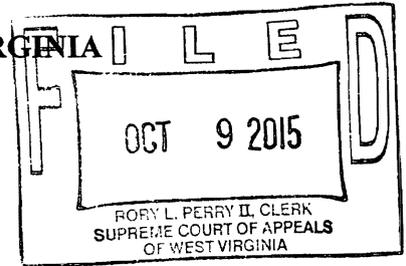


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0195



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

MATTHEW CALVERT,

*Defendant below, Petitioner.*

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SUMMARY RESPONSE

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**SUMMARY RESPONSE**

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**STATEMENT OF THE CASE**

Petitioner Matthew Calvert was convicted of a violation of W. Va. Code § 61-3c-14(a)(3), which makes it “unlawful for any person, with the intent to harass or abuse another person, to use a computer, mobile phone, personal digital assistant or other electronic communication device to...threaten to commit a crime against any person or property.” (Appendix at page 262, hereinafter “App. 262”.) The conduct that gave rise to this charge initiated in a forum called “Topix,” in which several Clarksburg, W. Va., residents engaged in a conversation about former police chief Goff, who had allegedly been forced out of office for some unspecified wrongdoing. (App. 72-85). Among the individuals who posted to this forum were the Petitioner as well as Mr. Goff’s sister and wife. The Petitioner fired the opening salvo

in this dispute when he opined that Goffs and their in-laws, the Gallos, were corrupt people who ran the Clarksburg area with favoritism and nepotism. (App. 81). This drew a response from Goff's sister:

Let me get this one straight. DO NOT EVER, AND I MEAN EVER, bring my son into this discussion. Do you understand me? Since you know so much regarding my family, please come to my house. You and I will have a very brief discussion on your issues at hand, because apparently you have more than one on your mind. You can take this to the bank. I am a Goff, married to a Gallo; who, unknown to you is no originally from WV. They are from NY., do not get that twisted. Next, the Goff's and the Gallo's are here to stay. If you are wondering who is behind me as I speak...the list is long, so why you feel like a frog, leap! As far as my son driving a police car...again, my suggestion is you leave my son out of this. Do not think for one minute I would not defend anyone in my family because I will, but listen you low life scum...do not mention my son again. Remember hackers are everywhere, and I know a few.

(App. 72).

The Petitioner responded to this post thusly:

Please let me respond, I beg you to hack it and look for me! Your husband violated my most scared right. I will have no problem answering your husband, your son, your friend, and any Clarksburg police department officer with my Mossberg shotgun, and I vow to you today, I will raise heaven and earth to have your husband convicted for what he did to me. I reiterate, please come looking for me, you come to my house bitch, I will open your chest with my 12 gauge, that I promise you from the bottom of my heart. Your husband wasn't a great man, he was a tool and the problem along with Zeke Lopez and the rest of Clarksburg's officials. Please take notice along with Patsy Trecoast, who I am also sure who took part in my railroading.

*Id.*

After several more posts from these and other parties, the Petitioner continued his barrage against the Goff and Gallo families, tacitly admitting that he was responding to threats by making his own threats:

Threats, threats, exactly what I responded to, you want to see someone willing to follow through, come find me. As for threats to Clarksburg Police, they know they aren't welcome here and if they come looking for trouble, they will get all they can handle. NOT a threat, a promise.

(App. 73).

Finally, the Petitioner concluded his tirade with extreme crudeness:

Marshall Goff is a tool, a crook, and gets away with it. He should be in jail getting but f\*cked by the people he abused and put in Jail. Maybe he can go munch on some of the pu\*s his daughter eats

*Id.*

Because of the threats to certain individuals and law enforcement officers in general, Clarksburg police detective Jason Webber, who patrols certain sections of the internet investigating crimes, began an inquiry to determine the identity of the poster (the Petitioner had posted these threats anonymously). (App. 136-147). After serving search warrants on Topix and Time Warner, Det. Webber was able to discover that the threatening posts came from the Petitioner's computer. Significantly, the Petitioner at no point denies that he wrote these words, and in the post-trial motions and sentencing phase, he expressed great remorse and claimed he had entered anger management treatment. (App. 312-313). This is in stark contrast to his claims before and during trial, that his words were responses to threats made against him and that they did not show criminal intent because of his misinterpretation of the Castle doctrine. (App. 5).

