SUPREME JUDICIAL COURT OF THE STATE OF MAINE

Sitting as the Law Court

Law Court Docket Number: KEN-24-341

STATE OF MAINE

v.

DENIS LEMIEUX

On Appeal from Unified Criminal Court sitting in Kennebec County.

Brief for Appellee – The State of Maine

Maeghan Maloney
District Attorney
Bar Number: 8792
Prosecutorial District IV

Jacob Demosthenes
Assistant District Attorney
Bar Number: 10247
Prosecutorial District IV

Attorneys for the State
Office of the District Attorney
95 State St.
Augusta, Maine 04330

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PROCEDURAL HISTORY

On October 17, 2023, the defendant was convicted of domestic violence terrorizing after pleading no contest. (A. at 28). In February of 2024, the State attempted to revoke the defendant's probation. (A. at 31-32). He received a sentence involving probation. (A. at 27). After hearing, the lower court (Lipez, J.) found that the defendant had violated his probation and sentenced him to eighteen months of incarceration with probation to continue. (Prob'n Rev. Tr. 35-36). The lower court refused to consider a challenge to the terrorizing conviction because it found that post-conviction review was the exclusive means of challenge the propriety of an underlying conviction. (A. at 14).

ISSUE PRESENTED

Whether the trial court must give a defendant the opportunity to address the constitutionality of his underlying conviction during a probation revocation proceeding.

SUMMARY OF THE ARGUMENT

The post-conviction review process is the exclusive means of reviewing criminal convictions when a direct appeal is no longer available. The only exception that this Court has created is for ineffective assistance of counsel claims during probation revocation proceedings. The reasoning behind that exception is not present in this case. Further, policy implications strongly support disallowing a court to review an underlying conviction in a probation revocation proceeding.

Even if the Court were to entertain the argument that the underlying criminal conviction can be challenged through a probation revocation proceeding, the statute is nonetheless facially constitutional. The terrorizing statute at the time of the defendant's conviction is not constitutionally overbroad.

STANDARD OF REVIEW

The lower court's decision is an interpretation of the post-conviction review statute. There are no factual disputes in this appeal. From the State's perspective, and as will be discussed below, the lower court had no discretion to review this issue in a probation revocation proceeding. Therefore, the standard of review in this case is de novo. *State v. Pinkham*, 2016 ME 59, ¶ 14, 137 A.3d 203.

ARGUMENT

I. 15 M.R.S. § 2122 clearly states that the only means of collaterally attacking a conviction is through post-conviction review.

The post-conviction review process was created to provide "a comprehensive and, except for direct appeals from a criminal judgment, exclusive method of review" of criminal judgments. *State v. Johnson*, 2012 ME 39, ¶ 18, 38 A.3d 1270; 15 M.R.S. § 2122. This process allows for relief from restraints including probation that resulted from a criminal judgment. 15 M.R.S. § 2124(1)(B). The Law Court has described its precedent as "uniformly hold[ing] that when a direct appeal is not available, post-conviction review is the exclusive method of review." *Johnson*, 2012 ME 39, ¶ 18, 38 A.3d 1270 (citing *State v. Ali*, 2011 ME 122, 32 A.3d 2019; *State v Trott*, 2004 ME 15, 841 A.2d 789; *Aldus v. State*, 2000 ME 47, 748 A.2d 463).

a. This Court's precedent and the Legislature's intent show that post-conviction review is the only means of reviewing an underlying criminal conviction after direct appeal.

The Court has only expanded non-post-conviction review relief in circumstances where a defendant has asserted that his counsel at the probation revocation proceedings was ineffective. *Petgrave v. State*, 2019 ME 72, ¶ 17, 208 A.3d 371. This general rule of disallowing collateral attacks during probation revocation proceedings is supported by federal precedent. *See United States v. Warren*, 335 F.3d 76 (2d Cir. 2003*)* (citing *United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975); *United States v. Hofierka*, 83 F.3d 357 (11th Cir. 1996); *United States v. Simmons*, 812 F.2d 561 (9th Cir. 1987)).

