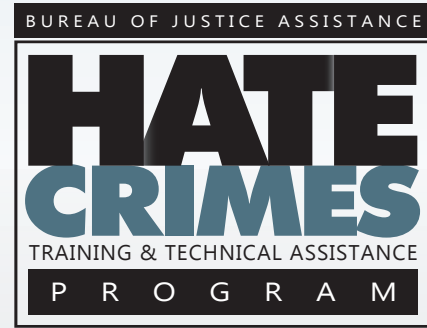


“TRUE THREATS” OF VIOLENCE: Overview of the U.S. Supreme Court’s Decision in *Counterman v. Colorado* and Its Implications for the Criminal Justice Community



ABSTRACT

This resource, tailored for criminal justice professionals and community partners, sheds light on the recent United States Supreme Court decision in *Counterman v. Colorado*, 143 S.Ct. 2106 (2023). This decision clarified that to establish a “true threat” of violence, the government must prove that “the speaker subjectively understood the threatening nature of his statements.” *Id.* at 2113. Proof of recklessness is the minimum mental state that will satisfy this burden. *Id.*

Counterman v. Colorado is relevant to the enforcement of hate crimes laws because hate crimes often involve a true threat or other violent crime (e.g., assault, battery, murder, arson). Although the First Amendment to the U.S. Constitution guarantees the right to free speech, this right does not extend to true threats. This resource therefore provides an overview of the Supreme Court’s decision and its implications for the field and identifies additional resources for consideration.

FACTS OF THE CASE

- C.W. is a singer/songwriter who received a Facebook friend request from Counterman.
- Over the next two years, Counterman sent her hundreds of direct messages that C.W. found “weird” and “creepy.” One message hinted that Counterman had made “physical sightings” of C.W. Another message stated that Counterman had seen her doing “things that [she did] out and about.” Some of them envisaged harm befalling her.
- C.W. never replied to any of the messages.
- She repeatedly blocked Counterman on Facebook, but he continued making new accounts and messaging her.
- In 2016, C.W. reported Counterman to law enforcement and obtained a protective order against him.
- She also canceled some scheduled performances due to worries that Counterman would attend.
- The police arrested and charged Counterman with stalking later in 2016.

ISSUE

This case asks the Supreme Court to determine whether a statement is a “true threat,” unprotected by the First Amendment, only when the speaker has the subjective intent to threaten, or whether it is enough for the government to show that a “reasonable person” would find the speech threatening.

PROCEDURAL HISTORY

- Counterman was charged with stalking in Colorado and moved to dismiss the charges on the First Amendment grounds. The trial court denied the motion, and he was convicted at trial. The Colorado Court of Appeals affirmed the denial of the motion and affirmed his conviction, finding that the State had proved under the “objective reasonable person standard” that his statements were “true threats” and not protected by the First Amendment. The Colorado Supreme Court denied review.
- The U.S. Supreme Court granted review, stating, “Courts are divided about (1) whether the First Amendment requires proof of a defendant’s subjective mindset in true-threat cases, and (2) if so, what mens rea standard is sufficient.” *Id.* at 2113.
- The U.S. Supreme Court ruled that the conviction violated the First Amendment because the jury was not instructed to consider evidence of the defendant’s awareness of the threatening nature of his statements. The Supreme Court therefore vacated the judgment of the Colorado Court of Appeals and remanded the case for further proceedings consistent with the Supreme Court’s opinion.
- The Colorado Court of Appeals reversed and remanded the case with directions, ordering a new trial. The court reasoned that Counterman was not only “precluded from introducing any evidence regarding his mental state at trial, but the jury was also specifically instructed **not** to consider Counterman’s mental state in deliberations.” *People v. Counterman*, 17 CA 1465 (June 13, 2024) (emphasis in the original).

