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United States Supreme Court Establishes Subjective Intent Requirement for Prosecution of Threat Related Offenses

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The United States Supreme Court recently evaluated a Colorado criminal statute that made it illegal to communicate with another person in “a manner that would cause a responsible person to suffer serious emotional distress and does . . . cause that person to suffer serious emotional distress.” The Court held that an objective standard, without consideration of the subjective intent of the defendant, violated the First Amendment to the United States Constitution.¹ This new decision may create enforcement issues for similar cases pursued under Florida law.

The First Amendment does not protect true threats, which are those that contain serious expressions conveying that a speaker means to commit an act of unlawful violence. However, the bounds of First Amendment protections are not endless, and therefore, the courts must take care to prohibit the criminalization of speech that would fall within the First Amendment’s protections. This is so because the threat or fear of criminal sanctions should the speaker “get it wrong” would necessarily lead to a chilling effect which may cause some to avoid speaking on constitutionally protected topics or in a constitutionally protected manner. The Supreme Court has resolved this issue and held that the speaker must harbor a mental state of *at least* recklessness before speech falls outside the protections of the First Amendment and, therefore, may be subject to arrest and criminal sanctions.

The facts of this case are undisputed. Over a period of two years the defendant sent hundreds of messages over social media to someone he did not know and whom he had never met. The recipient blocked the messages, but the defendant simply created a new account and continued the communications unabated. Some messages were innocuous, others suggested he was surveilling the recipient, and others expressed anger and suggested death. The threats put the recipient in fear, upended her daily existence, and led her to believe the defendant was threatening

¹ *Counterman v. Colorado*, Case No. 22-138, (June 27, 2023)

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her life which caused her substantial fear. The recipient changed her behavior, restricted her media and real-world profiles, and eventually called the authorities.

The defendant was ultimately charged under a state statute that made it illegal to communicate repeatedly with another person in such a manner that a reasonable person would suffer serious emotional distress and that actually caused the victim to suffer serious emotional distress. The defendant moved to dismiss the charges on First Amendment grounds, which the court rejected based on the objective reasonable person standard reflected in the state statute. Under that standard, the state only had to show that a reasonable person would have viewed the messages as threatening, and there was no requirement to prove the defendant had any subjective intent to threaten the recipient. The trial court denied the motion and the defendant was convicted by a jury. The state appellate court affirmed the conviction, and the state supreme court denied review. In accepting this case for review, the U.S. Supreme Court recognized that lower courts were divided on whether the First Amendment required proof of a defendant's subjective intent to threaten and, if so, what legal standard was appropriate.

On appeal, the State of Colorado argued that there was no requirement to prove the subjective intent of the defendant to threaten the recipient. The defendant argued that a subjective intent was required to avoid casting too broad a net and criminalizing otherwise protected First Amendment speech. The Court agreed with the defendant, and vacated his conviction, holding that a state must prove that the defendant had some understanding of his statements' threatening character. The Court then evaluated what subjective standard was sufficient to criminalize threats, and settled on recklessness as the guidepost. This subjective standard shields protected speech, but criminalizes reckless speech that demonstrates a conscious disregard for the substantial and unjustifiable risk that the conduct will cause harm to another. This standard also clearly establishes that intentional threats meet constitutional requirements. At its core, the Court shifted the analysis from the perception of the recipients of the threats to those who deliver them. Therefore, in order to criminalize threats against another person, the state must prove that the speaker had a subjective intent *of at least conscious disregard* for the risk of harm to the recipient.

The Florida Legislature has passed several threat-related statutes over the years, but a comprehensive analysis is beyond the scope of this article. It may be helpful, however, to address examples of Florida's threat statutes to determine if the subjective standard impacts their enforcement. In sum, the enforcement of Florida's threat statutes *may be* impacted, depending on the statute being pursued. Examples by increasing levels of complexity are instructive.

Assault – §784.011, Fla. Stat.

An assault is defined as an “intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.” Intentional conduct, like that required to prove an assault under Florida law, is a higher burden than mere recklessness, and therefore, there are no impediments to enforcement of Florida’s assault statute.

Threats; Extortion – §836.05, Fla. Stat.

Under this statute, an arrestable threat occurs when someone “either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offense, or by such communication maliciously threatens an injury to the person, property or reputation of another or maliciously threatens to expose another to disgrace, or to expose any secret affecting another, or to impute any deformity or lack of chastity to another, with intent thereby to extort money or any pecuniary advantage whatsoever, or with intent to compel the person so threatened, or any other person, to do any act or refrain from doing any act against his or her will.” As with the definition of assault, First Amendment protections are built into this statute because the element of maliciousness is a necessary requirement to establish probable cause for arrest. Florida courts are divided whether the requirement for maliciousness in this threats statute requires legal malice (intentional conduct without a lawful justification) or actual malice (ill will, hatred, spite, or an evil intent). Regardless, Florida’s extortion statute requires a subjective level of culpability that most likely satisfies First Amendment protections.

**Written or Electronic Threats to Kill, Do Bodily Injury,
or Conduct a Mass Shooting or an Act of Terrorism – §836.10, Fla. Stat.**

This statute provides that “it is unlawful for any person to send, post, or transmit, or procure the sending, posting, or transmission of, a writing or other record, including an electronic record, in any manner in which it may be viewed by another person, when in such writing or record the person makes a threat to: (a) kill or do bodily harm to another person; or (b) conduct a mass shooting or act of terrorism. Unlike Florida’s assault and extortion statutes, this threat *does not* contain a subjective intent component, and therefore, is largely similar to the Colorado statute held to be in violation of the First Amendment.

Threats – §836.12, Fla. Stat.

Since 2016 it has been unlawful to threaten “a law enforcement officer, a state attorney, an assistant state attorney, a firefighter, a judge, or an elected official, or

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a family member of such persons with death or serious bodily harm.” Unlike the other statutes discussed above, this threats statute is silent as to a subjective intent requirement, and therefore, would likely be unenforceable. However, in the 2023 the Florida Legislature amended this statute, *which will become effective October 1, 2023*. The amended statute permits charging an offender under this statute only if he or she “knowingly and willfully threatens” a member of the defined classes, and therefore, will comply with the Supreme Court’s recent First Amendment holding.

Law enforcement administrators and their counsel should promptly evaluate agency policies, procedures, and training to ensure those who investigate threat-related offenses are aware of this recent decision and the potential adverse impact on enforcement of *some* of these criminal statutes. Investigators and officers who enforce these statutes should also familiarize themselves with the subjective standard, as the Supreme Court’s recent holding now clearly establishes the subjective intent requirement, which may foreclose the ability to assert qualified immunity in litigation arising out of arrests occurring subsequent to this opinion.

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