Despite his supposed remorse, however, Petitioner continued to post angry messages on various sites, specifically condemning his arresting officer, Det. Webber, and the prosecutor. (App. 310). In other words, there is no reliable showing of remorse by the Petitioner, only regret at being caught. In fact, the trial judge actually increased his sentence to 60 days in jail and two years probation partially as a result of his conduct AFTER the trial, all of which went to show that he still did not take the charges seriously. The Petitioner, as a law student (possibly graduate by now), should certainly know better.

Det. Webber testified to his fear of himself or his colleagues' untimely end at hands of the Petitioner, who had threatened the Clarksburg police department repeatedly. (App. 7). Despite his assurance that such words were not a threat, but "a promise," the law simply makes no such distinction. After hearing the testimony of both Det. Webber and the Petitioner himself, the jury found the Petitioner guilty of a misdemeanor violation of W. Va. Code § 61-3c-14(a)(3), and the judge handed down the aforementioned punishment. This appeal followed.

### SUMMARY OF THE ARGUMENT

The Petitioner brings forth five assignments of error. First, the Petitioner claims the trial court committed plain error when it failed to narrowly construe the statute in question here, alleging a violation of the Free Speech portions of the Federal and State constitutions. There is simply no merit in this argument. The standard is not an objective, "reasonable person" test, but a subjective question of the Petitioner's intent in making the threats. Under the statute, if the Petitioner means the words as threats or knows they will be interpreted that way, then he is guilty of making the threats. *See infra*.

Second, the Petitioner claims that W. Va. Code § 61-3c-14(a)(3) is unconstitutionally vague and overbroad. Although this Court has not had the occasion to rule on the constitutionality of this section of the Code, this Court did allow application of this section, without addressing its constitutionality, in the unpublished opinion *State v. Keffer*, 2014 WL 6724747 (W. Va. 2014)(memorandum decision). This Court did address a similarly worded and similarly purposed statute recently, however, in *State v. Yocum*, 233 W. Va. 439, 759 S.E.2d 182 (2014). As will be further discussed *infra*, *Yocum* stands, in part, for the proposition that a statute prohibiting threats that also restricts speech is not void for vagueness just because its language can be interpreted – with a stretch – in more than one way. *Yocum* deals with the

statute prohibiting making terroristic threats, W. Va. Code § 61-6-24, which the Petitioner was initially charged with, but the grand jury did not return a true bill on that felony charge. The similarity between the statutes should be clear, since the same actions potentially give rise to both charges, and *Yocum* is therefore useful in analyzing the present statute in question.

Third, the Petitioner avers that the trial court committed reversible error in not instructing the jury on a material element of the crime charged, namely (as evidenced by the Petitioner's Supplemental Brief, which only expands on this alleged error) intent to commit a crime. This is patently untrue. Intent to "harass or abuse" in a criminal fashion is clearly stated in the instructions the Court gave to the jury. (App. 249-250). The Petitioner seems to desire an additional intent to commit a crime charge with regard to the "threaten" aspect of the crime, but this is simply mincing words. The Petitioner relies on the recent case of *Elonis v. U.S.*, 135 S.Ct. 2001 (2015), which construes a federal statute to require actual intent on the part of the threatener or at least knowledge that his words will be taken as a threat, as opposed to a reasonable person standard for determining guilt. The prior standard had arisen under *Virginia v. Black*, 538 U.S. 343 (2003). As we will see *infra*, *Elonis* does not overrule *Black*, but only tempers it slightly. Nevertheless, under the rule in both cases, the Petitioner would still be guilty by his own admission.

Fourth, the Petitioner alleges the Court committed reversible error failing to exclude non-noticed 404(b) evidence. The State had introduced into evidence that the police had been to the Petitioner's home before. Nothing more was alleged, and the State used it for the purpose of showing the reasonableness of Det. Webber's fear that he or another officer might be attacked by the Petitioner if they lawfully came to his residence. As the Court limited its use to

showing the reasonableness for the officer's fears, this evidence does not condemn or label the Petitioner in any manner. No 404(b) inquiry is required in such a case.

