SUPREME COURT OF NEW JERSEY

DOCKET NO. 72,293

STATE OF NEW JERSEY,
Plaintiff-Petitioner,

v.

DAVID POMIANEK,
Defendant-Respondent.

On Petition for Certification to the
Superior Court of New Jersey, Appellate Division
Hon. Susan L. Reisner, P.J.A.D.
Hon. Jonathan N. Harris, J.A.D.
Hon. Richard S. Hoffman, J.A.D.

AMICUS CURIAE **BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF THE DEFENDANT-APPELLEE**

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INTRODUCTION

Amicus curiae The Rutherford Institute, having been previously granted leave to appear in this cause, files this *amicus* curiae brief pursuant to R. 1:13-9(d)(4), in support of Defendant-Respondent David Pomianek (hereinafter "Pomianek").

Pomianek was tried and convicted of violating New Jersey's bias intimidation statute, N.J.S.A. § 2C:16-1, this State's version of a "hate crime" law, which makes it a separate offense for a person to commit a predicate crime under circumstances which are deemed "biased" toward the alleged victim. While "hate crime statutes" are constitutionally justified by the authority of the state to consider the motive for an offense in establishing punishment, see Wisconsin v. Mitchell, 508 U.S. 476, 484-85 (1993) ("criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained.") and Note, Motivation, Causation and Hate Crimes Sentence Enhancement: A Cautious Approach to Mind Reading and Incarceration, 59 Drake L.R. 181, 186-87 (2010) (noting that hate crimes are based upon a causal link between the forbidden animus and the underlying crime), New Jersey's version is unprecedented in that it contains provisions,

which are the specific basis for Pomianek's convictions, which wholly divorce the offender's intent or motive from the determination of guilt. Instead of basing guilt upon the mental state and subjective motivations of the defendant, New Jersey's bias intimidation statute, specifically N.J.S.A. § 2C:16-1a(3), allows for enhanced punishment based upon the perceptions of the victim and, for that matter, the jury.

The Appellate Division rightly concluded that § 2C:16-1a(3), as written and as applied to Pomianek, offends the First Amendment. State v. Pomianek, 429 N.J. Super. 339, 358-59 (2013). By basing guilt upon the "reasonable belief" of a victim concerning the intent and motivations of the defendant, N.J.S.A. § 2C:16-1a(3) creates a grave danger that a defendant will be punished for a "hate crime" on the basis of his or her speech. That danger was realized in the instant case, as the record makes plain that Pomianek was convicted on the basis of speech that was not only far from racially intimidating but was, at worst, politically incorrect. This is contrary to the bedrock principle underlying the First Amendment that the government may not proscribe or punish speech because society finds the expression offensive of disagreeable. Snyder v. Phelps,

131 S. Ct. 1207, 1219 (2011) (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).

Additionally, N.J.S.A. § 2C:16-1a(3) should be found unconstitutional because it violates the fundamental principle that criminal liability should be based upon the mental state of the defendant. N.J.S.A. § 2C:16-1a(3) instead bases bias intimidation liability upon what a fictional "reasonable" victim would believe, a standard that is inherently vague. As such, the statute fails to give fair notice to persons on what conduct violates the statute, in violation of the most fundamental guarantees of due process of law.

ARGUMENT

I. DEFENDANT POMIANEK WAS CONVICTED OF BIAS INTIMIDATION ON THE BASIS OF CONSTITUTIONALLY-PROTECTED SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Although the State argues that N.J.S.A. § 2C:16-1a(3) is constitutional because it is "well-settled that bias crimes" do not impermissibly restrict constitutionally-protected conduct (Brief of the State p. 22) and because the state may impose enhanced penalties for "bias intimidation done thoughtlessly and not just intentionally" (Petition for Certification at 3), § 2C:16-1a(3) is unlike other "hate crimes" statutes that have been upheld. Thus,

the statute upheld in State v. Mortimer, 135 N.J. 517, cert. denied, 513 U.S. 970 (1994), increased the punishment for harassment when the defendant acted with intent to intimidate because of hatred or bias toward the victim's race, color, religion, sexual orientation or ethnicity. Mortimer relied upon the ruling in Mitchell, which upheld a statute that increased punishment where it could be shown that the defendant intentionally selected the victim because of the victim's race, religion, color, ethnicity or other protected status. Id., 508 U.S. at 480. The Supreme Court in Mitchell reasoned that the statute was not punishing speech as such, but the conduct of the defendant when done with a discriminatory motivation. Id. at 486-87.

