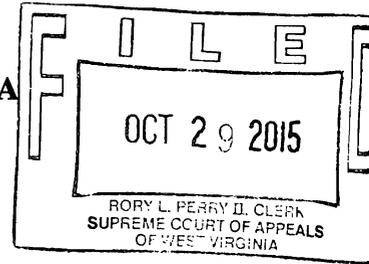


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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**CHARLESTON, WEST VIRGINIA**

**NO. 15-0195**

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**STATE OF WEST VIRGINIA**

**Plaintiff/Respondent**

**v.**

Appeal from a final order  
of the Circuit Court of  
Harrison County (14 -M-13-3)

**MATTHEW CALVERT,**

**Defendant/Petitioner**

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**PETITIONER'S REPLY BRIEF**

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**STATEMENT OF THE CASE**

The Petitioner incorporates by reference the procedural history and relevant facts regarding Petitioner’s trial and conviction contained in Petitioner’s original Petitioner’s Brief.

**ARGUMENT**

- I. The Respondent’s contention that the circuit court did not commit error in construing the statute is meritless, unsupported and should not be considered by this Court.*

The Petitioner in his Petitioner’s brief alleged the trial court bellow committed plain error when it failed to narrowly construe the criminal statute at issue with the commands of the First

Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution, and the mere recitation of a statute is insufficient that it is “mandatory and indispensable” that the instructions set forth the elements of the offense and the mere reading of a statute will not suffice. *United States v. Head*, 641 F.2d 174, 180 (4<sup>th</sup> Cir. 1981).

The Petitioner in his brief gave a detailed analysis of the Free Speech analysis and the “true threats” doctrine. The Respondent cites to no controlling law or persuasive authority to support its contention and relies solely on factual argument and is, therefore, meritless and should not be considered by this Court.

*II. Respondent’s reliance on Yocum for concluding the statute at issue before this Court is not vague or overbroad is misplaced.*

The Petitioner in his Petitioner’s brief alleged that West Virginia Code §61-3C-14a is unconstitutionally vague and overbroad in violation of the First Amendment of the United States Constitution and Article III § 7 of the West Virginia Constitution. The Respondent relies upon the Court’s holding in *State v. Yocum*, 759 S.E.2d 182 (W.Va. 2014) to contend the statute now before this Court is also not void for vagueness or overbreadth. But this reliance is misplaced.

The Court in *Yocum* determined that the statute at issue there, West Virginia Code § 61-6-24(b) (2010), was a general criminal statute that criminalizes conduct and subject to a review of a more general review that entails an examination of both the face of the statute and by considering the statute in the light of the conduct to which it is applied. The language challenged in *Yocum* for vagueness and to determine whether a potential offender has been given notice of the type of conduct he should avoid committing was “likely to cause serious bodily injury.” The Court concluded “the language at issue to be patently clear in its meaning and in need of no

further interpretation by this Court to place a potential offender on notice as to what conduct is proscribed.” *Yocum*, 759 S.E.2d at 187-188.

The statute now before this Court is a criminal statute that criminalizes freedom of speech and is entitled to the stricter "void for vagueness" analysis that pertains to criminal statutes which address or affect freedom of speech as set out in *State v. Flinn*, 208 S.E.2d 538 (W.Va. 1974). The statute here criminalizes using a computer to make contact with another which encompasses speech. See West Virginia Code §61-3C-14a. It criminalizes speech that may be abusive. *Id.* The statute is overbroad as the United States Supreme Court taught us that language of the political arena, like labor disputes, is “often vituperative, abusive, and inexact.” *Watts v. United States*, 394 U.S. 705, at 707 (1969). The statute is vague by using the term “contact” in relation to the internet without further clarification because the “law is void on its face if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *West Virginia Citizens Action Group v. Daley*, 324 S.E.2d 713, 719 (W.Va. 1984) (internal quotations and citations omitted).

*III. Respondent’s argument in subsection C does not address the argument of the jury being properly instructed on all of the essential elements of the alleged crime and should not be considered by this Court*

The Petitioner in his Petitioner’s brief alleged the trial court committed reversible plain error by not instructing the jury on the material elements of the offense charged. The only material element of the crime the Petitioner was indicted for and on trial for was to “threaten to commit a crime.” “Threaten to commit a crime” presumes that the Petitioner threatened to commit an enumerated crime of the West Virginia Code, but yet none was selected or instructed to the jury. The Petitioner can only presume this decision was a calculated decision because if the prosecution would have selected one of the enumerated crimes of assault or battery the jury

would have also been required to be instructed on related defenses such as self-defense and the castle doctrine which the prosecution did not want.

In the Respondent's Summary Response, it relies on *Elonis* to conclude the trial court did not error in instructing the jury which is entirely misplaced. *Elonis* adds to or clarifies the "true threats" doctrine, not whether the jury was properly instructed on the material elements of the crime alleged. To humor the Respondent, it relies on the subjective perception of Detective Webber and the Goff family as to how they perceived the comments on the "Topix" thread posted by the Petitioner. But even under the "true threats" analysis this is complete error. First, the Goffs, and more specifically, Cheryl Goff, did not testify at the trial below, so any conclusions as to what she believed is mere presumption. Second, contrary to the Respondent's allegations, Detective Webber was never the intended recipient of Petitioner's communications, the Petitioner did not know or believe Detective Webber was participating or reading the "Goff" thread. Lastly, it is not the subjective intent of the recipient of communications that determines whether a communication is a "true threat."

The "true threats" analysis is when 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." *Virginia v. Black*, 538 U.S. 343, 359 (2003). And, this is to be determined by the reasonable listener to evaluate the communication within the entire context of what was said, including the surrounding events, what was said, where it was said, how it was said, was it conditional and the listener's reaction. *Id.* See also *United States v. White*, 670 F.3d 498 (4th Cir. 2012). The purpose behind proscribing "true threats" is to "protect[s] 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." *Id.* at 360 (internal quotations omitted). The

“true threats” doctrine is not intended to protect the initial aggressor, nor does this State’s statutory or common law. Neither would an objective reasonable listener be put in fear by reading that a speaker is willing to defend his person or home with force, especially when the speaker is anonymous and responding to veiled threats.

**CONCLUSION**

Based on the foregoing, in addition to the assignments of error alleged in his Petitioner’s Brief and Supplemental Brief, the trial court below deprived the Petitioner of his fundamental right to a fair trial, and subjected him to a farce that was supposed to be his fair and impartial trial guaranteed by the United States and West Virginia Constitutions. The Respondent’s brief is a continuation of the mockery of the judicial process and should not be considered.

Respectfully submitted,

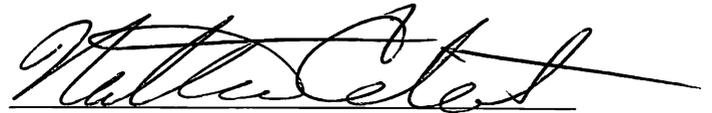


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**CERTIFICATE OF SERVICE**

I, Matthew Calvert, certify that I have caused a true and accurate copy of this  
“Petitioner’s Reply Brief” to be served upon the Assistant Attorney General via hand delivery,  
on October 29, 2015, at 812 Quarrier Street, 6<sup>th</sup> Floor, Charleston, WV 25301.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew Calvert", written over a horizontal line.

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