Fifth, the Petitioner claims that his due process rights were violated because the entry into evidence of the Topix logs may have been missing two posts that had possibly been deleted. There is simply no merit to this argument. The testimony showed – and was not objected to – that the logs entered into evidence represented all that the Petitioner would have seen on the Topix page at that time, and that the server automatically deleted messages with certain language in them, namely correctly spelled profanities, which is why the profanity in the excerpts above has various characters in place of some letters; otherwise, the posts would be automatically deleted. The entire transcript of the exchange on Topix was presented, and the sections written by the Petitioner are clearly damaging to the question of his intent to threaten harm.

## ARGUMENT

### I. Standard of review.

This Court has said that:

As a general rule, a reviewing court should allow great deference to the findings of a jury in a criminal trial. As stated in Syl. pt. 1, *State v. Easton*, 203 W.Va. 631, 510 S.E.2d 465 (1998), “[a] reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice.

Syllabus point 3, *State v. Sprigg*, 103 W.Va. 404, 137 S.E. 746 (1927).

The question of whether a statute passes constitutional muster “is a question of law which this Court reviews *de novo*” Syl. Pt. 1, *State v. Rutherford*, 223 W. Va. 1, 672 S.E.2d 137 (2008).

As stated in Syllabus Point 1 of *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163

(1995):

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Further, this Court has said that:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore the circuit court's factual findings are reviewed for clear error."

Syl. Pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996).

Finally, with regard to 404(b), this Court held in *State v. Angle*, 233 W. Va. 555, 759 S.E.2d 786 (2014), that the prosecution and the Court must specifically delineate the purpose and limitation of proposed 404(b) evidence, and the jury must always be informed of such limitations. There must be an *in camera* hearing and the Court must find by a preponderance of the evidence that the proposed 404(b) evidence is admissible and must instruct the jury on any limitations. Syl. Pt. 2, *Angle*. This all hinges, of course, on whether such evidence is being introduced.

## **II. The Petitioner's assignments of error are without merit.**

### **A. The circuit court did not commit error in construing the statute.**

The Petitioner here contends that he did not have the present intention at the time he wrote on Topix to make a threat; indeed, he claims he was responding to a threat. (App. 214-

15). The record does not bear this assertion out. There is the ferocity of the language, to be sure, and the intended recipient – Det. Webber in this case – clearly identified this as a threat to him and fellow officers. (App. 171). Most importantly, however, are the Petitioner’s own admissions on the stand and after the trial, in which he concedes repeatedly that he should not have used these words. (App. 215-240).

Further, the Petitioner uses the same tone and more or less same level of discourse as the Goff relatives’ posts, which the Petitioner claims were threats against him. (App. 224). It cannot be a threat for one party and not the other; for that matter, the Petitioner’s language is much harsher than the other parties’, and the Petitioner’s promise to shoot people in the chest who dare to set foot on his property shows not only anger, but a misunderstanding of the notions of self-defense and the Castle doctrine. (App. 215-240). Since numerous people read these statements as true threats, there is an objective test passed herein; and since the Petitioner was clearly raising the bar by baiting the other parties with greater threats of harm, his words cannot be anything but threats. As the Court below said, under what circumstances could “I’ll open your chest with a 12 gauge” not be perceived as a threat. (App. 193).

**B. The statute is not unconstitutionally vague or overbroad.**

In *Yocum*, the terroristic threat statute, similar to the present statute in most respects, was challenged in the context of a suspect threatening to assault an officer’s family. The Court reviewed the statute de novo, and concluded that “true threats” are not protected speech under a constitutional analysis. In this particular case, the threats were not “true” because the petitioner was a prisoner at the time he made them and could not reasonably be expected to consummate the threats while incarcerated. In the present case, the Goff relatives had posted under their real names (unlike the Petitioner), and the Petitioner admitted he knew their addresses; this is

factually distinct from the outcome of *Yocum*, but the statute at issue is similar in that it requires intentional threats of violence. There is nothing vague in the statute, and it is specific enough to avoid broadness issues. True threats are like pornography – we know them when we see them. Further, it is inconceivable that the Petitioner could consider the alleged threats against him as true threats, when he used a pseudonym. It is disingenuous to suggest otherwise.