Scholarly analysis of "hate crimes" also has identified the defendant's mens rea as justifying any increased punishment or distinct punishment:

> Under objective retributive theories, two well-recognized conditions give rise to culpability for wrongdoing. These conditions concern the actor's attitude--broadly construed--toward the wrongdoing. The first culpability-creating attitude is intending. An actor is culpable for his intentional wrongdoing. For example, because causing a death is a wrongdoing, an actor will be culpable for causing the death if he did so intentionally. The second attitude giving rise to culpability is believing, or more generally, assignment of likelihood to a state of affairs. Even if an actor does not intend to engage in wrongdoing, she may be culpable if she believed she was so engaged, or at least if she assigned a

> sufficiently high likelihood to the possibility that she was so engaged.

Dillof, A. M., Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes, 91 Nw. U. L. Rev. 1015, 1027-1028 (1997). Thus, "the 'critical factor in determining an individual's guilt for a bias crime' is bias motivation itself." Hanser, R.P., Punishing Hate, Punishing Harm, 90 J. Crim. L. & Criminology 1047, 1053 (2000)(quoting Lawrence, Frederick M., Punishing Hate Bias Crimes Under American Law, p. 64 (Cambridge, Mass., Harvard Univ. Press 1999)).

However, N.J.S.A. § 2C:16-1a(3) is unlike the statutes previously upheld in that, as written, the defendant's discriminatory intent or motive is not relevant and need not be found to exist by a jury. Instead, guilt under this section exists if "the victim, considering the manner in which the offense was committed, reasonably believed" that the defendant either intended to intimidate him/her or selected him/her as a target because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin or ethnicity. Thus, the defendant's motive or intent is not the factor triggering the separate, more serious "hate crime" set forth in § 2C:16-1a(3), and the defendant's hate

or bias is actually irrelevant to guilt under § 2C:16-1a(3). Indeed, Defendant Pomianek was acquitted on those counts under § 2C:16-1 which would have required a finding that he acted with discriminatory intent or motive, establishing that the jury found he did not harbor the bias or hatred normally associated with hate crimes.

Because it is the victim's perception, and not the defendant's intent or motive, that is the crucial factor for this more serious crime, it becomes a significant issue with respect to the constitutionality of § 2C:16-1a(3), both facially and as applied, as to what evidence is used to support the element that the victim had a "reasonable belief" that he/she was targeted because of his her race, color, religion or other protected status. In the instant case, that answer is clear: the sole basis for Mr. Brodie's perception that he was targeted because of his race was Pomianek's statement "Oh, you see, you throw a banana in the cage and he goes right in." Pomianek, 429 N.J. Super. at 348. Nothing else in the record supports the idea that, "considering the manner in which the offense was committed," Mr. Brodie "reasonably believed" he was targeted because of his race.

Viewed in this light, it is clear that in this case Defendant Pomianek was found guilty of violating § 2C:16-

1a(3)(a) and (b) on the basis of his expression and words he spoke. It is only because of his words regarding the "banana" that the additional counts of bias intimidation can be sustained; those words are the sole evidence which justify the convictions for bias intimidation over and above the predicate harassment offenses.

To punish a person on the basis of the content of his words and expression is contrary to and violative of the principles enshrined in the First Amendment. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). The freedom of speech guaranteed by the constitution "does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391 (1992). Moreover, a listener's reaction is not a legally sufficient basis for restricting speech. See Forsyth Cnty. v Nationalist Movement, 505 U.S. 123, 134-35 (1992).

The application of N.J.S.A. § 2C:16-1a(3) in the instant case clearly violates these principles. Defendant Pomianek was subject to a special punishment over and above

the predicate harassment offense because of his "banana" comment. While this comment may have been insensitive or politically incorrect in light of the race of Mr. Brodie, it was nonetheless speech protected by the First Amendment; it falls within no class of speech, such as obscenity or "fighting words", which is beyond the protection of the constitution. The fact that Mr. Brodie found the statement offensive and it led him to believe that Defendant's conduct was racially motivated is not sufficient grounds for imposing a special punishment upon Defendant Pomianek over and above the punishment imposable for the predicate offense. Even in the case of the most scurrilous of epithets, the Supreme Court has held that "the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." Cohen v. California, 403 U.S. 15, 25 (1971).