In *Petgrave*, the Court held that a defendant who is asserting that he was deprived of his right to effective assistance of counsel during a probation revocation proceeding is entitled to review through a non-post-conviction review process. *Petgrave v. State*, 2019 ME 72, ¶ 17, 208 A.3d 371. In that case, the only available option to the defendant was to request a discretionary appeal. *Id.* at ¶¶ 5, 10. Petgrave filed such a request on grounds of insufficient evidence at the probation revocation hearing. *Id*. at ¶ 4. The post-conviction review process was unavailable for alleged violations of rights during a probation revocation proceeding. *Id*. at ¶ 10. This is due to the Legislature unambiguously stating that probation revocations were outside the scope of the post-conviction review statutes. *Petgrave*, 2019 ME 72, ¶ 9, 208 A.3d 371; 15 M.R.S. 2121(2). The Court described "the unavoidable conclusion" that "Petgrave [was] deprived of an opportunity to obtain meaningful review" on the

issue of the effectiveness of his counsel at the probation revocation hearing. *Petgrave*, 2019 ME 72, ¶ 10, 208 A.3d 371. The Court proceeded to outline the proper procedure for dealing with this apparent problem. *Id*. ¶¶ 13-16. Given that the Legislature has specifically excluded probation revocations from post-conviction review, this Court created a new procedure which requires a defendant to file a M.R. Crim. P. 33 motion to request a new trial. *Id*. ¶ 14. This motion, with an accompanying affidavit asserting this specific issue, would trigger the type of evidentiary hearing necessary to litigate ineffective assistance of counsel issues – similar to the type of hearing which post-conviction review allows. *Id*. ¶¶ 13-16.

This Court's precedent makes clear that post-conviction review is the exclusive means of attacking a prior conviction, outside of direct appeals, and the only exception to that general rule is when there is an assertion of ineffective assistance of counsel during a probation revocation proceeding. The reasoning behind *Petgrave* clearly shows that the creation of a new exception, as the defendant requests, is inappropriate and unnecessary. The reason for the exception to the general rule is that the defendant had been "deprived of an opportunity to obtain meaningful review" as to the issue of ineffective assistance of counsel. *Id.* ¶ 10. That is clearly not the circumstances of the defendant in this case. The defendant has full opportunity to litigate the issue of the constitutionality of his conviction through post-conviction review, unlike the defendant in *Petgrave*. Probation revocation

proceedings are not the proper avenue for litigating the issue of the constitutionality of an underlying sentence – the Legislature has made that abundantly clear. 15 M.R.S. 2121(2). There is no compelling reason to ignore the Legislature's clear intent on this issue.

b. Policy implications support a holding that challenging the constitutionality of an underlying sentence should take place through post-conviction review, not through probation revocation proceedings.

Allowing for a defendant to effectively appeal his prior conviction in a probation revocation proceeding is unfair to those who comply with their probation conditions because defendants who do comply would not get a special opportunity to collaterally attack the conviction. *United States v. Warren*, 335 F.3d 76, 79 (2003).

As noted by the lower court, if the defendant's position is accepted by this Court, a defendant has an incentive to violate his terms of probation if they feel that there is a constitutional problem with their conviction and their conviction has been affirmed after a direct appeal. Instead of having to go through the oftentimes lengthy process of post-conviction review, they could simply choose to violate their probation conditions by, for example, contacting the victim of the underlying case to get an immediate review of their conviction. That conclusion is unacceptable as a matter of policy and as a matter of common sense.

II. The *Counterman* Court created a new procedural safeguard for prosecutions of true threats and, therefore, the holding is not retroactive. However, the defendant was convicted after the decision in *Counterman* so the issue is not relevant to this appeal.

The defendant pled guilty in October of 2023. *Counterman v. Colorado*, 600 U.S. 66 (2023) was decided on June 27, 2023. New rules which are announced by the Supreme Court of the United States apply to all pending criminal cases at the time the decision is announced. *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004) ("When a decision of this Court results in a new rule, that rule applies to all criminal cases still pending on direct review."). Retroactivity only comes into play if a defendant's conviction is final and any direct appeals have been completed. *Id.* at 351-52. For that reason, the issue of retroactivity is irrelevant. Nonetheless, the rule created by *Counterman* was procedural and not substantive and should not be retroactively applied to those cases which were final at the time of the decision.

III. Even if this Court were to allow review of the statute at a probation revocation proceeding, Maine's terrorizing statute is nonetheless facially constitutional.

a. Counterman simply required that the State must additionally prove that the defendant acted recklessly as to the threatening nature of the speech at issue in criminal prosecutions.

