COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT No. _____

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

v.

ARICKSON CRUZ,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF NEW BEDFORD DISTRICT COURT

APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW OF DEFENDANT-APPELLANT ARICKSON CRUZ

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February 14, 2024

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, defendant-appellant Arickson Cruz respectfully requests leave to obtain further appellate review of his judgment. Cruz was prosecuted for threatening to commit a crime after unexpectedly running into his ex-girlfriend at a concert and then sending her a text message that read "I swear to god if you touch my [kids] one more time I'll punch you in your fucking face Bitch, I'm not going to repeat myself again." The Appeals Court upheld his conviction, reasoning that even if Cruz had the right to put limits on who was permitted physical contact with his children, that right did not extend to threatening retaliation in future by physical force. Because the jury was not required to find any subjective intent to threaten in Cruz's issuing the warning to stay away from his children, his conviction is inconsistent with the United States Supreme Court's intervening decision in *Counterman v. Colorado* holding that, to comply with the First Amendment, criminal statutes punishing pure speech as true threats must contain a subjective *mens rea* element to the standard of recklessness. It further held that statutes like G.L. c. 275, §2, incorporating only a reasonable person standard amounting to subjective negligence, violate the First Amendment. Cruz's case therefore requires review for substantial reasons affecting the public interest and the interests of justice.

STATEMENT OF PRIOR PROCEEDINGS

On November 25, 2020, a complaint issued against Arickson Cruz charging him with one count of Threat To Commit A Crime, G.L. c. 275, §2. After a jury trial that took place on November 4, 2022 (Stone, J.) he was found guilty and sentenced to six months' probation. His brief was filed on April 21, 2023; on June 27, the United States Supreme Court issued its decision in *Counterman v. Colorado*, 600 U.S. 66 (2023). The Commonwealth filed its brief on August 23 and on January 30, 2024, the Appeals Court affirmed the conviction in an unpublished opinion. Neither cited *Counterman*.

STATEMENT OF FACTS

The facts are accurately summarized in the Appeals Court opinion for the purposes of this argument.

STATEMENT OF THE ISSUE WITH RESPECT TO WHICH CRUZ SEEKS APPELLATE REVIEW

I. In *Counterman v. Colorado*, decided after the filing of Cruz's brief, the United States Supreme Court held that to comply with the First Amendment, statutes like G.L. c. 275, §2 punishing true threats of violence must require the state to prove to a recklessness standard that the defendant was aware of the threatening nature of his communications. Where the jury instructions here required only that, like in the Colorado statute at issue, the Commonwealth prove that a reasonable person could have been threatened by Cruz's communication, did Cruz's conviction violate the First Amendment under this new precedent?

ARGUMENT

I. The Supreme Court In Counterman v. Colorado Held That the First Amendment Requires A Subjective Recklessness Standard For Criminal Prosecutions Of Pure Speech As True Threats;

True threats of violence are historically unprotected by the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359 (2003). "The true in that term distinguishes what is at issue from jests, hyperbole, or other statements that when taken in context do not convey a real possibility that violence will follow." *Counterman v. Colorado*, 600 U.S. 66, 74 (2023). In *Counterman* the United States Supreme Court held that while it was the content of the message, not the intent of the speaker, that determined whether a communication constituted a true threat, the First Amendment nonetheless required a showing to at least a recklessness standard that the defendant engaged in morally culpable conduct by being aware that others could regard his statements as threatening violence and delivering them anyway. *Id.* at 79. The Supreme Court distinguished this standard from negligence, which it identified as the standard used by threat statutes such as G.L. c. 275, §2 which incorporate a reasonable person standard without reference to any subjective *mens rea*. *Id.* at 79 fn. 5. The Court's reasoning was that the use solely of an objective standard, "turning only on how reasonable observers would construe a statement in context, would make people give threats a wide berth [and] discourage the

uninhibited, robust, and wide-open debate that the First Amendment is intended to protect." *Id.* at 78.

II. Because The Commonwealth Did Not Have To Prove That Cruz Knew Or Should Have Known That Warning His Ex Away From His Children In Future Would Be Taken As A True Threat To Commit A Crime, His Conviction Violated The First Amendment.

