

65064-5

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NO. 65064-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES READ,

Appellant.

REPLY BRIEF OF APPELLANT

James E. Lobsenz
Attorney for Appellant

Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020

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DIVISION ONE
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A. INTRODUCTION

Since both Zwedu and Read testified that Zwedu's race is *not* what cause Read to confront Zwedu, there is no evidentiary basis for this Court to find that Read confronted and frightened Zwedu "because of" her race. Therefore, her conviction for malicious harassment cannot stand.

The obvious motivating factor which caused Read to get out of his truck, clench his fists, to ask Zwedu in a rage if she was the one who wrote "the fucking ticket," and to tell her he knew where she worked, was that she was the person responsible for issuing the ticket. Selecting a parking lot attendant for verbal abuse "because of" her exercise of authority to issue a parking ticket does not constitute the crime of malicious harassment.

Undeniably, Read decided to call her a nigger "because of" her race, which was a readily observable fact. But it is not a crime to use the n-word when speaking. It is a crime to select someone as a target for a threat of bodily injury or death "because of" their race. But the evidence shows that did not happen here.

Even assuming that Zwedu's race accounted for some degree of the causation of the allegedly threatening behavior, the trial judge failed to find that the threatening behavior would not have occurred if Zwedu had not been an African-American. Without such a finding, Read's

conviction violates the First Amendment. Absent a finding that racial animus was the predominant factor which caused the defendant to select the victim as a target of illegal conduct, the conviction of a defendant for uttering offensive racist epithets is unconstitutional.

Finally, the trial court employed the objective test for “true threats” which predated the U.S. Supreme Court’s decision in *Virginia v. Black*, 538 U.S. 343 (2003). Because *Black* holds that a subjective intent to place the victim in fear of bodily injury or death is constitutionally required, and because no such finding was made, or could be made on the record in this case, Read’s conviction must be set aside.

B. ARGUMENT IN REPLY

1. THIS COURT MUST ENGAGE IN INDEPENDENT DE NOVO REVIEW OF THE FACTS.

a. The State Concedes That De Novo Review of the Facts is Constitutionally Required.

In his opening brief appellant Read noted that because First Amendment free speech rights are at issue, this Court must engage in independent *de novo* review of the factual findings in this case. *Brief of Appellant* (“BOA”), at pp. 12-17. The State properly concedes that Read is correct and that this court must undertake an independent review of the facts. *Brief of Respondent* (“BOR”), at 7-8, citing *State v. Kilburn*, 151 Wn.2d 36, 52, 84 P.3d 1215 (2004).

b. The State Correctly Notes That An Appellate Court Still Must Defer to Trial Court Credibility Findings.

The State also correctly states that an appellate court must defer to credibility findings made by the trier of fact. BOR, at 8.

c. Since Both Zwedu and Read Testified that Read Did Not Confront Her “Because Of” Her Race, The Trial Judge’s Determination That Zwedu Was More Credible Than Read Has No Impact on the Factual Determination of What Motivated Read.

In this particular case, Zwedu testified that she did *not* think that Read threatened her because of her race. RP II, 94-95. Read also testified that was *not* what caused him to yell at her. RP III, 209. Since there was no dispute between Read and Zwedu on this point, the fact that Zwedu was generally found to be more credible than Read does not mean that this Court should defer to the trial court’s finding that Read threatened Zwedu “because of” her race, because Zwedu never testified that she thought that was what motivated him.

d. The State Ignores The Fact That the Difference in Read’s Conduct Towards Smith and Towards Zwedu Is Attributable to the Fact That Zwedu Wrote the Parking Ticket and Smith Did Not.

