MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO: AND-22-317

STATE OF MAINE
Appellee

v.

JACOB LABBE
Appellant

ON APPEAL FROM THE SUPERIOR COURT FOR ANDROSCOGGIN COUNTY

SUPPLEMENTAL BRIEF OF APPELLANT

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FACTS AND PROCEDURAL HISTORY

The Court has requested supplemental briefing from the parties regarding the effect on this case, if any, of the United States Supreme Court holding in *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 2109, 216 L. Ed. 2d 775 (2023). Appellant relies on the factual and procedural history set forth in his original brief.

ISSUES PRESENTED FOR REVIEW

1. **What effect, if any, does the U.S. Supreme Court's holding in *Counterman,* have on Labbe's case, and especially on the State's burden of proof, if any, with respect to the Defendant's subjective awareness that his conduct could cause one of the effects in 17-A M.R.S.A. §210-A?**
2. **In light of the issues of preservation and retroactivity as set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and similar cases, can and should the Law Court address in this appeal, the issues raised by *Counterman*?**

SUMMARY OF THE ARGUMENT

The holding in *Counterman* is directly applicable to this matter. In *Counterman*, the United States Supreme Court held that the government is required to prove that a defendant at least recklessly intended for his words to cause fear of harm or other effects on a victim that Colorado's stalking statute is intended to

prevent[1]. While on different grounds, that is a similar argument to what Labbe made before, during and after trial, as well as on appeal. Labbe's argument throughout these proceedings has been that Maine's stalking law is unconstitutional because a person would not know that his non-threatening words, in this case trying to see his son and get his clothing, would be considered stalking under the law. Admittedly, Labbe's arguments were not specifically based on the First Amendment, but challenged the constitutionality of his conviction, nonetheless.

While Labbe's conviction cannot stand in light of the *Counterman* decision, his conviction is unjust even without the holding in *Counterman.* If anything, this is the perfect case for the Law Court to address this issue, considering that nothing about Labbe's statements to his wife was threatening or the type of conduct that the stalking statute was intended to apply to. To allow Labbe's conviction to stand would afford greater protection to threatening speech than to non-threatening speech, clearly not what the *Counterman* Court intended.

ARGUMENT

1. **What effect, if any, does the U.S. Supreme Court's holding in *Counterman,* have on Labbe's case, and especially on the State's burden of proof, if any, with respect to the Defendant's subjective awareness**

[1] Counterman's words were far more troubling than Labbe's.

that his conduct could cause one of the effects enumerated in 17-A M.R.S.A. §210-A?

Labbe's case is only distinguishable from *Counterman* in one respect. Counterman's behavior and speech was far more troubling than Labbe's benign non-threatening statements to his wife in this case.

The Colorado statute involved in *Counterman* is almost identical in terms to the Maine Statute that Appellant challenges here. In Colorado, the State must show that a defendant knowingly "[r]epeatedly ... made[ ] any form of communication with another person" 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 Maine, the State must prove that:

> "A. The actor intentionally or knowingly engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person:
>
> (1) To suffer serious inconvenience or emotional distress;"

Both statutes rely on an objective effect on the victim and do not require any showing of the subjective intent of the actor.

While Appellant admittedly did not specifically cite the First Amendment in this matter, his constitutional challenge to the statute was in all other respects similar to Counterman's. Just like Counterman, Appellant asserted that there was

no way for him to know or intend that his conduct, in this case repeated statements to his wife regarding his child and clothing, was threatening or that it would cause emotional distress and that a conviction without an intent to cause the injury sought to be protected against, is unconstitutional. Requiring the State to establish a mens rea under the stalking statute is one way to address what Appellant has always claimed is wrong with the law, that it does not adequately establish what constitutes illegal behavior.

Appellant has argued since prior to trial that Maine's stalking statute is unconstitutional because it does not establish a clear description of what communications and conduct are prohibited. Contrary to the suggestion by the amicus brief of the Attorney General, Appellant's conviction was based on his communications with the victim, specifically statements that the trial Court acknowledged would not likely have been threatening to the alleged victim, but for other prior issues between the parties. Given the holding in *Counterman,* it is now clear that stalking based on communication requires a mens rea of at least recklessness and the State of Maine was required to establish that Labbe acted at least recklessly in causing one of the effects intended to be prohibited by the statute. Appellant cannot stand convicted of a crime requiring no mens rea when the United States Supreme Court has held clearly that a mens rea is required.

The Maine Attorney General suggests that Labbe's speech did not constitute a "true threat" as the Supreme Court categorized Counterman's speech and suggests that Labbe's speech should not be afforded the same protection as Counterman. It is difficult to imagine that a mens rea is required to establish the subjective intent of the actor in a true threats stalking case, but not when non-threatening speech is at issue, as it is here.

Even if, as suggested by Amicus, this is not a true threats case, Appellant's conviction is still unconstitutional based on there being no showing by the State in this case of a mens rea of Appellant for his non-threatening speech. The concurrence in *Counterman* specifically stated that the issue of "true threats" did not need to be reached in that case and that the lack of a mens rea standard sufficient to adequately protect "unintentionally threatening speech," was enough to overturn the conviction:

> "Given this, prosecuting threatening statements made as part of a course of stalking does not squarely present the hardest questions about the *mens rea* required to prosecute isolated utterances based solely on their content.[2] 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. I do not think that is accurate, given the lessened First Amendment concerns at issue. In such cases, recklessness is amply sufficient. And I would stop there. There is simply no need to reach out in this stalking case to determine whether anything more than recklessness is needed for punishing true threats generally."