Contrary to the arguments of the State and unlike the statutes considered in Mortimer and Mitchell, this is not a situation where the statute punishes only behavior, because inherent in the element requiring that the victim "reasonably believe" he/she is the target of discrimination is a requirement that there be some communication or expression by the defendant indicating bias. It is difficult to imagine any situation where the victim's

belief would not be based on some words or expression of the defendant, and that is clearly the case with respect to the instant case. Defendant Pomianek was convicted of violating § 2C:16-1a(3) solely because of words he stated in connection with the "cage" incident and the offense at those words felt by Mr. Brodie. Again, "[t]he Supreme Court has made it clear, however, that the government may not prohibit speech . . . based solely on the emotive impact that its offensive content may have on a listener." Saxe v. State College Area School Dist., 240 F.3d 200, 209 (3d Cir. 2001). This is wholly distinct from the situations considered in Mitchell and Mortimer, where the "hate crime" enhanced punishment was based upon the intent or motive of the defendant, and speech of the defendant was simply evidence of that intent or motive. In this case, it was Defendant Pomianek's speech itself and its effect upon Mr. Brodie that was the basis for the § 2C:16-1a(3) convictions and enhanced punishment, a result which is not allowed by the First Amendment.

Indeed, § 2C:16-1a(3) should be deemed unconstitutional on its face in light of the fact that in almost all cases it will be applicable only because of statements or expression of the defendant, and that expression and the reaction of the alleged victim will be

the basis for any conviction.[1] It would be a rare case where the conduct of the defendant in committing the predicate offense will alone be grounds for the victim's belief that he or she was targeted because of bias.[2] In the vast majority of cases (as demonstrated by the instant case), the victim's belief will of necessity be based upon statements by the defendant because that is the only way the supposed bias of the defendant could be demonstrated. Because § 2C:16-1a(3) has the potential, fully realized in the instant case, to allow the state to prosecute and potentially convict somebody engaging in lawful speech that the First Amendment is designed to protect, it should be found unconstitutional on its face and invalid. See Virginia v. Black, 538 U.S. 343, 365 (2003) (statute banning cross-burning with intent to intimidate and making the act prima facie evidence of intent held unconstitutionally overbroad).

Furthermore, the fact that statute requires a jury finding that the victim's belief that he or she was

[1] Indeed, the State concedes that there is no basis for the Appellate Division's reading an intent to intimidate element into § 2C:16-1a(3) (Petition for Certification at 15), which the lower court did in order to save the statute from a finding of facial invalidity.

[2] Such cases might include those where the defendant used a noose or burning cross in connection with committing the predicate offense, but other examples are extremely difficult to imagine.

targeted to be "reasonable" does not cure the constitutional vice of § 2C:16-1a(3). In Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510 (1984), the Court noted that juries are "unlikely to be neutral with respect to the content of speech and hold[] a real danger of becoming an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." (citations omitted). The "reasonableness" standard is inherently malleable and "'allows a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression.'" Snyder, 131 S. Ct. at 1219 (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988)). The protection afforded by the First Amendment cannot be overcome by a jury verdict expressing disapproval of the speech. Snyder, 131 S. Ct. at 1219.

The convictions of Defendant Pomianek in this case are a stark example of the danger to First Amendment freedoms posed by "hate crimes" generally and N.J.S.A. § 2C:16-1a(3) in particular. Defendant Pomianek's offenses were elevated to a fourth degree offense because of a statement that was not even blatantly racial or patently offensive, but simply

"politically incorrect." Indeed, the jury rejected the charge that he was actually motivated by improper bias, yet found that he was deserving of enhanced punishment, essentially because his statement was insensitive and deemed offensive by Mr. Brodie. The First Amendment forbids states from imposing punishment because others consider speech offensive, and the right to free speech should be vindicated and protected here by ruling that N.J.S.A. § 2C:16-1a(3) was not only unconstitutionally applied to Pominanek but is unconstitutional on its face.