The State notes that Read’s behavior towards Smith and Zwedu was different in that Read got out of his truck to talk to Zwedu, but “Read did not get out of his truck or call Smith, who is white, any derogatory names

or threaten him.” BOR, at 3.¹ In addition, Read made the comment, “I know where you work” to Zwedu, but did not make this comment to Smith. The State seeks to explain these differences in behavior by pointing to the fact that Zwedu was “a small black woman” whereas Smith was a white man. BOR, at 8. Thus the State argues that Read’s intimidating behavior towards Zwedu was “because of” her race. But the prosecution’s own statement demonstrates the fallacy of its reasoning. The State asserts:

The initial encounter with the victim was presumably triggered by the defendant’s anger over being given the ticket and began only with profanity. However, the evidence produced at trial reflects that the defendant became more irate *when he discovered that the ticket had been issued by the victim, a small black woman.*

BOR, at 8 (emphasis added). The second sentence in this passage from the State’s brief accurately acknowledges that *two things* changed as Read went from his first encounter with Smith to his second encounter with Zwedu: first (1) Read “discovered that the ticket had been issued by the victim [Zwedu]” and second (2) he “discovered” that the ticket issuer was “a small black woman.” The State simply *assumes* that the second discovery was what “caused” Read’s behavior to threaten Zwedu.

¹ See also BOR, at 8 (“Although the defendant was already angry when he approached the valet, he did not threaten the valet or try to physically intimidate him.”)

But the State provides no explanation as to how this Court should reach the conclusion that it was the second discovery, and not the first, which caused the change in behavior. Put another way, suppose Zwedu had been a white woman. The State contends that if she had been white, Read would have stayed in his truck, and would not have made the threatening remark "I know where you work." But the State provides no explanation as to why this Court should be convinced beyond a reasonable doubt that this is how Read would have acted had Zwedu been a white woman.

Obviously, if Zwedu had been a white woman, it is almost certain that Read would not have called her a nigger. But calling her a nigger is not the crime he was charged and convicted of. He was convicted of threatening her, and of selecting her as a person to threaten "because of" her race. The threatening behavior was getting out of his truck, approaching close to her, and telling her he knew where she worked. The State provides no explanation as to how this Court can find that Read did *not* do these things simply because Zwedu was the person who issued the ticket.

There are two possibilities as to the motive or "cause" of Read's decision to get out of his truck and to make the threatening remark towards Zwedu: (1) she wrote the ticket; and (2) she is a black person. If

the first possibility is the actual motivating factor, then Read is not guilty of the crime. Only if the second possibility is the actual motivating factor, is Read guilty of the offense. The State must prove beyond a reasonable doubt that it was the second possible motive – and not the first – that caused Read to act as he did. Yet the State has offered *nothing* to prove this. The State simply hopes that this Court will overlook the first possibility, and will affirm Read’s conviction on the basis of a conclusion that it is *possible* that the second motive – race – is what caused him to act. But the State’s burden is not met by merely showing that the second motive could *possibly* have been the cause. It must prove beyond a reasonable doubt that it *was* the cause. This Court is now the trier of fact, and applying *de novo* review to this factual determination – as it must – it should conclude that it is not persuaded beyond a reasonable doubt.

2. THE STATE SIMPLY IGNORES THE FACT THAT THE TRIAL COURT NEVER FOUND *HOW MUCH* OF A MOTIVATING FACTOR RACE WAS IN THIS CASE. THE TRIAL JUDGE MERELY FOUND THAT RACE WAS “AT LEAST IN PART” A MOTIVATING FACTOR. THE FIRST AMENDMENT IMPOSES A CONSTITUTIONAL REQUIREMENT THAT THE STATE MUST PROVE THAT RACE WAS (a) THE PRIMARY MOTIVATING FACTOR WITHOUT WHICH NO THREAT OF VIOLENCE WOULD HAVE BEEN MADE, OR (b) AT THE VERY LEAST, THAT RACE WAS A SUBSTANTIAL MOTIVATING FACTOR WHICH CAUSED THE DEFENDANT TO THREATEN VIOLENCE TO THE VICTIM’S PERSON.

Even assuming, arguendo, that this Court is convinced that Zwedu's race played "some part" (to use the trial judge's phrase") in causing Read to get out of his truck, clench his fists, and state in a loud and aggressive tone that he knew where Zwedu worked, *that is not enough*. The First Amendment requires *more*.

