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No. 92593-3  
IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

T.J.M., Petitioner.

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REPLY TO BRIEF OF AMICUS CURIAE

ACLU OF WASHINGTON

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Tamara A. Hanlon, WSBA #28345  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

JOSEPH BRUSIC  
Yakima County Prosecuting Attorney  
128 N. 2d St. Rm. 329  
Yakima, WA 98901-2621

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**A. ISSUES RAISED**

1. Should the Court require the true threats doctrine to have a subjective intent element?
2. Does the objective test satisfy due process and longstanding principles of criminal law?

ANSWER TO ISSUES RAISED

1. No, the Court should not require the true threats doctrine to have a subjective intent element.
2. Yes, the objective test satisfies due process and longstanding principles of criminal law.

**B. ARGUMENT**

1. **The Court should not require the true threats doctrine to have a subjective intent element.**

The ACLU argues that Virginia v. Black, 539 US. 343, 123 S.Ct. 1536, 155 L. Ed. 535 (2003), “recognizes that a speaker’s subjective intent to threaten is a requisite constitutional element in a criminal conviction predicated on threatening speech.” (Brief at 5). However, as previously briefed, the majority of State courts have rejected that interpretation of Black when addressing the First Amendment issue. The issue in Black was whether a Virginia statute banning cross burnings with the intent to intimidate a group or person violated the First Amendment. 538 U.S. at 347, 360-3. A plurality of the Court concluded that the statute was unconstitutional because some cross burnings may be political speech. Id. at 363-67. (opinion of O’Connor, J.).

However, while the Supreme Court described some types of true threats, including intimidation and those types where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence, Black, 538 U.S. at 359-60, the Court did not hold that true threats were *limited* to those types of statements. Instead, relying on R.A.V. v. City of St. Paul, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), which involved a statute with an *objective* standard, the Court held that a true threat need not include an intent to actually carry out the threat. Id. Furthermore, the Court noted that the reason why the First Amendment does not protect true threats is so that individuals may be protected from the “fear of violence,” the “disruption that fear engenders,” and “from the possibility that the threatened violence will occur.” Id. (citation omitted). That reasoning directly supports the majority of State courts who have interpreted Black as not requiring a subjective intent as a constitutional element.

In support of their argument that courts have expressed doubt or abandoned the objective test post-Black, the ACLU cites only three cases, United States v. Heineman, 767 F.3d 970, 970 (10th Cir. 2014), United States v. Parr, 545 F.3d 491 (7th Cir. 2008), and an Indiana case, Brewington v. State, 7 N.E.3d 946, 964-6 (Ind. 2014). (Brief at 5-6). The State would first note that the quoted language from Parr is dicta. In Parr,

the court applied an objective test, noting that the jury was “properly instructed” that the defendant’s statements qualified as a “true threat if a reasonable person would understand that the statements, in their context and under all the circumstances,” would be interpreted as a serious expression of an intent to bomb the federal plaza. 545 F.3d at 497. In dicta, the court stated that after Black it is “more likely” that “an entirely objective definition is no longer tenable.” Id. at 500. But what that meant, the court continued, is “unclear.” Id. The Court noted, “We need not resolve the issue here.” Id.

In Brewington, Indiana employed a subjective-intent standard for threats, finding that the speaker must intend his communications to put his targets in fear for their safety. 7 N.E.3d at 964. Importantly, the state court noted that it was adopting, as a matter of state law, a free-speech standard, “even beyond what the First Amendment requires.” Id.

As a rationale for adopting a subjective test, the ACLU argues that an objective test will result in a chilling effect on speech and arbitrary enforcement. (Brief at 6-8). However, the cases cited in this section of their brief are very dissimilar from the case at hand. In U.S. v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011), the Ninth Circuit overturned a conviction under federal law for threatening a presidential candidate. Bagdasarian posted messages on an online board about the candidate and

claimed he was drunk when he did so. The Court held that the federal statute in question, 18 U.S.C. 879(a)(3), required both an objective and subjective test. In reversing the conviction, however, the Ninth Circuit noted that “We are not suggesting that an objective determination does not provide a worthwhile test...” 652 F.3d at 1117.

The ACLU also cites People v. Dye, 2015 Ill. App. (4th) 130799 (Ill. App. Ct. 4th Dist. 2015). In that case a client told his attorney, “I’m gonna get you” and the Court reversed because the comment could imply nonviolent retribution, as opposed to violent retribution. Again, the case is highly distinguishable from the facts of the case at hand. Here, T.J.M. made detailed statements involving violent retribution.

In O’Brien v. Borowski, 461 Mass. 415, 961 N.E.2d 547 (Mass. 2012), another case cited by the ACLU, the issue was a violation of a civil harassment order. The case was decided on statutory, not constitutional grounds and pertained to a *civil* statute. In that case, Massachusetts held that the statute itself required proof of the defendant’s specific intent. 961 N.E. at 557. Black was only discussed in dicta. The court noted an important difference between the civil statute at issue and the criminal harassment act:

A reasonable person standard may have been necessary to uphold the constitutionality of the criminal harassment

act, which otherwise required only that the knowing and malicious pattern of conduct “seriously alarm” the person harassed, ... but the additional requirements in the civil harassment act more carefully limit the scope of prohibited speech to constitutionally protected “true threats.”