II. THE BIAS INTIMIDATION STATUTE IS INVALID BECAUSE IT FAILS TO PROVIDE ADEQUATE NOTICE, CREATES A STRICT LIABILITY OFFENSE AND IS AN IRRATIONAL MEANS FOR PREVENTING BIAS-MOTIVATED CRIMES

The bias intimidation statute at issue here is apparently unprecedented in making "hate crime" liability dependent on the perceptions of the alleged victim. As pointed out above, "hate crimes" are generally justified by the authority to increase an offender's punishment on the basis of his or her intent or motive. Mitchell, 508 U.S. at 485. N.J.S.A. § 2C:16-1a(3) ignores this fundamental underpinning for hate crime culpability by defining the crime in terms of the perceptions of the victim. This raises inherent problems with its validity.

First, there is a procedural due process and vagueness problem with tying a person's guilt for bias intimidation to the subjective feelings of the alleged victim. "'A penal statute should not become a trap for a person of ordinary intelligence acting in good faith, but rather should give fair notice of conduct that is forbidden. A defendant should not be obliged to guess whether his conduct is criminal. Nor should the statute provide so little guidance to the police, that law enforcement is so uncertain as to become arbitrary.'" State v. Allen, 334 N.J. Super. 133, 137 (Law Div. 2000) (quoting State v. Lee, 96 N.J. 156, 165-66 (1984)). A person cannot know whether the circumstances of his or her conduct will cause another to believe that he or she has been targeted because of his or her race, sex or other protected status. The other person's belief will depend wholly upon the thoughts, memories or experiences of which the alleged offender almost certainly cannot know. Almost by definition, a person charged under N.J.S.A. § 2C:16-1a(3) cannot have the kind of fair notice that his conduct will violate this section that is a fundamental requirement of due process.

By making the elements of "intimidation" and "purpose" dependent upon the subjective feelings of the alleged victim, the offense set forth in N.J.S.A. § 2C:16-1a(3) is

unconstitutionally vague. In Binkowski v. State, 322 N.J. Super. 359, 381 (App. Div. 1999), the court pointed out that the constitution requires that a law be sufficiently clear and precise so that a person of ordinary intelligence has notice and adequate warning of the prohibited conduct. Although the court there upheld a hunter harassment statute, it specifically distinguished offenses that depend upon the subjective feelings and beliefs of the victim:

> Nor is the statute vague because its enforcement depends on the subjective feeling of the particular hunter involved; nor does it effectively grant the hunter the discretion, without any defining standard, the right to decide whether the conduct should be proscribed. See [Coates v. City of Cincinnati, 402 U.S. 611, 615-16 (1971)]; . . . . To the contrary, the proscribed conduct is not based on the hunter's personal predilections, but on the actor's conduct and his or her specific intent. In other words, for a person to be found to have violated the statute, the State must prove that the person "block[ed], obstruct[ed] or imped[ed], or attempt[ed] to block, obstruct, or impede," the hunter with "the purpose of hindering or preventing the lawful taking of wildlife." N.J.S.A. 23:7A-2a (emphasis added). By imposing a specific-intent requirement on subsection (a), the Legislature sufficiently clarified the conduct proscribed. See Mortimer, supra, 135 N.J. at 536.

Binkowski, 322 N.J.Super. at 382-383. The bias intimidation statute suffers from the very vice identified in Binkowski; it makes a person's guilt dependent upon the alleged victim's subjective feelings regarding intimidation

and beliefs as to targeting. This renders the statute inherently vague because no person can know whether his conduct is deemed intimidating or improperly discriminatory by another. It requires persons to be mind readers and fails to give persons of ordinary intelligence the kind of notice required by the Constitution.