The First Amendment requires that the *amount* of causation attributable to the defendant's perception of the victim's race must rise to meet a constitutionally required minimum level. The appellate courts in at least five States have held that the minimum constitutionally required threshold level is defined by the phrase "substantial motivating factor." *People v. M.S.*, 10 Cal.4th 698, 719-720 896 P.2d 1365, 42 Cal.Rptr.2d 355 (1995); *City of Wichita v. Edwards*, 23 Kan.App.2d 962, 968, 939 P.2d 942 (1997); *In re Welfare of S.M.J.*, 556 N.W.2d 4, 6-7 (Minn. Ct. App. 1996); *State v. Mortimer*, 135 N.J. 517, 532, 641 A.2d 257 (1994). One State court has held that the threshold minimum is not reached unless bias is the "primary motivating factor." *Martinez v. State*, 980 S.W.2d 662 (Tex. Ct. App. 1998).

Appellant Read has argued that the trial judge's unquantified finding -- that Zwedu's race played "at least some part" (RP III, 246) in Read's decision to commit his threatening act -- is constitutionally inadequate. In

response, the State appears to have made two contradictory arguments.

First, the State asserts:

Read argues . . . that the trial court was required to make an explicit finding that the victim's race was a "significant factor" or a "substantial factor" in causing the defendant to commit the crime. However, the malicious harassment statute *already* requires the State to prove that the defendant selected the victim "because of" the victim's race or other characteristic. The trial court made that finding and it is supported by the evidence. Any requirement that race be a 'substantial factor' *is subsumed* in this statutory requirement, which, as the *Talley* court explained, renders the malicious harassment statute constitutional.

BOR, at 11 (emphasis added).

It is not clear what the State means by "subsumed." The dictionary defines the word "subsume" to mean: "to include or place within something larger or more comprehensive." *Webster's Ninth New Collegiate Dictionary* 1177 (1983). It is true, no doubt, that all degrees of causation are "subsumed" within the general term "cause." But a finding that the victim's race played some role in the defendant's behavior is not the equivalent of a finding that the victim's race was the primary cause, or even a substantial cause of the defendant's behavior. The State's observation that the general term "because of" *subsumes* several degrees of causation does not even address the question of *whether a particular degree of causation is constitutionally required*.

In the next breath, the State's brief seems to make the contradictory argument that if courts were to rule that the First Amendment requires that the degree of causation attributable to race must be at least a "substantial factor," then the courts would be "engrafting" a new element onto the statutory definition of the crime:

Read's argument that a separate "substantial factor" element must be *engrafted* onto the statute should be rejected. The statute is constitutional as written and needs *no additional* court-imposed elements.

BOR, at 11-12 (emphasis added).

The State does not explain how something can simultaneously be both (1) a new "additional" element which a court has "engrafted" onto the statute and (2) something "already subsumed" by the statute. It cannot be that the degree requirement is "already" in the statute, and yet at the same time is something "additional" which the courts are imposing as a requirement beyond the statutory requirements. In any event, constitutional requirements necessitated by the First Amendment are often "engrafted" onto statutory definitions of crimes. *See, e.g., Miller v. California*, 413 U.S. 15, 24 n.6 (1973) (holding that as long as state obscenity statutes are "construed" as incorporating several additional judicially imposed proof requirements, such criminal statutes may be enforced).

Moreover, constitutionally required burden of proof rules are extremely common in First Amendment case law. The Supreme Court has frequently held that the First Amendment requires that proof of various elements of crimes and of civil causes of action must meet specific burden of proof thresholds. For example, in defamation cases a private figure plaintiff must prove falsity by a preponderance of the evidence, and it is unconstitutional to require the defendant to prove the truth of his statement, *Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 775-76 (1986). A public figure defamation plaintiff must do more, and must prove the element of actual malice by “clear and convincing evidence.” *Rosenbloom v. Metromedia*, 403 U.S. 29, 52 (1971). When a content discriminatory law burdens speech, the government bears the burden of proving that there is no less restrictive alternative means of advancing a compelling state interest. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