In *Counterman v. Colorado*, 600 U.S. 66 (2023), the Supreme Court held that, in order for speech to be prosecuted under the "true threat" exception to the First Amendment, the defendant must have, at least, been reckless in regards to the

threatening nature of the speech. *Id.* at 72. Counterman had been convicted after sending a substantial number of messages to the victim, causing her emotional distress. *Id.* at 70. The victim would block the defendant and the defendant would merely create a new profile and message the victim again. *Id.* The defendant sent messages such as: "was that you in the white jeep?"; "a fine display with your partner"; "fuck off permanently."; "Staying in cyber life is going to kill you."; "You're not being good for human relations. Die." *Id.* At the end of a jury trial, Counterman moved to dismiss the case, asserting that his conduct was protected by the First Amendment and did not fall under the true threat exception, an as-applied challenge to his conviction. *Id.* at 69. The Colorado trial court, consistent with applicable precedent at the time, utilized an objective "reasonable person" standard. *Id.* at 71. "Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. By contrast, the State had no need to prove that Counterman had any kind of subjective intent to threaten." *Id.* (internal quotations omitted). The majority rejected this analysis and, instead, held that the proper test was to require the State to show that the defendant was, at least, reckless in causing the proscribed result. *Id.* at 70. The Court reasoned that requiring a mens rea brings prosecutions of true threats in line with prosecutions under other exceptions such as defamation and obscenity. *Id.* at 76.

In fact, the *Counterman* Court did not even augment the definition of what constitutes a true threat, it merely added a requirement under the First Amendment. *Id.* at 74.

Importantly, the Supreme Court did not order that the charges must be dismissed nor that Counterman's speech was protected under the First Amendment. Instead, the Court merely reversed the lower court's determination of whether Counterman's conduct was protected under the First Amendment. *Id.* *17-18; Amy Howe, *Justices throw out Colorado man's stalking conviction in First Amendment dispute*, SCOTUSBlog (June 27, 2023), https://www.scotusblog.com/2023/06/justices-throw-out-colorado-mans-stalking-conviction-in-first-amendment-dispute/; Andrew Gumbel, *'Victims are terrified': supreme court ruling on stalking cases sparks alarm*, The Guardian, (June 28, 2023), https://www.theguardian.com/law/2023/jun/27/supreme-court-stalking-ruling-alarms-advocates-and-victims.

From the facts described by the Court, it appears likely that Counterman's speech would still clear the reckless mens rea requirement.[1] Counterman was neither a successful as-applied challenge nor a successful facial challenge; the Court merely

[1] For instance, the fact that the victim blocked the defendant, never responded, and the defendant continued to make new accounts and contact with the defendant saying things like "Die" are very likely sufficient to show that Counterman was, at least, reckless to the threatening nature of his speech. This would be litigated, once again, on an as-applied challenge to his conviction.

augmented the test used for what can be prosecuted as a true threat and instructed the lower court to use the new test. Colorado prosecutors can continue to prosecute under the existing stalking statute. The *Counterman* Court did not change the definition of true threats nor facially invalidate any statute. *State v. Smith*, Order on Motion to Dismiss, Me. Super. Ct., No. KENCD-CR-2023-0907, Kennebec Cty., (Jul. 25, 2024) (Lipez, J.) ("The Counterman Court did not alter the definition of true threat. Rather, the Court held in Counterman that in a true threats case, the First Amendment requires that the prosecution additionally prove that the defendant was at least reckless regarding the effect of his or her speech.").

It is worth pausing here a moment because this is what many courts, attorneys, and this Defendant, have gotten wrong: *Counterman* did not invalidate the Colorado statute. *Counterman* is simply another First Amendment case which informs what a prosecution must prove in cases involving true threats. What the Defendant attempts to assert is a startling proposition: that if a statute touches, at all, any protected speech it is, therefore, unconstitutional. That proposition is not supported by the caselaw.

This is the central issue; a law which could potentially criminalize some protected speech is not per se unconstitutional. Criminal statutes need not embed in their text legal tests for constitutional issues. Instead, judges and juries must decide whether the State has cleared all procedural hurdles – for instance, whether they have

complied with the First Amendment by additionally proving that the defendant was at least reckless as to the threatening nature of their speech.

b. Despite *Counterman's* additional requirement of a reckless mens rea, the terrorizing statute is not constitutionally overbroad and, therefore, is facially constitutional.

A statute may be facially invalidated on First Amendment grounds if it is constitutionally overbroad. *Counterman* narrowed what type of speech could be successfully prosecuted under the First Amendment and is, therefore, relevant to an over-breadth challenge. It is especially important to highlight that these are the only means of facially invalidating a statute on Free Speech grounds in this context. *Speet v. Schuette*, 726 F.3d 867, 872 (6th Cir. 2013) (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)) ("Where a plaintiff makes a facial challenge under the First Amendment to a statute's constitutionality, the facial challenge is an overbreadth challenge.").

