

92593-3

FILED
September 21, 2015
Court of Appeals
Division III
State of Washington

No. 32981-0-III

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,

Respondent,

v.

T.M.,

Juvenile Appellant.

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON**

ACLU OF WASHINGTON FOUNDATION

Venkat Balasubramani, WSBA # 28269
venkat@focallaw.com
800 Fifth Avenue, #4100
Seattle, WA 98104
(206) 529-4827

La Rond Baker, WSBA #43610
David Russell, Legal Intern
lbaker@aclu-wa.org
drussell@aclu-wa.org
901 Fifth Avenue, #630
Seattle, WA 98164
(206) 624-2184

Attorneys for Amicus Curiae

TABLE OF CONTENTS

I. Identity and Interest of *Amicus Curiae*..... 1

II. Issue to be Addressed by *Amicus* 1

III. Factual Background.....1

IV. Argument..... 4

A. True Threat Statutes Should Be Analyzed Under a Subjective Intent Standard or they Will Run Afoul of the First Amendment..... 6

 1. A statute that criminalizes “true threats” must require subjective intent.....7

 2. The objective test improperly favors state interests over free speech protections.10

B. The Objective Reasonable-Speaker Test Violates Due Process Principles and Is Inconsistent with the Supreme Court’s Recent Holding in *Elonis v. United States*..... 11

C. People—and Adolescents in Particular—Should not Be Penalized for Making Statements in the Course of Mental Health Treatment 14

V. Conclusion..... 17

TABLE OF AUTHORITIES

State Cases

<i>State v. E.J.J.</i> , 183 Wn.2d 497, 354 P.3d 815 (2015)	15
<i>State v. Krona</i> , No. 71810-0-I, 2015 WL 4531223 (Wn. App. July 27, 2015)	12
<i>State v. Schaler</i> , 169 Wn.2d 274, 236 P.3d 858 (2010)	7, 14, 16, 17

Federal Cases

<i>Dombrowski v. Pfister</i> , 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)	8
<i>Elonis v. United States</i> , 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)	11, 12, 13, 14
<i>Haley v. State of Ohio</i> , 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948)	3
<i>J.D.B. v. N. Carolina</i> , 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011)	3
<i>Jaffee v. Redmond</i> , 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996)	15
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (2015)	12, 13
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d. 305 (1992)	4
<i>Rogers v. United States</i> , 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975)	8

<i>Staples v. United States</i> , 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)	13
<i>United States v. Alvarez</i> , 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012)	4, 9
<i>United States v. Bagdasarian</i> , 652 F.3d 1113 (9th Cir. 2011).....	9, 14
<i>United States v. Magleby</i> , 420 F.3d 1136 (10th Cir. 2005).....	9
<i>United States v. X-Citement Video, Inc.</i> , 513 U.S. 464, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)	13
<i>Virginia v. Black</i> , 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003)	4, 7
<i>Watts v. United States</i> , 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)	4
Cases from Other State Jurisdictions	
<i>Aboye v. United States</i> , No. 13-CM-1219, 2015 WL 4714153 (D.C. C.A. Aug. 6, 2015)	12
<i>Brewington v. State</i> , 7 N.E.3d 946 (Ind. 2014).....	9
<i>California v. Toledo</i> , 26 Cal. 4th 221, 26 P.3d 1051 (Cal. 2001).....	11
<i>O'Brien v. Borowski</i> , 461 Mass. 415, 961 N.E.2d 547 (Mass. 2012).....	9
<i>People v. Dye</i> , No. 4–13–0799, 2015 WL 4609913 (Ill. App. Ct. Aug. 3, 2015)	9
<i>Seney v. Morhy</i> , 467 Mass. 58, 3 N.E.3d 577 (Mass. 2014)	9

State v. Miles,
15 A.3d 596 (Vt. 2011) 9

Statutes

18 U.S.C. § 875(c) 11

RCW 9A.46.020..... 1, 4, 5

Other Authorities

Libby Nelson,
Why Trigger Warnings Are Really so Controversial, Explained, Vox
Magazine (Sept. 10, 2015),
<http://www.vox.com/2015/9/10/9298577/trigger-warnings-college>..... 11

Manny Fernandez and Christine Hausersept,
*Handcuffed for Making Clock, Ahmed Mohamed, 14, Wins Time with
Obama*, New York Times (Sept. 16, 2015),
[http://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-
investigation-for-building-a-clock.html?_r=0](http://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html?_r=0)..... 10

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 50,000 members dedicated to the preservation of civil liberties. The ACLU strongly opposes laws and government action that infringe on the free exchange of ideas, and unconstitutionally restrict protected expression. It has advocated for free speech as *amicus curiae* at all levels of the state and federal court systems. The ACLU is particularly concerned with the chilling effect of criminal sanctions on those who engage in protected speech.