Nor are we lacking precedent to govern cases where “mixed motives” cause a person to act in a certain way, and one of those motives implicates First Amendment concerns. In *Mt. Healthy Sch. District v. Doyle*, 429 U.S. 274 (1977), the local school district board of education decided not to renew the contract of an untenured teacher and the teacher brought a civil rights action against the local board arguing that it had violated his free

speech rights. The evidence produced at a bench trial showed that the board had two motives for its action. First, the teacher had given a copy of the school principal's dress code to a local radio station which then broadcast a news story about the dress code. Second, the teacher had made an obscene gesture to some students in the school cafeteria. The trial judge found that both of these incidents contributed to the school board's decision not to renew the teacher's contract. The first reason, retaliation for having given a document to a local radio station, was unlawful because it penalized the teacher for exercising his First Amendment rights. The second reason was not unlawful. The District Court ruled that because the impermissible reason played a "substantial part" in the decision not to renew the contract, the school board had violated the teacher's First Amendment rights. *Id.* at 284.

The Supreme Court reversed and remanded the case for further proceedings, holding that the key question was whether the school district would have made the same decision not to renew the teacher's contract even if the teacher had never engaged in the protected exercise of his First Amendment rights. *Id.* at 285. The Court held that since the teacher was the plaintiff, it was initially proper to require him, as the plaintiff, to prove that his constitutionally protected conduct was a motivating factor, but that the school board should then have been given the opportunity to prove by

a preponderance of the evidence that it would have reached the same decision even if the teacher had never engaged in the protected conduct.

Initially, in this case, the burden was properly placed upon [the teacher] to show that his conduct was constitutionally protected, and that his conduct was a “substantial factor” or to put it in other words, that it was a “motivating factor” [FN omitted] in the Board’s decision not to rehire him. [The teacher] having carried that burden, however, the District Court should have gone on to determine *whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.*

Doyle, 429 U.S. at 287 (emphasis added).

Since the present case is a criminal case, not a civil case, the plaintiff was the State of Washington, not the accused, and therefore the burden of proof rules of *Doyle* require that the State, as the plaintiff, bear the burden of proof. Thus, the burden is properly placed upon the State to prove by a preponderance of the evidence that if Zwedu had not been an African-American, Read would not have gotten out of his truck, raged at her, and stated that he knew where she worked. As *Doyle* demonstrates, it is *not* sufficient that the State prove only that racial bias was “a substantial factor.” It must have been the preponderant factor without which the criminal conduct would never have occurred.

If the School Board would have fired Doyle anyway, even if he had never made his protected speech about the dress code, then the decision

not to renew Doyle's contract was constitutional because Doyle was not being punished for protected speech. Similarly, if Read would not have yelled at Zwedu, and would not have said that he knew where she worked, if she had been a white person, then convicting Read for malicious harassment would be constitutional because he would not be being punished for protected speech. Thus, the State is required to prove that Read would *not* have "reached the same decision" in the absence of circumstances triggering his racial bias. And since it is a criminal case, the State must prove that beyond a reasonable doubt.

In *Doyle* the plaintiff was not allowed to enjoy the "windfall" of getting monetary recovery simply because the local school board happened to have a second impermissible motive (speech retaliation) which did not play a determinative causal role because the board would have denied contract renewal anyway, even in the absence of any protected speech by the teacher. Similarly, the plaintiff in this case – the State of Washington – cannot be allowed to enjoy the "windfall" of securing a judgment and criminal punishment of Read simply because Read happened to have a second impermissible racial motive which did *not* play a determinative causal role because he would have threatened Zwedu anyway, even "in the absence of" her being a racial minority person.

In this case, the trial judge did not make any of these constitutionally required findings. He did not find that racial bias was the determinative causal factor. He did not even find that racial bias was a *substantial* motivating factor. And he did not find that Read would not have committed the threatening acts if Zwedu had been a white person. Therefore, the conviction for the offense charged cannot stand because it may rest on speech which is protected by the First Amendment, and upon thought which did *not* cause the commission of the criminal act.