Counterman v. Colorado, 600 U.S. 66, 86, 143 S. Ct. 2106, 2121, 216 L. Ed. 2d 775 (2023).

This is also the perfect opportunity for this Court to address the issue at hand, the mens rea required to commit stalking under Maine law, which is surely to be raised by defendants in every prosecution regarding the same. If this Court chooses not to apply *Counterman* to Labbe's non-threatening communications with his wife, then "true threats" will be accorded more protection than non-threats, which is clearly not what the *Counterman* Court intended.

In fact, the *Counterman* Court specifically recognized that establishing a mens rea subjective standard is required for true threats, "lest prosecutions chill too much protected**, non-threatening expression**." *Counterman v. Colorado,* 600 U.S. 66, 143 S. Ct. 2106, 2113, 216 L. Ed. 2d 775 (2023)(*emphasis added*). "A mens rea requirement would not, however, present an uncommon or insurmountable barrier to true-threats prosecutions. Nonetheless, under such a standard, there will be some speech that some find threatening that will not and should not land anyone in prison." *Id.*, 600 U.S. at 89, 143 S. Ct. at 2123, 216 L. Ed. 2d 775 (2023).

Labbe has consistently argued that his statements to his wife regarding his clothing and seeing his child cannot be what Maine's statute is intended to prohibit and the holding in *Counterman* squarely addresses that issue. With or without the holding in *Counterman*, however, Labbe's conviction based on his non-threatening words and behavior cannot stand. Upholding Labbe's conviction would have a

significantly chilling effect on how Mainers communicate with each other for fear of violating the stalking statute.

2. **In light of the issues of preservation and retroactivity as set forth in *Griffith v. Kentucky*, 479 U.S. 314 (1987) and similar cases, can and should the Law Court address in this appeal, the issues raised by *Counterman*?**

Simply stated, under the holding in *Counterman*, Maine's statute is unconstitutional as it stands, because it does not require a subjective mens rea to establish the crime. This issue was more than adequately preserved, but even assuming it was not, Labbe's conviction based on Maine's stalking statute cannot stand without the State establishing a requisite mens rea for Labbe's speech. Under any analysis the State or amici raise, the fact remains, Mr. Labbe's conviction is squarely illegal under *Counterman* and upholding of that conviction would be directly contrary to the law established in *Counterman*.

In *Griffith v. Kentucky,* 479 U.S. 314, 107 SCt. 708, 93 L.Ed.2d 649 (1987), the U.S. Supreme Court adopted a retroactivity approach to cases pending on direct review at the time a new rule is announced. The Court held that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith,* 479 U.S. at 322, 107 S.Ct. at 713. The Court gave two reasons for its decision. First, because the

Supreme Court can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." *Id.,* 479 U.S. at 323, 107 S.Ct. at 713.

Second, "because selective application of new rules violates the principle of treating similarly situated defendants the same, we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final." *Id.*, 479 U.S. at 323-24, 107 S.Ct. at 713-14. "A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.,* 479 U.S. at 328, 107 S.Ct. at 716.

"It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. *Teague v. Lane* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). "In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Id.*, 489 U.S. at 301. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. *Id.,* 489 U.S. at 301(*citing Truesdale v. Aiken*,

480 U.S. 527, 528-29, 107 S.Ct.1394, 1394-95, 94 L.Ed.2d 539 (1987)(Powell, J., *dissenting*).

If this Court determines that despite Appellant's repeated challenges to the constitutionality of Maine's stalking statute, Appellant did not preserve the issue, obvious error exists to overturn Appellant's conviction.

The obvious error standard (1) calls for an evaluation of the error in the context of the entire trial record to determine (2) whether the error was so seriously prejudicial that it is likely that an injustice has occurred. *See State v. Pabon,* 2011 ME 100, ¶ 19, 28 A.3d 1147, 1151–52. The obvious error standard requires the reviewing court to make a penetrating inspection of all the circumstances of the trial to determine whether there exists a seriously prejudicial error tending to produce manifest injustice. *Id.* What is obvious error defies precise articulation, and only the particular circumstances, weighed with careful judgment, will determine whether the obviousness of the error and the seriousness of the injustice done to the defendant thereby are so great the Law Court cannot in good conscience let the conviction stand. *Id.*

While the Law Court has stated that what constitutes obvious error is not always easy to determine, one can argue that there can be no error more obvious than allowing a conviction to stand in direct violation of United States Supreme

Court precedence. Assuming, Appellant has not preserved his argument in this matter, his conviction cannot stand in light of *Counterman*.

Appellant repeatedly preserved his challenge to his conviction based on the statute being constitutionally deficient. While Appellant may not have articulated a First Amendment argument, his challenge to his conviction on constitutional grounds was more than adequately preserved below and on appeal. Under any scenario, Labbe's conviction is illegal and must be vacated.

Date: October 10, 2023

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CERTIFICATE OF SERVICE

I, Verne E. Paradie, Jr. hereby certify that I have forwarded two copies of Appellant's Supplemental Brief via first class United States Mail to the following individuals:

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