In order for a party to successfully invalidate a statute due to overbreadth, the statute must satisfy the overbreadth doctrine. As an initial matter, it is important to note that the mere fact that a statute may criminalize some protected speech is not sufficient to satisfy the overbreadth doctrine. *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). Instead, the overbreadth "must be not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* Said another way, a

statute that *can* be applied in unconstitutional ways is not necessarily unconstitutional on its face. The overbreadth doctrine "is, at the very least . . . an exception to our traditional rules of practice." *Id.* This is because the defendant's conduct is irrelevant to the overbreadth analysis. *Id.* at 610. Instead, the analysis focuses on how much protected speech *could be* criminalized by the statute compared to the "plainly legitimate sweep" of the statute. *Id.* at 615.

Additionally, claims arguing this doctrine, "if entertained at all, have been curtailed when invoked against ordinary criminal laws" even when those laws are being utilized to prosecute protected speech. *Broadrick*, 413 U.S. 601, 615 (1973) (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). "Overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner." *Broadrick*, 413 U.S. 601, 615 (1973) (citing *United States v. Harriss,* 347 U.S. 612 (1954).). "Invalidation for overbreadth is strong medicine that is not to be casually employed." *United States v. Williams*, 553 U.S. 285, 293 (2008) (internal quotations omitted).

In *Broadrick v. Oklahoma*, the Supreme Court acknowledged that the law at issue, a rule for state employees requiring them to get permission for certain political activities, could be applied constitutionally. 413 U.S. 601, 602 (1973). The Court acknowledged that the law prohibited some protected speech but it was nonetheless

constitutional. *Id.* at 613-14. This is no small detail: the Court entirely acknowledges that the law prohibits constitutionally protected conduct but specifically found that it did not prohibit enough protected conduct, in relation to its legitimate purpose, to be wholly invalidated. *Id.* at 616 ("[The statute at issue] is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amandments.").

In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court vacated a conviction for breach of the peace but did not strike down the statute. *Id.* at 308. In that case, a Jehovah's Witness had been convicted after playing a phonograph record attacking the Catholic Church that two Catholic men heard on a public street. *Id.* at 311. Despite the government prosecuting clearly protected speech, the Court declined to invalidate the entirety of the statute. *Id.* at 308. The Court "seemingly envisioned its continued use against a great variety of conduct . . . ." *Broadrick*, 413 U.S. 601, 614 (1973) (citing *Cantwell*, 310 U.S. 308 (1940)) (internal quotations omitted). Said another way, this was a successful as-applied challenge but the statute wass nonetheless constitutional.

There are a number of cases which invalidate statutes which are clearly and substantially overbroad. The most noteworthy case where a statute was facially invalidated for violating the overbreadth doctrine is *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In that case, the defendant was convicted under a statute which made it

illegal to advocate for "crime, sabotage, violence . . . as a means of accomplishing industrial reform." *Id.* at 445. Importantly, the statute did not require that the advocacy actually be likely to cause such actions.[2] The Court deemed this statute to be unconstitutional because the law criminalized mere advocacy of the aforementioned conduct and did not require there to be any likelihood that those actions actually take place. *Id.* at 448. The Court reasoned that this encapsulated a significant amount of protected speech in comparison to the amount of speech it criminalized. *Id.* at 448-49. This was substantially overbroad because anyone advocating for this conduct where it was unlikely to occur could be subject to prosecution – despite the fact that this conduct would be protected under the First Amendment. *Id.*

Another such example is *Thornhill v. Alabama*, 310 U.S. 88 (1940). In that case, the Supreme Court held that a statute which criminalized picketing any business was constitutionally overbroad. *Id.* at 105-06. The Supreme Court reasoned that almost all of the conduct which would be criminalized by the statute would be constitutionally protected. *Id.* at 105. On the other hand, the legitimate purpose of the statute was incredibly narrow. *Id.* ("We hold that the danger of injury to an

[2] The exception to the First Amendment dealt with in that case was incitement. In order for speech to be deemed incitement (and therefore not be protected under the First Amendment), it must be directed to inciting or producing imminent lawless action and *be likely to invite or produce such action. Id.* at 447-48.

industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in [the statute].").