Moreover, even if the trial judge *had* made a finding that Zwedu's race was the predominant motivating factor which was the proximate cause of Read's (supposedly) threatening words and conduct, this Court still would have to make an independent *de novo* finding that race was the predominant motivating factor without which Read would not have engaged in this behavior. Such a finding simply cannot be made on this record. Any reasonable trier of fact would have to conclude that no matter what race the parking lot attendant who issued the parking citation was, Read would have gotten out of his truck, shouted at her that he knew where she worked, gotten red in the face, clenched his fists, and would have aggressively protested the issuance of the "fucking ticket."

That Read additionally insulted Zwedu on racial grounds was simply an opportunistic means of adding verbal insult to the injury of (allegedly)

threatening bodily harm. Had Zwedu been a midget, Read might well have called her “a fucking dwarf.” Had she been marked as a Polish or French speaking foreigner by a language accent, he might have called her “a fucking Polack” or “a fucking frog.” But such verbal abuse would *not* demonstrate that he engaged in his allegedly physically threatening conduct “because of” her Polish or French ancestry. Because Read “would have reached the same decision as to” his own conduct “even in the absence of” Zwedu’s minority status, he cannot be punished under the malicious harassment statute simply because he expressed racist views.

3. THE STATE IGNORES THE FACT THAT IN *VIRGINIA v. BLACK*, THE U.S. SUPREME COURT HELD THAT IN ORDER TO CONSTITUTE AN UNPROTECTED “TRUE THREAT,” THE PROSECUTION MUST PROVE THAT THE DEFENDANT HAD AN INTENT TO CAUSE THE VICTIM TO BE PLACED IN FEAR OF BODILY HARM OR DEATH.

In his opening brief, appellant Read noted that in *Virginia v. Black*, 538 U.S. 343 (2003), for the first time ever the U.S. Supreme Court defined the term “true threats,” and specified that in order to be a “true threat” the speaker must subjectively *intend* to place the listener in fear. The Court distinguished between an intent *to carry out* the threat, and an intent *to cause fear* by simply communicating the threat. Significantly, the Court held that *only* speech made with the intent of causing fear is “constitutionally proscribable”:

“True threats” encompass those 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. The speaker *need not intend to carry out the threat*. Rather a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur. *Intimidation in the constitutionally proscribable sense of the word* is a type of true threat, *where a speaker directs a threat* to a person or group of persons *with the intent of placing the victim in fear of bodily harm or death*.

Virginia v. Black, 538 U.S. at 359-360 (emphasis added).

This definition of a “constitutionally proscribable” “true threat” is markedly *different* from the definition which Washington courts have been using since 2001, which employs an objective listener test. As one commentator has noted, the Supreme Court’s opinion in *Black* has created confusion in the courts. Note, “*True Threats*” and the Issue of Intent, 92 Virginia Law Review 1225, 1226 (2006). The issue is “What is the required *mens rea* for threatening speech to be constitutionally criminalized?” *Id.* After the *Black* decision, courts have split on this issue, with several courts concluding that *Black* requires a *subjective intent* to cause fear.

In the present case, the prosecution makes no response to Read’s argument. The State’s brief never mentions the *Black* decision. Instead, the State ignores the issue. Instead of analyzing the evidence to see

whether Read's speech was *intended* to frighten Zwedu, the State simply states that "a reasonable person in Read's position would foresee that his statement 'I know where you work,' would be *interpreted* as a serious expression of an intent to harm Zwedu." *BOR*, at 12. This approach is consistent with *State v. Williams*, 144 Wn.2d 197, 207-08, 26 P.3d 890 (2001) and *State v. J.M.*, 144 Wn.2d 472, 477-78, 28 P.3d 720 (2001), both of which applied an objective listener test. But three years after *Williams* and *J.M.* were decided, the U.S. Supreme Court adopted a different test in *Black*. Since the Supreme Court has the last word on what the First Amendment requires, the *Black* test, and not the *J.M./Williams* test, is binding on all Washington courts.