Second, by ignoring the intent and/or motive of the defendant and focusing on the perceptions of the alleged victim, N.J.S.A. § 2C:16-1a(3) essentially creates a strict liability offense. As a rule, "[t]he intent with which a criminal act is done determines the legal character of its consequences." State v. Murray, 240 N.J.Super. 378, 401 (App. Div. 1990). Although the legislature may make a defendant's intent irrelevant in defining a criminal offense, the presumption is to the contrary and it is not to be inferred that the legislature intended to impose strict criminal liability. State v. Michalek, 207 N.J.Super. 340, 348-49 (Law Div. 1985). Strict liability is generally reserved for the enforcement of regulatory schemes by minor penalties that are essentially civil in nature. State v. Kiejdan, 181 N.J.Super. 254, 258-59 (App. Div. 1981). It certainly cannot be said that a defendant charged with a violation of N.J.S.A. § 2C:16-1a(3) faces only minor penalties.

Finally, the fact that N.J.S.A. § 2C:16-1a(3) ties a defendant's guilt to the subjective beliefs or feelings of the alleged victim is wholly irrational because the statute will not serve to prevent or deter bias-motivated crimes. Again, this kind of hate crime statute is justified by the governmental interest in preventing victimization of certain protected classes. But if a defendant's selection of a person was not because of their protected status, the existence of this distinct criminal prohibition based upon the subjective beliefs of the alleged victim would not have deterred the defendant in any event. As held in Michalek, 207 N.J.Super. at 349, "there is no rational basis for inflicting serious penalties on one who did not know (or have reason to know) that he was doing something dangerous and prohibited[.]"

The approach taken by N.J.S.A. § 2C:16-1a(3) has been deemed unreasonable even by the most ardent supporters of this kind of "hate crime" legislation. One commentator summarized the views of a proponent of hate crime prohibitions as follows:

> Despite his harm-based justification for penalty enhancement, Lawrence specifies that determinations regarding who merits such enhancement should not take actual harm into account. Rather, the "critical factor in determining an individual's guilt for a bias crime" is bias motivation itself (p. 64). "A

> result-oriented focus is particularly inappropriate" because "[i]n many cases, the harms associated with a bias crime depend entirely on whether the victim, the target group, and the society perceive the perpetrator's bias motivation," and the offender "may often have little control" over that perception (pp. 64-65). . . . "[A] defendant whose crime was only unconsciously motivated by the defendant's membership in a particular group (an "Unconscious Racist") should not be punished as a bias criminal--even, presumably, if his crime gives rise to all of the excess harms associated with bias crimes. "[A]ctual harm," Lawrence reasons, "has never been a sine qua non for guilt, and there is no reason that bias crimes should be an exception to this rule" (p. 67).

Hanser, R.P., supra, at 1053-54. The focus adopted by N.J.S.A. § 2C:16-1a(3) upon the victim's perceptions as a basis for guilt is irrational, fundamentally unfair and violative of constitutional norms. It should be held to be invalid and unenforceable as to Defendant Pomianek.

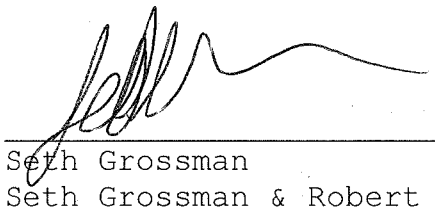
CONCLUSION

New Jersey's bias intimidation statute is an extreme example of "hate crime" statutes that unnecessarily blur the distinction between what might be constitutionally protected, albeit offensive, speech and criminal behavior. It has the effect of criminalizing speech that society might deem distasteful or politically incorrect. That effect is on stark display in this case, where N.J.S.A. § 2C:16-1(a)(3) was applied to enhance Pomianek's conduct

from a disorderly persons offense to a fourth degree crime simply on the basis of statements that cannot be deemed overtly racial or offensive. This enhancement occurred despite the fact that he was found not to have acted with a racial motive or intent, so the Appellate Division's judgment reversing Pomianek's conviction under the statute should be affirmed. Moreover, the First Amendment does not allow for punishment of expression because it is deemed offensive, and because N.J.S.A. § 2C:16-1(a)(3) patently allows for such punishment and does not require a finding that a defendant acted with discriminatory intent, this Court should rule that it is facially invalid.

Respectfully submitted,

Dated: January 9, 2014



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 10, 2014, two (2) copies of the foregoing *Amicus Curiae* Brief of The Rutherford Institute in Support of the Defendant-Respondent were served upon each party to this action by delivering said copies to a courier for delivery within one business day using the following last-known address of counsel for the parties:

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