The Supreme Court is reticent to invalidate criminal laws which only incidentally criminalize protected conduct such as in *United States v. Hansen*, 143 S. Ct. 1932 (2023). There, the Supreme Court reversed the Ninth Circuit which had held that a statute criminalizing "encouraging . . . or inducing" illegal immigration was constitutionally overbroad. *Id.* at 1937. The Supreme Court held that the lower court had erred when it had determined that the amount of protected speech criminalized by the statute was significant in comparison to its legitimate purpose. *Id.* at 1937-38. The Ninth Circuit, and Hansen himself, had asserted that the statute criminalized such conduct as inviting a person who had not immigrated legally inside during a storm or advising them about available social services. *Id.* at 1938. The Supreme Court rejected the Ninth Circuit's reasoning and held, instead, that the type of conduct which is constitutionally protected that is also criminalized by the statute is minor in relation to its legitimate purpose of enforcing immigration laws. *Id.* at 1946. To emphasize, the Court held that some protected speech may be criminalized by the statute but the statute is, nonetheless, still valid. *Id.*

Turning to the case at hand, a court would struggle to find a circumstance where a person is guilty under Maine's terrorizing statute and that conduct is also

protected under the First Amendment. In order to be guilty of terrorizing, a person must:

> communicate to any person a threat to commit or to cause to be committed a crime of violence dangerous to human life, against the person to whom the communication is made or another, and the natural and probable consequence of such a threat, whether or not such consequence in fact occurs, is:
>
> To place the person to whom the threat is communicated or the person threatened in reasonable fear that the crime will be committed.

17-A M.R.S. § 210-A(1)(A). In order to be protected under *Counterman*, the defendant's conduct would have to fall under the statute *and* the defendant was not even reckless as to the threatening nature of the speech. Said another way, there would have to be a fact pattern where (1) a listener *reasonably believed* that they were being threatened *and* (2) the speaker was not even reckless as to cause that result. It stretches one's imagination to create a fact pattern that would be both protected under the First Amendment and also criminalized under the statute. While there may be some convoluted hypothetical case where actually protected speech is criminalized under the statute, the statute, prior to its amending by the Legislature is 2024, is nonetheless not substantially overbroad.

The obvious legitimate purpose of the terrorizing statute is public safety and to attempt to intervene in violent situations without having to wait for a violent result.

The amount of protected speech actually criminalized by the statute, if any at all, is dwarfed in comparison to the statute's clearly legitimate purpose. Further, this Court should follow the Supreme Court's guidance in that "overbreadth scrutiny" should be "less rigid" when the statute regulates conduct in a "neutral, noncensorial way." *Broadrick*, 413 U.S. 601, 615 (1973). There is no basis to assert that the terrorizing statute is attempting to censor any particular viewpoint.

In comparing this case to the precedent previously discussed, it is clear that Maine's terrorizing statute, even prior to its amending by the Legislature, is constitutional. In *Cantwell,* the breach of the peace statute was so overly broad that it criminalized debating religion in public and, yet, the Court did not deem the law overly broad. Here, no such hypothetical fact pattern is readily apparent and, even if such a fact pattern could be imagined, it is not nearly substantial enough to invalidate the terrorizing statute. Similarly, the terrorizing statute is not remotely close to the statute at issue in *Thornhill* where the overwhelming majority of the criminalized conduct was protected speech. Instead, the terrorizing statute falls in line with *Hansen* where the Supreme Court held that although the statute may be overbroad in some contexts, the overbreadth was not substantial and, therefore, the statute was deemed constitutional. Maine's prior terrorizing statute likewise falls in line with *Counterman* where the Court did not find the Colorado statute unconstitutional but merely applied in an unconstitutional manner toward that particular defendant.

Because Maine's terrorizing statute is not overly broad, let alone substantially overbroad as required under the overbreadth doctrine, it is facially constitutional.

CONCLUSION

Because the proper means of addressing the validity of an underlying conviction is exclusively within post-conviction review and that, regardless, the terrorizing statute, even prior to its amending by the Legislature, is constitutional, the ruling of the lower court must be affirmed.

DATED:

_____

Jacob Demosthenes
Assistant District Attorney
Bar No.: 10247

CERTIFICATE OF SERVICE

I, Jacob Demosthenes, Assistant District Attorney, hereby certify that one (1) copies of the within Brief for Appellee were mailed to Appellant's Attorney addressed as follows:

Daniel Lawson, Esq.
Capital Region Public Defender's Office
153 State House Station
Augusta, Maine 04330

The State has sent a native .pdf file for submission to the court (at lawcourt.clerk@courts.maine.gov).

Dated: _____ _____

Jacob Demosthenes, Esq.
Attorney for the State
Bar No. 10247