Cruz argued below that his text message was not a true threat because it conveyed a warning that his parental privilege entitled him to – setting conditions on which other adults were permitted physical contact with his children. He argued that the fact that this warning contained the contingent threat of physical violence on a speculative future occasion (moreover one unlikely to occur, as the two did not habitually encounter each other) was not enough to render it a true threat to commit an unambiguous crime, especially in the context of a relationship bereft of violence actually committed at any point. The Appeals Court, citing *Commonwealth v. Allen*, 474 Mass. 162, 168-169 (2016), held that because Cruz would not have been entitled to the affirmative defense of defense of another for the punch in the face he threatened if it had been delivered on the past occasion prompting the text message, where his ex-girlfriend merely returned a hug from the children, the evidence permitted the jury to find beyond a reasonable doubt that the threat was serious and the victim's fear reasonable. Add. 4-5. The opinion did not mention or apply the intervening *Counterman* decision.

Cruz's conviction violates the First Amendment in precisely the same way as the defendant's in *Counterman*.[1] Without the jury being asked to determine that Cruz knew or at least strongly suspected that telling his ex to stay away from his kids and backing it with his fists would be taken as a serious expression of an intent to harm her, his conviction as well as others under G.L. c. 275, §2 are inconsistent with the decision in *Counterman*. As Cruz argued below, prosecution for conditional warnings of retaliation with future violence that, on that future occasion, may or may not be unlawful presents a significant chilling effect on core categories of protected speech. Without any requirement of a subjective intent to threaten, the Appeals Court's decision means that even fully justified self-protective threats of future violence (e.g., "touch me again and you'll lose a finger," "stay away from me, I have a gun") render the speaker vulnerable to prosecution by the Commonwealth under G.L. c. 275, §2. *See Counterman*, 600 U.S. at 78 ("The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring

[1] Cruz testified at his trial that he did not intend the text to be taken seriously. His argument in that regard is considerably stronger than that of the defendant in *Counterman*, whose "hundreds" of communications to a local singer and musician he did not know contained references to following her ("[w]as that you in the white Jeep?" "[a] fine display with your partner") paired with expressions of hatred ("Fuck off permanently." "You're not being good for human relations. Die.") *Counterman*, 600 U.S. at 70.

legal costs—all those may lead him to swallow words that are in fact not true threats"). Because the decision in *Counterman v. Colorado* requiring a subjective element invalidates the Appeals Court's decision in this case, Cruz's conviction requires further review for substantial reasons affecting the public interest and the interests of justice.

CONCLUSION

For the reasons set forth above, Arikson Cruz respectfully requests that this Court grant further appellate review of his conviction.

Respectfully submitted,

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By and through his attorney,

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February 14, 2024

Certificate of Compliance Pursuant to Mass. R. A. P. 16(k)

I, Rachel T. Rose, hereby certify that the foregoing complies with the requirements of Mass. R. A. P. 16 that pertain to the form and filing of briefs because it is in 12-pt monospaced font and 7 pages long, not counting the parts of the brief excluded by Rule 20(a)(2)(D).

_____
Rachel T. Rose

CERTIFICATE OF SERVICE

I, Rachel T. Rose, Esq., hereby certify that on this the 14th day of February, 2024, I caused a true and correct copy of the foregoing ALOFAR to be sent to opposing counsel, Stacey Gauthier Esq., via the Odyssey File and Serve System.

Rachel T. Rose

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-151

COMMONWEALTH

vs.

ARICKSON CRUZ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant was convicted, after a jury trial, of threatening to commit a crime, G. L. c. 275, § 2. In this direct appeal from the judgment of conviction, he argues that (1) prior bad act evidence in the form of text messages should not have been admitted, and (2) there was insufficient evidence to support the conviction because a different text message was not a true threat, but rather a lawful expression to stay away from his children. We affirm.

The jury could have found the following facts. See Commonwealth v. James, 73 Mass. App. Ct. 383, 383 (2008). The defendant and the victim dated for almost five years, during which time they lived together. They separated in the spring of 2018, and the defendant moved out of their house. After the separation, the pair did not have much contact, although the

defendant would occasionally text message the victim, and the victim noticed the defendant's car parked outside her house on multiple instances.

On February 8, 2020, the defendant sent the victim two text messages: the first, sent at 4:29 A.M., read, "I wish u all die bitch I'm so hurt and it still hurt fuck u I hope u die bitch;" the second, sent at 5 A.M., read, "It hurts so much it hurts a lot oh" (February 8 text messages).

