

STATE OF MICHIGAN  
IN THE MICHIGAN SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellant,*

MSC Docket No. 169039

vs.

COA Docket No. 371542

Lower Ct. Case No: 24-001354-01-FH

MICHAEL JOSEPH KVASNICKA,

*Defendant-Appellee.*



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROSECUTOR'S OFC.  
Timothy E. Baughman (P24381)  
Special Assistant Prosecuting Attorney  
*Attorneys for Plaintiff-Appellant*  
Wayne County Criminal Justice Center  
5301 Russell St., Suite 200  
Detroit, MI 48211  
(313) 224-5792  
[tbaughma@waynecounty.com](mailto:tbaughma@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant-Appellee*  
18538 Mack Avenue  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)  
[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

**APPENDIX TO:**

**APPLICATION FOR LEAVE TO APPEAL  
FROM THE COURT OF APPEALS ON REMAND**

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**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

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(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 1

STATE OF MICHIGAN  
33RD DISTRICT COURT  
3RD JUDICIAL CIRCUIT

COMPLAINT  
FELONY

CASE NO.: 8223720960-01  
DISTRICT:  
CIRCUIT:

District Court ORI: MI- M1820305J  
19900 VAN HORN RD., WOODHAVEN, MI 48183 (794) 671-0201

Circuit Court ORI: MI- M1821095J  
1441 ST. ANTOINE DETROIT, MI 48226 313-224-2520

THE PEOPLE OF THE STATE OF MICHIGAN  
v  
MICHAEL JOSEPH KVASNICKA 8223720960-01

Complaining Witness  
**Detective Sean Szczepaniak**  
Victim or complainant  
**Chanel Migdalia Hamly  
Alyssa Myella-Inis Taylor  
Sean Szczepaniak**

Location  
**8965 Bridge Rd, Grosse Ile, MI, 48138**

Date:  
**09/17/2023**

County in Michigan  
**Wayne**

Defendant TCN

Defendant SID

**6503600X**

Defendant DOB:  
Put DOB in Ref. No. row 1 on MC 97

Police agency report no.  
**82TR/2023-10961**

Charge  
**See below**

Maximum penalty  
**See below**

A sample for chemical testing for DNA identification profiling is on file with the Michigan State Police from a previous case.

DLN Type:

Defendant DLN  
Put DLN in Ref. No. row 3 on MC 97

WITNESSES: See Witness List

STATE OF MICHIGAN, COUNTY OF WAYNE

The complaining witness says that on the date and at the location described, the defendant, contrary to law,

**COUNT 1: FALSE REPORT OR THREAT OF TERRORISM**

did threaten to commit an act of terrorism and did communicate that threat to another person; contrary to MCL 750.543m. [750.543M]

FELONY: 20 Years and/or \$20,000.00; reimburse government for expenses incurred from violation (see MCL 750.543x & 769.1f)

**COUNT 2: COMPUTERS - USING TO COMMIT A CRIME - MAXIMUM IMPRISONMENT OF 20 YEARS OR MORE OR LIFE**

did use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another to commit 750.543M; contrary to MCL 752.796 and MCL 752.797(3)(f). [752.7973F]

FELONY: 20 Years and/or \$20,000.00; reimburse government for expenses incurred in relation to violation in manner indicated by MCL 769.1f (see MCL 752.797(7)). A consecutive sentence may be imposed for the underlying conviction.

The complaining witness asks that the defendant be apprehended and dealt with according to law.

Warrant authorized on <u>09/19/2023</u> by: Date <i>Michael J. Kazyak</i>
Michael James Kazyak, P82114, Prosecuting Official
<input type="checkbox"/> Security for costs posted

I declare under the penalties of perjury that this complaint has been examined by me and that its contents are true to the best of my information, knowledge, and belief.