II. ISSUE TO BE ADDRESSED BY *AMICUS*

Whether the objective reasonable-speaker standard sufficiently narrows Washington State’s harassment statute, RCW 9A.46.020, to ensure that protected speech is not unconstitutionally burdened.

III. FACTUAL BACKGROUND

In October 2014, T.M. was a 14-year-old freshman at Naches Valley High School (“NVHS”) in Naches, Washington. T.M. was raised by his grandparents in eastern Washington. RP 247. T.M. had previously been involved in the foster care system. *Id.* At the time of the incident he spent a lot of time alone, and was plagued by feelings of isolation, sadness, and fear. RP 250.

The morning of T.M.’s arrest, the principal of NVHS notified the

student body that one of T.M.'s classmates had committed suicide. RP 173. After announcing the sad news, the principal allowed students who wished to go home for the day, and who had parental permission, to do so. RP 173-74. That evening, T.M. met with his mental health counselor. RP 11. During this meeting, T.M. told his counselor that he wanted to bring a gun to school to kill three classmates who teased him. RP 19. He said he might be able to break into his grandfather's gun closet to get a gun, but if he did he would "just kill himself so that the boys would feel his pain." RP 34. The counselor reported T.M.'s statements to law enforcement.¹

A Yakima County Sheriff's deputy went to T.M.'s home that same evening and questioned T.M. RP 47. The deputy asked T.M. to repeat what he had told his counselor. RP 63-64. T.M. told the officer that he thought about killing three of his classmates. *Id.* T.M. also told the deputy that he was probably too lazy to go through with this "plan" and would rather play video games or kill himself. RP 65-66. T.M. was very forthcoming and spoke with the deputy at length. RP 56. He even walked the deputy around the property to show him his fort, and showed him his

¹ T.M. previously told his counselor that he considered committing suicide, including how to do it. RP 25, 28. T.M. had also previously told his counselor that he wanted to kill his grandfather. RP 25. His counselor did not report his previous statements regarding suicidal ideation or thoughts of harming his grandfather. RP 26, 29-32 T.M. may have grown accustomed to sharing his inner most thoughts with his counselor without retribution.

search history on his school iPad as well as a few small explosives that he had made.² RP 57, 60. During this interaction T.M. was emotional and told the deputy that he was having mental health problems. RP 66. It is unlikely that he understood the grave nature of the situation.³

A Yakima County deputy arrested T.M. that evening. Later that night, a Yakima County detective called the school principal and the parents of the three boys to alert them of T.M.'s "hit list" and that he was in custody. RP 75-76, 87, 101-02, 120. T.M. never spoke to those parents or children directly regarding his putative threat. *Id.* Instead, it was conveyed by the detective. *Id.* T.M. was convicted of three counts of felony harassment. On appeal, T.M. argues that insufficient evidence supports the convictions, and that the convictions are unconstitutional since his statements were not "true threats" under either Washington's reasonable-speaker/objective standard or the subjective-intent standard set forth in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

² T.M. mentioned that he had been experimenting with small explosives around his property, but he also explained that these were so small that his grandparents could not hear them when he set them off in the yard. RP 19, 68.

³ See *Haley v. State of Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224 (1948) ("In the specific context of police interrogation, events that would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."); *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2397, 180 L. Ed. 2d 310 (2011) ("The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

IV. ARGUMENT

Although pure speech generally cannot be criminalized, there are a few narrow categories of speech that fall outside of First Amendment protections, including “true threat[s].” *United States v. Alvarez*, 132 S. Ct. 2537, 2539, 183 L. Ed. 2d 574 (2012). Courts have interpreted the First Amendment to allow for prohibitions of true threats because of the government’s interest in “protect[ing] individuals from the fear of violence” and “from the disruption that fear engenders.” *Black*, 538 U.S. at 359-60 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d. 305 (1992)). However, statutes that criminalize “true threats” must be narrowly drafted to avoid sweeping constitutionally protected speech into their ambit, and “must be interpreted with the commands of the First Amendment clearly in mind.” *Watts v. United States*, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969).