U.S. SUPREME COURT’S DECISION IN *COUNTERMAN V. COLORADO*

The State must prove in true-threats cases that the defendant had “some subjective understanding of his statements’ threatening nature, but the First Amendment requires no more demanding a showing than recklessness.” *Id.* at 2113.

The *Counterman* decision raised the bar for the prosecution of true threats. A true threat “encompasses those statements where 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). True threats of violence are not protected by the First Amendment and “are punishable as crimes.” *Counterman*, 143 S.Ct. at 2111. To establish that a statement is a true threat, the State must now prove that the defendant subjectively knew or intended the threatening nature of the statement. *Id.* Proof of recklessness (i.e., “where the person consciously disregards the substantial and unjustifiable risk that the conduct will cause harm to another”) meets this requirement. *Id.* at 2118. “In the context of threats, it means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.” *Id.* at 2117. The Court selected this standard of culpability for the purpose of providing “enough ‘breathing space’ for protected speech” without sacrificing too many of the benefits of enforcing laws against true threats. *Id.* at 2119, citing *Elonis v. United States*, 575 U.S. 723, 748 (2015).

IMPLICATIONS FOR THE CRIMINAL JUSTICE COMMUNITY

While this decision addressed an unsettled area of the law, it has broad implications for the criminal justice community. Most states and many federal circuit courts of appeals have used an objective standard for years to protect victims of true threats while safeguarding First Amendment rights. Under the objective standard, prosecutors have had to prove that a “reasonable person” would regard the statement as a threat of violence. However, the *Counterman* decision to require proof of subjective intent (i.e., the subject’s state of mind) will make the prosecution of true threat cases more difficult. As the dissent in *Counterman* noted, this standard of proof will be particularly challenging with respect to the prosecution of devious or delusional individuals who threaten others. *Counterman*, 143 S.Ct. at 2141 (Barrett, J., and Thomas, J., dissenting) (“A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her”).

HOW IS *COUNTERMAN V. COLORADO* RELEVANT TO HATE CRIMES INVESTIGATIONS AND PROSECUTIONS?

A hate crime is a crime that is motivated by the victim's actual or perceived race, ethnicity, religion, gender, sexual orientation, national origin, or disability. It is often a violent crime, such as assault, murder, arson, vandalism, or threats to commit such crimes. It may also cover conspiring or asking another person to commit such crimes, even if the crime was never carried out. See the "[Learn About Hate Crimes](#)" section of the U.S. Department of Justice (DOJ) Hate Crimes website.

Consider an incident in which a woman sent threatening letters containing violent threats and racial slurs to an interracial couple who lived in the same neighborhood. Evidence that the couple reasonably believes the woman was threatening violence would not alone be sufficient to support a true threats case. In light of the *Counterman* decision, the evidence would have to show that the woman knew or intended her letters to be understood as threatening violence. In addition, as is true in all hate crimes cases, the woman's bias motivation (i.e., that the woman targeted the couple because of their race) must also be proved.

For further information about hate crime resources, refer to the [DOJ Hate Crimes Enforcement and Prevention Website](#).

ADDITIONAL RESOURCES: LAW REVIEW ARTICLES

Joseph Palmer, [When Does Online Speech Become a Federal Crime](#), 71 DOJ J. Fed. L. & Prac., no. 2, 77 (August 2023) (analyzing when threatening online expression crosses the line from constitutionally protected speech to violations of federal law).

Kathryn E. Gilbert, [Prosecuting Hate Crime Threats](#), 70 DOJ J. Fed. L. & Prac., no. 2, 239 (March 2022) (analyzing prosecutable bias-motivated threats, identifying practical considerations related to investigating and prosecuting true threats, and addressing common legal issues).

Clay Calvert, [Counterman v. Colorado: Defining True Threats of Violence Under the First Amendment](#), 2023 CATOSCTR 113 (September 2023) (discussing the development of unprotected categories of speech and the evolution of the true threats doctrine).

For questions, please contact the Hate Crimes TTA Program at info@hatecrimestta.org.

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