The next day, February 9, 2020, the victim went to a fundraiser to play with her band around 11 A.M. The defendant later arrived at the fundraiser with his two children. When the children saw the victim, they ran to her and hugged her. By 2 P.M., the victim's band had already played, so she left. As she departed, the defendant followed her outside while yelling and screaming. At 4:03 P.M., the defendant sent the victim a text message saying: "I swear to god if you touch my [kids] one more time I'll punch you in your fucking face Bitch, I'm not going to repeat myself again" (February 9 text message).

The defendant argues that the February 8 text messages were evidence of prior bad acts and should not have been admitted. "[T]he prosecution may introduce evidence of a defendant's prior bad acts, if relevant, to show a common scheme or course of conduct, a pattern of operation, absence of accident or mistake, intent, or motive." Commonwealth v. Julien, 59 Mass. App. Ct.

679, 686 (2003), quoting Commonwealth v. Roche, 44 Mass. App. Ct. 372, 380 (1998). "Even if such evidence is relevant for other purposes, however, its probative value must not be outweighed by its prejudicial effect." Commonwealth v. Oberle, 476 Mass. 539, 550 (2017). "Determinations of the relevance, probative value, and prejudice of such evidence are left to the sound discretion of the judge, whose decision to admit such evidence will be upheld absent clear error." Id., quoting Commonwealth v. Robidoux, 450 Mass. 144, 158-159 (2007).

The judge did not abuse her discretion here. As the judge noted, the February 8 text messages were very close in time to the threat, and were relevant to whether the February 9 text message "could reasonably have caused the victim to whom it was conveyed to fear [that] the defendant had both the intention and ability to carry out [the] threat." See Commonwealth v. Chin, 97 Mass. App. Ct. 188, 201 (2020) ("When prior bad act evidence that occurred close in time to the date of the offense bears directly on the central issues in a case, the value of admitting it is not outweighed by the danger of unfair prejudice"). The judge could reasonably conclude that the February 8 text messages were relevant to understand the meaning and intent of the text message sent the following day. Additionally, the judge carefully limited the jury's consideration of the February 8 text messages by instructing the jury that they could be

considered "solely on the limited issue of whether the defendant made the threat under circumstances which could reasonably have caused the person to whom it was . . . conveyed to fear the defendant," and not "for any other purpose." See Commonwealth v. Andrade, 468 Mass. 543, 549 (2014) ("The jury are presumed to follow the judge's instructions"). There was no error in admitting the February 8 text messages for that limited purpose.

The defendant next argues that the February 9 text message did not constitute a true threat, but rather was simply an expression of a lawful demand that the victim refrain from touching his children. To sustain a conviction for threatening to commit a crime under G. L. c. 275, § 2, the Commonwealth is required to prove beyond a reasonable doubt that the defendant expressed an "intention to inflict a crime on another and an ability to do so in circumstances that would justify apprehension on the part of the recipient of the threat." Commonwealth v. Hamilton, 459 Mass. 422, 426-427 (2011), quoting Commonwealth v. Sholley, 432 Mass. 721, 724-725 (2000).

Taken in the light most favorable to the Commonwealth, the evidence permitted the jury to find beyond a reasonable doubt that the February 9 text message was not merely a demand that the victim refrain from touching the defendant's children, but was coupled with a threatened battery. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979). Even accepting that the

defendant had a right to demand that the victim not return a hug from his children, that right did not extend to threatening to "punch [her] in [the] fucking face" should she do so. See Commonwealth v. Allen, 474 Mass. 162, 168-169 (2016) (defense of another requires reasonable belief that third person being unlawfully attacked). Moreover, the evidence permitted the jury to find that the defendant had the ability to carry out that threat, not least because he knew where the victim lived. The circumstances, including the nature of the prior relationship between the defendant and the victim, the content of the February 8 text messages, and the conflict between the defendant and the victim that day, permitted the jury to find that the victim's fear was reasonable. See Hamilton, 459 Mass. at 426.

Judgment affirmed.

By the Court (Wolohojian, Milkey & D'Angelo, JJ.[1]),

Assistant Clerk

Entered: January 30, 2024.

[1] The panelists are listed in order of seniority.