The state supreme court adhered to the objective-listener test in *State v. Kilburn*, 151 Wn.2d 36, 43, 84 P.3d 1215 (2004), and the prosecution, without mentioning *Black*, cites to *Kilburn*. But it is abundantly clear from the *Kilburn* opinion that the *Kilburn* Court was *completely unaware* of the U.S. Supreme Court's decision in *Black*.

The defendant in *Kilburn* asked the Supreme Court to abandon the test adopted in *Williams* and *J.M.* *Kilburn*, 151 Wn.2d at 44. The defendant asked the Court to adopt a subjective test which required the prosecution

to prove that the defendant intended *to carry out* his threat.² While the Supreme Court declined to do so, it noted that Kilburn “relies on dissents.” *Id.*, at 44. The *Kilburn* opinion discusses Judge Wright’s dissent in *Watts v. United States*, 402 F.2d 676, 691 (D.C. Cir. 1968) and Judge Kozinski’s dissent in *Planned Parenthood v. American Coalition of Life Activists*, 290 F.3d 1058, 1089 n.1 (9th Cir. 2002). *Kilburn*, 151 Wn.2d at 44-45. Ultimately the *Kilburn* Court concluded that there was “very little support for Kilburn’s position and it really cannot be fairly said, as he urges, that there is a second line of cases representing his view that a true threat may be found only where there is an actual intent to carry out the threat.” *Id.* at 45.

If the *Kilburn* Court had been aware of the U.S. Supreme Court’s decision in *Black*, instead of stating that there was “very little support” for Kilburn’s position, it would have stated that Kilburn’s argument had been *definitively rejected* by the U.S. Supreme Court. The *Black* decision unambiguously states that to be a true threat which the State can punish, “The speaker *need not intend to carry out* the threat.” *Black*, 538 U.S. at 359-60 (emphasis added). Thus, it is clear that the *Kilburn* Court was unaware of the *Black* decision, and therefore unaware that *Black* held that

² Appellant Read makes no such argument. Instead Read asks this Court to recognize that in *Black* the Supreme Court held that an intent to frighten is constitutionally required, but *not* an intent to perform the threatened act.

to be a “true threat” unprotected by the First Amendment it must be proved that the defendant spoke “with the intent of placing the victim in fear.” *Id.* at 360.

Since *Black* was decided, the Tenth Circuit has decided that absent an intent to place the victim in fear, there can be no “true threat” for which the defendant can be punished. *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (“The threat must be made ‘with the intent of placing the victim in fear of bodily harm or death.’”).³

In *United States v. Parr*, 545 F.3d 491 (7th Cir. 2008), the Seventh Circuit noted that the *Black* decision had undermined the prior “traditional” view that a purely objective test was constitutionally proper, and noted that it was “likely” that the Supreme Court had changed the law so that it now required proof of an additional subjective element in order to make punishment of threatening speech constitutional:

It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality’s discussion of threat doctrine was very brief. ***It is more likely, however, that an entirely objective definition is no longer tenable.***

³ The defendant in *Magleby* alleged he was entitled to relief in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2255. He alleged his attorney was ineffective for failing to request jury instructions which made it clear that proof of an intent to frighten was required. But the Court denied relief because *Magleby*’s attorney could not be blamed for having failed to anticipate the *Black* decision. The Court held that *Magleby*’s trial attorney “could hardly be faulted for not pointing out the requirements of *Black*, which was decided two years after our decision in *Magleby*’s appeal.” *Id.* at 1140.

Parr, 545 F.3d at 500 (emphasis added) (citation omitted).

The Seventh Circuit also noted that it was not clear whether the new subjective intent requirement had replaced the old objective listener test, or whether it was now an additional requirement:

But whether the Court meant to retire the objective “reasonable person” approach or to add a subjective intent requirement to the prevailing test for true threats is unclear. If the latter, then a standard that combines objective and subjective inquiries might satisfy the constitutional concern: the factfinder must be asked first to determine whether a reasonable person, under the circumstances, would interpret the speaker’s statement as a threat, and second, whether the speaker intended it as a threat. In other words, the statement at issue must objectively *be* a threat and subjectively be *intended* as such.