RCW 9A.46.020, which criminalizes harassment under a “true threat” analysis, should be construed as requiring a person charged with harassment based on pure speech to have a subjective intent to threaten or cause fear to the person to whom the speaker’s words were directed.⁴ The

⁴ (1) A person is guilty of harassment if:
(a) 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; or
(ii) To cause physical damage to the property of a person other than the

statute is fatally overbroad for First Amendment purposes without a subjective intent requirement because it would criminalize pure speech that is innocuous (and protected) but inflammatory.

A person is guilty of violating RCW 9A.46.020 if they “knowingly” threaten bodily injury, property damage, or physical confinement. RCW 9A.46.020. The statute itself is silent as to how “knowingly” should be defined, *id.*, and there are several ways to interpret the mens rea requirement. Washington courts have already rejected two possible interpretations—that the defendant have intended to commit the act or that the speaker have actually heard the words. This case presents the more challenging question of whether the speaker must harbor some subjective intent to place the putative victim in fear.

The ACLU contends that Washington’s harassment statute, RCW 9A.46.020, should be read as requiring subjective intent in order to ensure that it does not run afoul of the First Amendment. It also urges the Court

-
- actor; or
 - (iii) To subject the person threatened or any other person to physical confinement or restraint; or
 - (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and
- (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020.

to consider the collateral consequences of criminalizing speech made by adolescents in the course of mental health treatment. Criminalizing such speech deeply chills speech to the detriment of both public safety—as young people are deterred from being honest with mental health professionals—and to the children themselves, who are faced with the often life-long consequences of a criminal record simply because they sought appropriate mental health care.

Amicus agrees with T.M. that his convictions must be reversed because the State failed to prove the statutory elements and because the convictions violate the First Amendment under the reasonable-speaker standard. However, *amicus* urges this Court to take the opportunity to address the broader question of whether the First Amendment requires proof of subjective intent to threaten before speech may be sanctioned as a true threat. Recent U.S. Supreme Court cases and policy considerations demonstrate the necessity of imposing this limitation on the criminalization of pure speech.

A. True Threat Statutes Should Be Analyzed Under a Subjective Intent Standard or they Will Run Afoul of the First Amendment

The United States Supreme Court defines true threats as “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular

individual or group of individuals.” *Black*, 538 U.S. at 359. In *Virginia v. Black*, the Court found unconstitutional Virginia’s ban on cross burning—even though cross-burning is closely linked to lynchings, firebombings, and white supremacy, and has been used for generations to intimidate, threaten, and terrorize people of color. In so doing, it emphasized the long-held First Amendment principle that speech can only be criminalized as a “true threat” when there is an intent to intimidate. As such, *Black* indicates that a speaker’s subjective intent to threaten is a requisite constitutional element in a criminal conviction predicated on speech.

However, Washington State courts currently require only a showing that an objective reasonable person may view the speech in question as a threat before such speech may be criminalized. *See State v. Schaler*, 169 Wn.2d 274, 287, 236 P.3d 858 (2010). This means that instead of requiring that the speaker intend to threaten before pure speech may be criminalized, *see Black*, speech may be penalized if an objective, reasonable person may view it as threatening or if the speaker was negligent, regardless of whether the speaker meant the speech to be a threat, joke, or something else entirely. *See Schaler*, 169 Wn.2d at 287.

- 1. A statute that criminalizes “true threats” must require**

subjective intent.

The U.S. Supreme Court has repeatedly warned of the “chilling” effect that the threat of criminal prosecution has on free speech, even where that speech contains reference to conducting future criminal activity. *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965) (“The chilling effect upon the exercise of First Amendment rights may derive from the fact of [criminal] prosecution, unaffected by the prospects of its success or failure.”). The requirement of subjective intent in “true threat” jurisprudence to ensure that protected speech was not penalized was first articulated by Justice Thurgood Marshall in his concurring opinion in *Rogers v. United States*, 422 U.S. 35, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975) (Marshall, J., concurring). Justice Marshall was particularly concerned with the First Amendment implications of an objective test, believing it swept too broadly, and warning that courts “should be particularly wary of adopting such a standard for a statute that regulates pure speech.” *Id.* at 47. Justice Marshall noted that the objective reasonable-speaker standard, which “charg[es] the defendant with responsibility for the effect of his statements on [] listeners,” and would have a chilling effect on speech. *Id.* at 47-48.