**C. The trial court did not err in instructing the jury.**

Most of the Petitioner’s argument in his original brief is subsumed by his supplemental brief, which relies heavily on *Elonis*. However, this again results in a determination of whether the Petitioner made a true threat:

There is no dispute that the mental state requirement in Section 875(c) is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat. See Tr. of Oral Arg. 25, 56. In response to a question at oral argument, *Elonis* stated that a finding of recklessness would not be sufficient. See *id.*, at 8–9. Neither *Elonis* nor the Government has briefed or argued that point, and we accordingly decline to address it. See Department of Treasury, *IRS v. FLRA*, 494 U.S. 922, 933, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990) (this Court is “poorly situated” to address an argument the Court of Appeals did not consider, the parties did not brief, and counsel addressed in “only the most cursory fashion at oral argument”). Given our disposition, it is not necessary to consider any First Amendment issues.

135 S.Ct. at 2012-13.

*Elonis* thus directs our focus on whether the Petitioner transmitted “a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat.” *Id.* Det. Webber definitely perceived this as a threat, and he is a fourteen year veteran officer. It is equally reasonable to assume that the Goff family, knowing that many people had knowledge of their whereabouts, would have seen this language as threatening. Most importantly, the admittedly angry Petitioner certainly knew he was making a threat. He started and escalated this war of words, giving no thought to the consequences of issuing so horrifying

a threat. Self-defense is not an available option when you invite someone to your house, as the Petitioner clearly did. His words, therefore, are threats and thus outside the protection of the constitutions.

**D. No 404(b) evidence was produced at trial.**

The Petitioner seeks to label the simple mention in the testimony that the police had been to his house as character evidence that should be subject to a 404(b) analysis. The record makes clear, however, that this evidence was admitted only for the purpose of showing the reasonableness of Det. Webber's fears. (App. 171). The prosecutor did not comment on it any further, nor did the witness discuss anything that would have called the police there or even whether the police were there for the Petitioner. There is simply no merit in this argument. The testimony is not related to 404(b) at all.

**E. The electronic document entered into evidence was complete.**

The Petitioner's final assignment of error relates to the supposed missing two posts from the Topix record that was introduced into evidence. The Petitioner claims that the State had a duty to preserve such evidence and that its failure to do so rendered the evidence incompetent. This is a misunderstanding of how Topix works. Det. Webber, who testified to having close working relationships with management at Topix, described how the two posts were deleted and why. The Topix software automatically deletes messages with certain offensive words. The Petitioner never saw these messages or knew what they were about, so there is no relevant contextual argument to be made. It is the Petitioner's own posts that seal his fate – not those of anyone else. Petitioner shows his malicious intent in his own words, and the context makes it clear that he is the aggressor and provoker in these exchanges. (App. 155). No jury instruction about the missing posts is required since there are not any, in effect, missing posts. This is just

another attempt to obfuscate the Petitioner's clear knowledge of what he was doing when he typed those posts. Further, if they could be deleted by the user, as the Petitioner suggests, why would he have not deleted his hateful posts after a time of reflection? It is simple; in the Petitioner's own words, he was angry.

### CONCLUSION

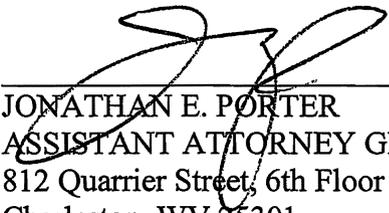
The Petitioner created this situation. He escalated it to the point of threats of physical violence that he should clearly know are not self-defense. There is no relevant caselaw on the constitutionality of the statute at issue here, but given *Yocum*, it is highly unlikely that this Court would hold this statute unconstitutional for any of the reasons Petitioner advances. He managed to escape serious punishment, and while the State certainly sympathizes with a recent (we presume) law graduate facing a difficult time at bar admission, this incident will hopefully be a lesson in professionalism. Lawyers cannot afford to be governed by emotions, much less anger. In this case, this young man let his anger get the best of him and has to pay a penalty for the threats he clearly knows he made. The judgment of the Circuit Court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Plaintiff Below, Respondent*

By counsel

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**CERTIFICATE OF SERVICE**

I, JONATHAN PORTER, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *SUMMARY RESPONSE* upon the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 9th day of October, 2015, addressed as follows:

Matthew Calvert, *pro se*  
157 Winding Way  
Clarksburg, WV 26301



JONATHAN PORTER