Parr, 545 F.3d at 500 (italics in original).

Finally, the Ninth Circuit has acknowledged that it is internally divided and has been unable to resolve the question of whether *Black* changed the law by requiring a subjective intent to intimidate the threat recipient. In *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005), a panel held that a subjective intent to threaten was constitutionally required. A second panel declined to follow that approach. *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005). A third panel noted the disagreement between the two prior panel decisions, and declined to resolve the split, holding instead that the evidence established a true threat under either definition. *United States v. Stewart*, 420 F.3d 1007, 1017-

1018 (9th Cir. 2005). And in *Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008), the panel again declined to resolve the question because under *either* test the speech in question was *not* a true threat.

In this case appellant Read is explicitly raising this issue, and he asks this Court to recognize that the First Amendment does require proof of a subjective intent to cause fear, (in *addition* to proof that a reasonably objective listener would be frightened) without which no criminal punishment can constitutionally be imposed.

Moreover, Read submits that in this case, the evidence presented at trial does not prove that such a subjective intent existed. Indeed, the trial judge himself stated that for him the key issue was whether the facts presented established the commission of any kind of threat:

All that said, the crux of this case, to me, is: Was a threat made? All the other elements are clearly proved beyond a reasonable doubt. I know counsel sees it differently. Maybe the crux of the case was perception because of the victim's race. Or was it because he selected a parking lot attendant? But to me, it is: Was there a threat? . . .

RP III, 248.

Ultimately, the trial judge found a threat in “the totality” of the Read “words and conduct” because Ms. Zwedu felt afraid of Read:

During the encounter with Mr. Read, Ms. Zwedu *felt fearful* that Mr. Read was going to physically harm her on the spot because of his clenched fists, red face, raged look, and manner in which he approached him [sic].

Immediately after the encounter and for sometime after (days), Ms. Zwedu was concerned with the defendant's statement "I know where you work". *She interpreted that as a future threat to physically harm* because it was immediately after an encounter where Mr. Read clenched his fists, had a red face, raged look, and approached her in an aggressive manner. Further, his aggressive driving before and after the encounter contributed to *her belief* that his threat would be carried out. *The totality of Mr. Read's words and conduct clearly amounted to a threat.*

CP 187-188, FF 9 & 10 (emphasis added).

In his conclusions of law the trial judge found that "the defendant threatened a specific person," that he "placed that person in reasonable fear of harm to person or property," and that her fear was "reasonable." CP 188-189, Conc. Law No. 2. But he did *not* find that the defendant *intended* to place Ms. Zwedu in fear.

This not surprising given that Washington appellate court decisions have never required proof of such subjective intent, and have held that all that is required is proof that the defendant communicated a message which would cause an objectively reasonable person to be afraid. But after *Virginia v. Black, supra*, this is not constitutionally sufficient. Proof of subjective intent to cause such fear is constitutionally required.

On appeal the State argues that the facts of this case "support the conclusion that a reasonable speaker in Read's position would have foreseen that his threat, "I know where you work," accompanied by his

very angry tone, profanity, racial slurs and his aggressive stance, would be interpreted as a serious expression of his intention to harm the victim.” *BOR*, at 17. But after *Virginia v. Black*, *supra*, this is simply not the relevant test.⁴ The test is not what an objectively reasonable person would have foreseen; the test is what Read himself subjectively intended to do.

The prosecution argues:

The State needs to prove only that a reasonable person in Read’s position would have foreseen that the statement [“I know where you work”] would be interpreted as a serious threat. The State met that burden of proof. Sufficient evidence was presented that Read’s threat was a “true threat.”

BOR, at 17.