Requiring a mens rea of subjective intent for crimes that are predicated on pure speech provides “breathing room” for potentially

valuable speech by “reducing an honest speaker’s fear that he or she may accidentally incur criminal liability for speaking.” *Alvarez*, 132 S. Ct. at 2553. Hence, *Black* is often interpreted as imposing this requirement. *See United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011) (overturning conviction for threatening the president because the defendant lacked subjective intent to threaten); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (supporting subjective test articulated in *Black*); *Brewington v. State*, 7 N.E.3d 946 (Ind. 2014) (applying both objective and subjective tests); *People v. Dye*, No. 4–13–0799, 2015 WL 4609913 (Ill. App. Ct. Aug. 3, 2015) (holding true threats require intentionality, even when statute only requires “knowledge”); *O’Brien v. Borowski*, 461 Mass. 415, 961 N.E.2d 547 (Mass. 2012) (holding true threats require the speaker subjectively intend to communicate a threat), *abrogated on other grounds by Seney v. Morhy*, 467 Mass. 58, 3 N.E.3d 577 (Mass. 2014); *State v. Miles*, 15 A.3d 596, 599 (Vt. 2011) (adopting subjective intent test to determine whether defendant intended to threaten in the course of his mental health treatment).

2. The objective test improperly favors state interests over free speech protections.

The objective reasonable-speaker standard improperly burdens free speech in an effort to protect people from the fear that threats can arouse. Although protecting people from fear caused by threats is a legitimate government interest, the objective reasonable-speaker standard unduly favors this protection over First Amendment protections by criminalizing speech that may not have had any criminal intent. This is particularly true because using an objective reasonable person's view to determine whether speech constitutes a "true threat" analysis is discretionary, and thus may be informed by intentional or implicit bias. Manny Fernandez and Christine Hausersperg, *Handcuffed for Making Clock, Ahmed Mohamed, 14, Wins Time with Obama*, New York Times (Sept. 16, 2015), http://www.nytimes.com/2015/09/17/us/texas-student-is-under-police-investigation-for-building-a-clock.html?_r=0 (discussing teenage Muslim boy's arrest for bomb threats after he created a clock and brought it to school to show his teachers). It can also be increasingly difficult in today's age to tell what will cause alarm or threaten someone. See Libby Nelson, *Why Trigger Warnings Are Really so Controversial, Explained*, Vox Magazine (Sept. 10, 2015), <http://www.vox.com/2015/9/10/9298577/trigger-warnings-college>

(discussing the multitude of trigger warnings utilized in the media and on college campuses but noting that it would be impossible to identify and address the myriad of triggers that could evoke discord in someone emotionally or psychologically).

B. The Objective Reasonable-Speaker Test Violates Due Process Principles and Is Inconsistent with the Supreme Court's Recent Holding in *Elonis v. United States*

In addition to the objective test's friction with the First Amendment, there are also fundamental due process issues at stake. Although many states do not require subjective intent as the constitutional requirement for true threats, many nonetheless require subjective intent through statutory interpretation.⁵ The United States Supreme Court recently took this approach when it interpreted a federal threat statute without an explicit mens rea requirement. *See Elonis v. United States*, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015).

In *Elonis*, an individual was convicted for posting, on Facebook, threatening, "crude, degrading, and violent material about his soon-to-be ex-wife." *Id.* at 2002. The conviction was under 18 U.S.C. § 875(c), which makes it a federal crime to transmit in interstate commerce "any communication containing any threat . . . to injure the person of another."

⁵ *See, e.g., California v. Toledo*, 26 Cal. 4th 221, 227-28, 26 P.3d 1051 (Cal. 2001) (requiring that "the prosecution must establish . . . that the defendant made the threat with the specific intent that the statement was to be taken as a threat").

