. X-citement Video, Inc., 513 U.S. 64, 70 (1994); and Posters 'N' Things Ltd. v. U.S.. These cases help to distinguish and show how intent and knowing can be misinterpreted causing wrongful convictions.

Adding to the confusion is the word intention within the objective reasonable person standard which states, in part:

... the statement would be interpreted as a serious expression of intention to carry out the threat.

To the trier of fact, whom in all cases should be considered of only average intelligence and not well versed in law, could easily mistake "a serious expression

of intention to carry out the threat" as the requisite intent required by the statute. With that said it is also very easy for the trier of fact to satisfy the element of intent or knowing with the fact that the perpetrator intended to communicate something or knowingly communicated something rather than intending to engender fear or knowing the communication would engender fear.

It is for all of the forementioned reasons that a subjective intent should be required. It would help clarify what is wrongful conduct from innocent conduct. And, It would help stop wrongful convictions of innocent people.

Finally, I would like to address Justice Alito's opinion in Elonis in which he concurs in part and also dissents in part. Whereas Justice Alito opines that recklessness should suffice for true threats, I disagree.

"Negligence requires only that the defendant 'should [have] be[en] aware of a substantial and unjustifiable risk,' ALI Model Penal Code § 2.02 (2)(d), p. 226 (1985), while recklessness exists 'when a person disregards a risk of harm of which he is aware,' Farmer v. Brennan, 511 U.S. 825, 837 (1994); Model Penal Code § 2.02 (2)(c)." (quoting, Elonis, 135 S.Ct., (Alito, J., opinion))

Justice Alito states: Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is

is not engaged in innocent conduct. He is aware that others could regard his statements as a threat, but he delivers them anyway.

The above logic is a departure from the logic which has arrived at a subjective intent requirement. One that has arrived at the conclusion that "wrongdoing must be conscious to be criminal." While recklessness does admit an awareness it does not admit a complete conscious purpose of wrongdoing. It is so close to the borderline with negligence that it could tend to criminalize otherwise innocent speech. It can easily be said to say something out of anger and frustration, which is of course not a rarity amongst the human race is a disregard of a harm of which the person is aware. In other words they may be aware the words will "sting", however it is not their goal to engender fear.

As Justice Alito points out in his opinion in Elonis, stating: We have sometimes cautioned that it is necessary to "extend a measure of strategic protection" to otherwise unprotected false statements of fact in order to ensure enough "breathing space" for protected speech. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (quoting NAACP v. Button, 371 U.S. 415, 43 (1963)). A similar argument might be made with respect to threats. But we have held that the law provides adequate

breathing space when it requires proof that false statements were made with reckless disregard of their falsity. See: New York Times, 376 U.S., at 279-280 (Civil liability); Garrison, 379 U.S., at 74-75 (Criminal liability). Justice Alito then contends that requiring proof of recklessness is similarly sufficient here.

I disagree. Comparing false statements to threats is like comparing apples to oranges. They are not the same thing. While they both deal with speech they are different in nature. A threat unlike a false statement can be driven by mere emotion and it becomes very easy to say something negligently or even recklessly when there is no clear purpose to engender fear. Delivering a false statement on the other hand is more calculated and therefore I would say recklessness would suffice in regards to false statements. However threats must be given greater "breathing space" to ensure convictions are not wrongful. For that reason a greater mens rea of at least knowing should be required for threats.

This court should take the opportunity to review this case addressing the issue of a subjective intent requirement relating to threats. Finally putting this issue to bed once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Hon. P. ~~Stevens~~

Date: Feb. 5, 2018