461 Mass. 428.

The ACLU also cited United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005), for its proposition that the court applied the subjective test of Black. (Brief at 7). Magleby claimed jury instructions were contrary to the principles announced in Black. Because the issue was not raised on direct appeal, however, the court was left with deciding if there was ineffective assistance of counsel. 420 F.3d at 1139. The Tenth Circuit did not adopt any particular test. This was evident from language from the Tenth Circuit later on in the Heineman case:

“...our ruling on Magleby’s claim of ineffective assistance of appellate counsel hinged on the pre-Black law in effect at the time of his earlier appeal. Any statement in the opinion regarding the meaning of Black was irrelevant to the opinion and therefore dictum.” (citations omitted).

767 F.3d at 975.

Finally, the ACLU cites State v. Miles, a state case in which the Vermont State Supreme Court held that willfulness was required in order to find a violation of probation, specifically, that Miles engaged in

“violent or threatening behavior.” 2011 VT 6, 189 Wt. 564, 15 A.3d 596 (Vt. 2011). The probationer was delusional when making purported threats to a nurse while he was confined in a mental health unit. *Id.* at 565. He told the nurse of an intent to kill “Bill Brown” but it was unknown if the target was real or made up. *Id.* at 565-6. The Court found that there was no actual threat. *Id.* The case was not decided on First Amendment grounds and is highly distinguishable from the case at hand.

In sum, while the ACLU has cited many cases, none of them support the argument that use of an objective test will result in a chilling effect on speech or in arbitrary enforcement. Most of the cases also involve unique facts, highly distinguishable from the facts of this case.

**2. The objective test satisfies due process and longstanding principles of criminal law.**

The ACLU argues that as a matter of due process, the true threat analysis should incorporate some mens rea more than mere negligence. (Brief at 9). For the crime of harassment, the State must prove that the defendant *knowingly* communicated a threat that a reasonable person would foresee would be viewed as serious expression of an intent to harm or kill, RCW 9A.46.020. Because RCW 9A.46.020 explicitly requires that the State prove that the defendant act with knowledge in communicating a true threat, any due process concerns are met.

**C. CONCLUSION**

Based on the above arguments, Washington should maintain the objective, reasonable person standard. In Black, the Court did not indicate that it was abrogating the purely objective standard employed by most courts. This standard complies with due process and longstanding principles of criminal law. Recent caselaw has not changed this. As such, the Court should not add a subjective intent element to the analysis of true threats.

Respectfully submitted this 25th day of April, 2016,

  
TAMARA A. HANLON, WSBA # 28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on April 25, 2016, by agreement of the parties, I emailed a copy of "State's Reply to Brief of Amicus Curiae ACLU of Washington" to the following attorneys:

David L. Donnan  
Washington Appellate Project  
1511 3rd Ave Ste 701  
Seattle WA 98101-3647  
david@washapp.org

Venkat Balasubramani  
Focal PLLC  
900 1st Avenue S Suite 203  
Seattle WA 98134-1236  
venkat@focallaw.com

Lila Jane Silverstein  
Washington Appellate Project  
1511 3rd Ave Ste 701  
Seattle WA 98101-3647  
lila@washapp.org

La Rond Baker  
ACLU of Washington  
901 5th Ave Ste 630  
Seattle WA 98164-2086  
lbaker@aclu-wa.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th day of April, 2016 at Yakima, Washington.

TAMARA A. HANLON, WSBA  
#28345  
Senior Deputy Prosecuting Attorney  
Yakima County, Washington  
128 N. Second Street, Room 329  
Yakima, WA 98901  
Telephone: (509) 574-1210  
Fax: (509) 574-1211  
tamara.hanlon@co.yakima.wa.us

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**To:** Tamara Hanlon  
**Cc:** david@washapp.org; lila@washapp.org; La Rond Baker; venkat@focallaw.com  
**Subject:** RE: State of Washington vs T.M. 925933

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**Cc:** david@washapp.org; lila@washapp.org; La Rond Baker <lbaker@aclu-wa.org>; venkat@focallaw.com  
**Subject:** RE: State of Washington vs T.M. 925933

Good afternoon all,

Attached for filing is the State's "Reply to Brief of Amicus Curiae ACLU of Washington" in the case below:

State of Washington vs T.M.  
No. 92593-3

Thank you,

***Tamara A. Hanlon***  
Senior Deputy Prosecuting Attorney  
Appellate Unit  
Yakima County Prosecuting Attorney's Office  
128 N. Second Street Room 329  
Yakima, WA 98901  
Phone: (509)574-1254  
Email: [tamara.hanlon@co.yakima.wa.us](mailto:tamara.hanlon@co.yakima.wa.us)