*Id.*⁶ The Court vacated *Elonis*' conviction because the jury instruction failed to require some awareness of wrongdoing on the part of the defendant. The Court held that failure to require knowledge of wrongdoing on the part of *Elonis* violated fundamental principles of due process that generally require "that a defendant must be 'blameworthy in mind' before he can be found guilty[.]" *Id.* at 2009 (quoting *Morrisette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (2015)). The *Elonis* court held that an objective reasonable-person or negligence standard was an insufficient showing of a 'blameworthy mind' to support a conviction. *Id.* at 2009. To ensure that federal threat statutes had a sufficiently high mens rea requirement to "separate wrongful conduct from 'otherwise innocent conduct'" the Court held that an objective reasonable-person test was insufficient to ensure that innocent speech or behavior were not the basis of a criminal conviction. *Id.* at 2010.⁷

In reaching its holding, the *Elonis* Court relied on the basic principle that "wrongdoing must be conscious to be criminal" to determine

⁶ Notably, the ACLU and numerous other free speech advocacy groups filed *amici curiae* briefs in *Elonis*, uniting behind the position that subjective intent be a requirement of this statute. See *Elonis*, 135 S. Ct. (noting *amici curiae* briefs filed in support of petitioner, including by the ACLU and others).

⁷ At least one court has already reconsidered its intent requirement for a threat statute post-*Elonis*. See *Aboye v. United States*, No. 13-CM-1219, 2015 WL 4714153 at *4 n.18 (D.C. C.A. Aug. 6, 2015) (describes a recent threat conviction that was reheard and vacated in light of the *Elonis* subjective-intent requirement); but see *State v. Krona*, No. 71810-0-I, 2015 WL 4531223 (Wn. App. July 27, 2015) (declining to revisit a statutory reading requiring the objective test in light of the ruling in *Elonis*).

that something more than negligence is required to be convicted under the federal threat statute when that conviction is based on pure speech. 135 S. Ct. at 2009 (quoting *Morissette*, 342 U.S. at 252). The Court explained that the speaker's intent when uttering the words that serve as a basis for a criminal conviction is "the crucial element separating legal innocence from wrongful conduct." *Id.* at 2003 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 464, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)).

While the Court did not determine what level of mens rea was sufficient, it noted that an objective reasonable-person standard was inconsistent with "the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.* See also *Morissette*, 342 U.S. at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

Although the *Elonis* Court did not address the First Amendment issue, it implicitly adopted the Ninth Circuit's position that negligence is insufficient to convict under the federal threat statute. 135 S. Ct. at 2011. However, Washington's interpretation of its state analog to the federal statute in question does not specify a mens rea requirement and, contrary

to the driving due process and free speech principles articulated in *Elonis* and *Bagdasarian*, Washington courts have applied a lower mens rea than the federal courts and have allowed individuals to be convicted for speech under this more lenient objective reasonable-person/negligence standard. *Elonis* strongly suggests that when faced with a threat statute with no mens rea, courts should infer the requirement of criminal intent. Washington's interpretation of the mens rea requirement, which finds that "simple negligence" is sufficient for a conviction under its harassment statute, is inconsistent with this reasoning. *Compare Elonis*, 135 S. Ct. at 2011, with *Schaler*, 169 Wn.2d at 287.

C. People—and Adolescents in Particular—Should not Be Penalized for Making Statements in the Course of Mental Health Treatment

T.M. did what he was supposed to do. He expressed the disturbing thoughts he was having to his mental health counselor, perhaps to get attention, perhaps to seriously discuss the implications of and resolve these thoughts. The fact that T.M. had learned of his classmate's suicide that morning supports the idea that T.M. was merely working through some unfamiliar emotions.

Regardless of T.M.'s motivation, he expressed his thoughts in a wholly appropriate forum and should not be punished for doing so. Mental health treatment should be a place where all, but especially

children, are encouraged to speak freely, bond with, and open up to their counselors, without fear that their statements can be used as a basis for prosecution.⁸ The criminalization of typical adolescent behavior—speaking angrily and hastily without intent to follow through—contributes to adolescent alienation from the authority figures in their lives and can have long-lasting effects.⁹ Further, “[w]e should [be careful to] not criminalize and pathologize typical juvenile behavior.” *State v. E.J.J.*, 183 Wn.2d 497, 354 P.3d 815, 831 (2015).

Importantly, this kind of prosecutorial response is also completely at odds with the point of therapy and mental health treatment for troubled youth. Frank and open discussion is the cornerstone of therapy and is an area where constitutional protections should be robust in order to prevent any “chilling” of expression. *See Jaffee v. Redmond*, 518 U.S. 1, 10, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996) (“[A] psychiatrist’s ability to help her patients is completely dependent upon [the patient’s] willingness and ability to talk freely.” (internal quotation marks omitted)). The subjective

⁸ The duty to warn is an important safeguard and serves a great societal interest by protecting those who may be in danger. However, it does not require criminal sanctions against the patient.

