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**U.S. Supreme Court
&
Court of Criminal Appeals Update**

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US Supreme Court

- *Counterman v. Colorado*, [600 U.S. 66](#) (6/27/23) [5[Kagan]+2[Sotomayor]-1[Thomas]-2[Barrett]]

That an objectively reasonable person would find the defendant's words to be true threats is not enough to exclude them from First-Amendment protection. To criminalize a threat of violence, the defendant must be at least reckless about whether his words would be viewed in that manner.

Counterman became obsessed with a local musician who was a stranger to him. Over two years, he sent her hundreds of social media messages, including some that suggested he was surveilling her and that envisioned harm coming to her (e.g., "Staying in cyber life is going to kill you."; "You're not being good for human relations. Die."). She never responded, but the fear that he was following her and would hurt her upended her daily existence and caused her to lose sleep and cancel some performances. Counterman was charged with stalking by repeated communications, which in Colorado requires communicating with another "in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ...to suffer serious emotional distress." In short, it did not require the State to prove Counterman had a subjective intent to threaten the victim. Counterman argued that his messages could not be criminalized because they were protected under the First Amendment. The Colorado courts disagreed, and Counterman appealed to the Supreme Court.

Justice Kagan's majority decision sided with Counterman. True threats of violence (serious expressions conveying that a speaker means to commit an act of unlawful violence, which can be categorized as such based solely on their objective content) have historically been unprotected. They harm others even when the speaker is clueless that their speech will be understood as threatening. To ensure that criminalizing true threats doesn't chill speech that falls on the fully protected, non-threatening free-speech side of the dichotomy, however, the First Amendment demands the defendant have some subjective awareness that his speech will be viewed as threatening. This means that some otherwise proscribable speech (and that causes real harm) will go unpunished because the State cannot prove the defendant's mental state. But by reducing an honest speaker's fear that he may erroneously incur liability, the *mens rea* requirement provides breathing room for more valuable speech. In the same way, defamation is defamation and obscenity is obscenity, but, to punish either, the defendant must have some subjective awareness of the disregard for truth or of the character and nature of the materials he distributes to avoid the hazard of self-censorship.

The subjective mental state required is recklessness. This means that a speaker must know that others could regard his statements as threatening violence but conveys them

anyway. This less onerous standard (compared with purpose/intent or knowledge) is necessary because of the value in protecting against profound harms to both individuals and society from true threats of violence—harms that formed the basis for this historically unprotected category of speech. Recklessness is also consistent with the standard required for defamation. That standard appears to have given sufficient breathing room to non-defamatory statements. Societal interests in countering threats are at least as high (if not higher) than defamation, and the protected speech near the borderline is typically further from core First Amendment concerns than more frequently political reputation-damaging speech. While incitement of criminal conduct requires a higher mental state (intent), that is because the protected speech at the border is often only a hair's breath from political advocacy. Because the State in *Counterman's* case only had to prove whether a reasonable person would understand his statements as threats, not whether he was reckless about that possibility, it violated the First Amendment.

Justice Sotomayor concurred, pointing out that “because petitioner was prosecuted for stalking [for a combination of threatening statements and repeated, unwanted, direct contact with the victim], this case does not require resort to the true-threats exemption to the First Amendment.” For the same reason, less First-Amendment scrutiny is warranted than there would be for pure speech (as would occur in prosecutions for a single statement based solely on its content). She stresses the limited holding of the case: “True-threats doctrine came up below only because of the lower courts’ doubtful assumption that petitioner could be prosecuted only if his actions fell under the true-threats exception.”

➤ *McElrath v. Georgia*, [601 U.S. 87](#) (2/21/24) (9 [Jackson]+1[Alito])

A jury’s acquittal on one offense that is so contradictory to that same jury’s guilty verdicts on other offenses that they cannot both be true is nonetheless an acquittal for double jeopardy purposes.

McElrath suffered from delusions. He was committed to a mental-health facility and diagnosed with schizophrenia. One week after his release, he killed his mother by stabbed her more than 50 times. He told first responders he did so because she was poisoning him and asked if his actions were wrong.

He was charged with malice murder (which is like our intentional and knowing murder), felony murder, and aggravated assault. McElrath asserted an insanity defense. Although the crimes neither occurred at different times nor through distinct acts, the jury found McElrath not guilty by reason of insanity on malice murder and guilty but mental ill on the other two offenses. Under Georgia law, the insanity acquittal results in a commitment to a mental-health facility while the “guilty but mentally ill” verdicts give

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