NO. 99809-4

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RICARDO MIRELES JR.,

Appellant.

ANSWER TO PETITION FOR REVIEW

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A. ISSUE

Ricardo Mireles Jr. has petitioned this Court for review of the Court of Appeals decision in his case, claiming that the analysis of the appellate court conflicts with a decision of this Court, with decisions from the United States Supreme Court, and is an issue of substantial public interest. Pet. for Review, at 1-13. The State did not file an answer to the petition. This Court has asked the State to "address[] the portion of the Court of Appeals opinion striking down the 'embarrass' prong of the cyberstalking statute."

B. ARGUMENT

Mireles first argues that the decision below conflicts with this Court's decision in State v. Williams, 144 Wn.2d 197, 202, 26 P.3d 890 (2001), in which this Court held that the harassment statute was overbroad since it prohibited speech that threatened a person's "mental health," a term that was undefined in the statute. It is difficult to tell, however, where the conflict lies. Williams invalidated a statute that

criminalized threats to "mental health," because that term was vague, undefined, and thus prohibited too much potentially protected speech. The Court of Appeals opinion here, likewise, invalidated the "embarrass" prong of the cyberstalking statute because that term swept a substantial amount of protected speech within its reach. State v. Mireles, 16 Wn. App. 2d 641, 654-55, 482 P.3d 942 (2021). The actual holdings of the decisions seem in harmony, not dissonance.

Mireles seems to argue that "to the extent that [the cyberstalking statute] is a content-based regulation … the Court of Appeals holding …[is] … in conflict with" Williams. But the Court of Appeals decision is not "content-based" as Mireles claims. The Court of Appeals did not hold, as Mireles seems to suggest, that all language in a statute is permissible if the statute has an element of scienter. Pet. at 4-5. The Court held simply that most of the cyberstalking statute was constitutional because it requires scienter, but the "embarrass" portion was not constitutional because it swept in too much protected speech.

The holding of Mireles does not seem in conflict with the holding in Williams. Review is unwarranted on this basis.

Second, Mireles argues that the decision below conflicts with United States Supreme Court authority because it fails to strike down a statute that criminalizes "unpleasant speech" made with a "caustic intent." Pet. at 5-6. This is not a fair characterization of the decision of the Court of Appeals. The lower court carefully analyzed precedent from this Court and the Supreme Court and held that the cyberstalking statute criminalized conduct, not speech, in much the same way as the harassment and telephone harassment statutes and, thus, was constitutional. Mireles, 16 Wn. App. 2d at 652. The manner of communication – through electronic means rather than over a telephone or in person – was simply not constitutionally significant when the communication occurred in a private forum. Id. The manner of communication was significant, however, when the communication was in a public forum, meaning that the "embarrass" prong did not survive a challenge

because embarrassing people in a public forum should not be criminalized. Mireles, at 652. These holdings are fully supported by precedent from this Court and the Supreme Court. Mireles fails to explain how the holdings conflict with such authority. His allegations do not accurately summarize the holding of the court below and are conclusory. They do not supply a basis to grant review.

Third, Mireles asserts that "the cyberstalking statute criminalizes a person communicating in a public or private electronic forum in a lewd way, in an indecent way, in a way that suggests lewd or indecent acts, or in an anonymous or repeated way, as long as the speaker has a caustic intent toward another." Pet. at 8. It is unclear how this assertion is materially different from the last. But, again, this assertion is not a fair characterization of the opinion below, and it fails to account for the plain language of the statute and, thus, overstates the scope of the prohibition. The opinion recognizes the distinctions between conduct and speech as well as the distinctions between

private and public forums, and it appropriately recognizes that as long as a statute includes an element of scienter – an intent to harass or intimidate – it may be regulated in a private forum more than in a public one.

> RCW 9.61.260 regulates speech in the public forum because it criminalizes "electronic communications," which includes internet-based communications made "with intent to harass, intimidate, torment, or embarrass." In Dyson we evaluated a similar statute in a private forum. 74 Wash. App. 237. We determined that "making telephone calls with the intent to harass, intimidate, or torment another while using lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act" was conduct implicating speech, rather than speech itself. 74 Wash. App. at 243. Because the statute required a specific intent, we concluded that the impact on speech was insubstantial. Id. Therefore, the statute was not overbroad.
>
> We did so in reliance on Talley, which had considered an overbreadth challenge to the malicious harassment statute under public forum standards. Id. (citing Talley, 122 Wn.2d at 198). There, the Supreme Court considered language that criminalized certain speech made with intent to harass, that mirrors the operative language here. Talley, 122 Wn.2d at 198, 202. It noted specifically that "a person is free ... to make his or her odious or bigoted thoughts known to the world so long as those words do not cross the boundary into criminal harassment." Id. at 211. Such criminal

harassment, the court noted, was conduct, not speech. Id. at 210-11.

In Virginia v. Black, 538 U.S. 343, 362, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), the Supreme Court reached a similar conclusion. It upheld a Virginia law banning cross burning on another's property or any public place "with 'an intent to intimidate.' " Id. at 348. It held that a mens rea of evil intent rendered otherwise protected speech unprotected by the First Amendment. See id. at 362, 365 (cross burning may be proscribed with intent to intimidate, but cross burning without additional proof of the requisite intent may not).

We conclude that the intent requirement of the cyberstalking statute sufficiently limits the statutes reach to conduct. It punishes not the content of speech, but rather the selection of a victim and directing the speech in such a way as to cause a specific harm to them. See Talley, 122 Wn.2d at 205-06. Under these cases, the harm from harassment and intimidation have been significant enough harm to warrant government regulation. See id. at 210-11; Black, 538 U.S. at 362; Dyson, 74 Wn. App. at 244 (prohibiting harassment is not prohibiting speech). While none of the cases specifically considered the "intent to torment" in their overbreadth analysis, the outcome would be the same. The intent is the same. The selection of the victim is the same. The harm is at least as great as that of harassment or intimidation.

Mireles, at 653-54 (footnote omitted). Mireles seemingly ignores this analysis in his petition. His conclusory allegations

do not establish any conflict between the decision below and Supreme Court authority.

Fourth, Mireles argues that the statute is not narrowly tailored to protect a compelling government interest. Pet. at 9-11. But as should be clear from the section quoted above, this Court has consistently held that protecting people from words designed to harass and intimidate is a compelling state interest, and the decision below recites that line of authority and reasoning. This argument does not provide a basis to grant review.

Finally, Mireles argues that the decision below presents an issue of substantial public interest. Pet. at 12. He is mistaken. As to the constitutionality of the statute generally, the decision below breaks no new ground, it is firmly rooted in jurisprudence from this Court and the Supreme Court. Although the regulation of speech is a significant issue, this case does not change that regulation in a manner that should draw interest.

The decision is novel only insofar as it holds that an intent to "embarrass" someone in a public forum may not be deemed criminal. Mireles, at 654-55. The court then severed that provision from the remaining parts of the statute to preserve the rest of the statute. Id. at 655. This holding is unremarkable. It preserves the portions of the statute that are like previously recognized constitutional limits, but it strikes the novel and further-reaching portion of the statute. To the knowledge of below-signed counsel, few if any prosecutions have been pursued based solely on the "embarrass" prong of this statute, so any real impact on Washington prosecutions is more theoretical than real. And because embarrassment is a lesser harm than harassment, intimidation, or threating physical harm, severing that prong from the statute will not create a public safety issue.

C. CONCLUSION

For all these reasons, Mireles has not met the criteria of RAP 13.4(b) and the State respectfully asks this Court to deny review.

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DATED this 30th day of September, 2021.

Respectfully submitted,

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