⁹ It is certain that America’s history of school shootings, and the law, may require a mental health provider to give notice to individuals or the police when a young person threatens harm to others at school. This is appropriate. What is inappropriate, and is a factor in the overincarceration and criminalization of youth, is prosecuting children who need help and are not a credible threat to others. In this instance, it was right for the mental health provider to alert the police. The decision to prosecute was problematic.

intent test provides a higher threshold of protection in this context.

Although there are times when it may be appropriate to intervene in mental health treatment, prosecution should be a last resort. If the goal is to maintain public safety—and to protect the safety of the young person seeking mental health treatment—only a subjective intent standard makes sense. Any other standard would inevitably chill speech that could otherwise prevent harm. And, as Justice Sanders stated in his opinion in *Schaler*, there are other alternatives short of prosecution available, e.g. civil commitment if a person is a harm to themselves or others, when a patient makes statements in counseling that may be viewed as threatening. *Schaler*, 169 Wn.2d at 296 (Sanders, J., concurring and dissenting in part).

The facts in T.M.'s case further support the position that subjective intent must be required to ensure that pure speech is not chilled or penalized because it may be ill-tempered. If subjective intent had been required, T.M. would not have been charged in the first place: statements made to a mental health counselor are generally not intended to threaten third parties since such statements are made in confidence and not intended for further disclosure.

Indeed, the *Schaler* Court recognized the problems the objective reasonable-speaker standard creates in the context of mental health treatment:

While the standards may yield no meaningful difference in many cases, in this case the difference is not academic. Here, there was a genuine issue of whether a reasonable person in Schaler's position would foresee that threats he uttered to a mental health counselor while receiving medical care, which referred to third parties not present, would be interpreted as serious expressions of intent to harm those third parties.

Schaler, 169 Wn.2d at 290 n.7. A concurring and partially dissenting Justice Sanders lamented that the Court's ruling overcriminalized speech and penalized someone for seeking help:

Schaler's speech in the context here had everything to do with Schaler, his attempt to get help, and his admirable efforts to try to work through his problems and—to the extent he was tempted to actually commit an unlawful act—his intent to resist that temptation. His speech had *nothing* to do with any intent to coerce, intimidate, or humiliate his neighbors. To the extent Schaler posed a danger to his neighbors or the community if released without further treatment, there is a legal mechanism (not at issue here) where a person can be civilly confined involuntarily.

Id. at 292 (Sanders, J., concurring and dissenting in part).

V. CONCLUSION

For the foregoing reasons this court should apply the subjective intent standard to Washington's harassment statute, and reverse T.M.'s conviction.

Respectfully submitted this 21st day of September 2015.

BY: ACLU OF WASHINGTON FOUNDATION

/s/ La Rond Baker

La Rond Baker, WSBA #43610

David Russell, Legal Intern

lbaker@aclu-wa.org

drussell@aclu-wa.org

901 Fifth Avenue, #630

Seattle, WA 98164

(206) 624-2184

FOCAL PLLC

/s/ Venkat Balasubramani

Venkat Balasubramani, WSBA # 28269

venkat@focallaw.com

800 Fifth Avenue, #4100

Seattle, WA 98104

(206) 529-4827

Cooperating Attorney for the ACLU

Attorneys for *Amicus Curiae*

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

No. 32981-0-III

State of Washington v. T.M.

DECLARATION OF SERVICE

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below, I caused to be served a copy of the Brief of *Amicus Curiae* American Civil Liberties Union of Washington via email and submission to the Division III JIS Link system to the following addresses:

Lila Silverstein
Washington Appellate Project
1511 3rd Ave #701,
Seattle, WA 98101
(206) 587-2711
lila@washapp.org

Tamara A. Hanlon
Joseph Brusic
Yakima County Prosecutors Office
128 N. Second Street, Room 329
Yakima, WA 98901
(509) 574-1210
tamara.hanlon@co.yakima.wa.us
joseph.brusic@co.yakima.wa.us

Signed this 21st day of September 2015, at Seattle, King County, WA.

/s/ La Rond Baker

La Rond Baker, WSBA #43610
ACLU of Washington Foundation
lbaker@aclu-wa.org
901 Fifth Avenue, #630
Seattle, WA 98164