⁴ Quite recently, the Supreme Court has taken note of the fact that the *Black* decision requires proof of a higher mens rea than simple negligence (the speaker of the threat should have foreseen its intimidating effect on the recipient). In *State v. Schaler*, 169 Wn.2d 274, 236 P.3d 858 (2010), the defendant, for the first time on appeal, raised a constitutional challenge to the jury instructions, arguing that they did not adequately inform the jury of the mens rea requirement for a true threat. Schaler argued, and the Supreme Court applied, the negligence based objective standard of *Williams, J.M.* and *Kilburn*. The Supreme Court reversed Schaler’s conviction agreeing with him that the jury instructions were inadequate. In the course of the opinion, Justice Stephens noted in a footnote that the *Black* decision imposed a higher mens rea requirement than Washington courts have traditionally imposed in speech cases involving threats. Refuting the argument of dissenting Justice J.M. Johnson who claimed that the majority’s decision was at odds with *Black*, Justice Stephens noted: “But the law at issue in *Black* required an even greater mens rea as to the listener’s fear. *Black*, 538 U.S. at 360, 123 S.Ct. 1536 (“intimidation . . . is a type of threat[] where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.” *Schaler*, 169 Wn.2d at 287 n.4 (emphasis added by the *Schaler* Court). Thus it appears that the state supreme court has become aware of the tension between its traditional objective test and the new *Black* test. It was unnecessary, however, for the *Schaler* Court to address whether *Black* required reversal of Schaler’s conviction, because he was entitled to a reversal even under the pre-*Black* objective test.

But after *Black* this is no longer true. The State must prove that Read directed a threat to Zwedu “with the intent of placing [her] in fear of bodily harm or death.” *Black*, 538 U.S. at 360. His subjective intent may well have actually been quite different. For example, he may have intended to signal nothing more than the fact that he intended to complain to her employer about what she had done by issuing him a ticket. He may have intended to signal more, such as an intent to cause her to lose her job. But even so, a subjective intent to threaten to complain and thus to get her fired is ***not*** constitutionally sufficient to remove a threat from constitutional protection. *See State v. Knowles*, 91 Wn. App. 367, 374, 957 P.2d 797 (1998) (threatening judges with financial harm is not a “true threat” and thus it is entitled to First Amendment protection); *State v. Stephenson*, 89 Wn. App. 794, 801, 950 P.2d 38 (1998) (same).

Thus, even if ***an objectively reasonable person would foresee*** that Zwedu would ***interpret*** the words as a threat to do her bodily harm (and Read disputes this contention), ***that is not enough*** to remove the words from the protective ambit of the First Amendment. The State must prove that what Read ***subjectively intended*** was to make her fear bodily injury or death.

In the present case reversal of the conviction is required *both* because (1) the trial judge did not find such subjective intent, *and* (2) because even

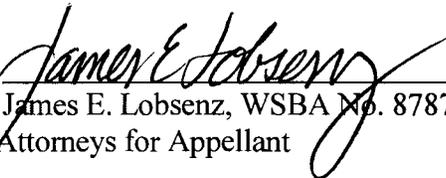
if the trial judge had found such a subjective intent, this appellate Court, in conducting a de novo review of the facts as constitutionally required in cases where First Amendment freedoms are at stake, cannot find that such a subjective intent to frighten has been established.

C. CONCLUSION

For the reasons stated above, appellant Read asks this Court to vacate his conviction and to remand with directions that the charge of malicious harassment be dismissed. There should be no occasion for a retrial because the evidence is constitutionally insufficient to meet either the *Black* standard for a true threat, or the requirement of illegal conduct perpetrated “because of” the victim’s race.

DATED this 9th day of November, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By 
James E. Lobsenz, WSBA No. 8787
Of Attorneys for Appellant

NO. 65064-5-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES RAYMOND READ,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing addresses are both 701 Fifth Avenue, Suite 3600, Seattle, WA 98104.

3. On November 12, 2010, I caused to be served via Legal Messenger, a true and correct copy of the following document on:

DANIEL T. SATTERBERG/ANN SUMMERS
King County Prosecuting Attorney's Office
516 Third Avenue, Room W554
Seattle, WA 98104

Entitled exactly:

REPLY BRIEF OF APPELLANT



Lily T. Laemmle

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