*Col. Sean Szczepaniak* 09/19/2023  
 Complaining Witness Signature Date  
 Sworn to before me *SEA46* 9/19/23  
 Judge/Magistrate/Clerk Date



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
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(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

[dfwnplc.com](http://dfwnplc.com)

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 2

STATE OF MICHIGAN  
IN THE 3<sup>rd</sup> CIRCUIT COURT FOR THE COUNTY OF WAYNE  
CRIMINAL DIVISION

STATE OF MICHIGAN,

*Plaintiff,*

vs.

Case No. 24-001354-01-FH  
Hon. Shannon N. Walker

MICHAEL JOSEPH KVASNICKA,

*Defendant.*



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROS. OFC.  
Karishma Madhu Huber, P82419  
Assistant Prosecuting Attorney  
1441 St. Antoine  
Detroit, MI 48226  
(313) 224-5777  
[khuber@waynecounty.com](mailto:khuber@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant*  
18538 Mack Avenue  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that Defendant's Motion to Dismiss on Grounds That MCL §750.543m Is Unconstitutional Under the First Amendment is scheduled for **Monday, May 13, 2024**, at a time to be determined by the Court, or as soon thereafter as may be heard, before the Hon. Shannon K. Walker, via Zoom.

Respectfully Submitted,  
DODSON, FOWLER, WILLIAMS & NESI, PLC

*/s/ Daniel J. Williams*  
DANIEL J. WILLIAMS (P72085)  
*Attorneys for Defendant*

Dated: May 6, 2024

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record for all parties to the above cause at their respective addresses as disclosed by the pleadings of record herein on this 6<sup>th</sup> day of May, 2024

By: Electronically

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

*/s/ Sharon M. McCarthy*  
SHARON M. McCARTHY,  
Sr. Litigation Paralegal

STATE OF MICHIGAN  
IN THE 3<sup>rd</sup> CIRCUIT COURT FOR THE COUNTY OF WAYNE  
CRIMINAL DIVISION

STATE OF MICHIGAN,

*Plaintiff,*

vs.

Case No. 24-001354-01-FH  
Hon. Shannon N. Walker

MICHAEL JOSEPH KVASNICKA,

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FOWLER  
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& NESI, PLC**

*Personal Injury &  
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18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROS. OFC.  
Karishma Madhu Huber, P82419  
Assistant Prosecuting Attorney  
1441 St. Antoine  
Detroit, MI 48226  
(313) 224-5777  
[khuber@waynecounty.com](mailto:khuber@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant*  
18538 Mack Avenue  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)

**DEFENDANT'S MOTION TO DISMISS ON GROUNDS THAT M.C.L. §750.543m  
IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT**

Defendant, MICHAEL JOSEPH KVASNICKA, by and through his attorneys, DODSON, FOWLER, WILLIAMS & NESI, PLC, and Daniel J. Williams, and for his Defendant's Motion to Dismiss, states as follows:

- I. Defendant is charged with two felony counts: Count 1 – Using Computer to Commit Crime 20 Years or More; Count 2 – False Report or Threat of Terrorism/Terrorist Act.
2. Defendant notes that Count 1 – Using Computer to Commit Crime 20 Years or More, is predicated on the occurrence or validity of Count 2 – False Report or Threat of Terrorism/Terrorist Act.

3. The charges arise from an alleged incident which occurred on or about September 17, 2023.

4. Michigan's False Report or Threat of Terrorism/Terrorist Act statute is found at M.C.L. §750.543m (Exhibit I – Statutory Language).

5. Michigan's statute specifically notes that a defendant's lack of subjective intent or capability to commit the offense is not a permissible defense to a violation of the statute.

6. M.C.L. §750.543m(2) states: "It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism." (Exhibit I).

7. The referenced Michigan Statute was put into effect on April 22, 2002 (Exhibit 2 – Public Act with Effective Date).

8. M.C.L. §750.543m criminalizes speech which the United States Supreme Court labels as "true threats".

9. Statutes that criminalize speech are subject to First Amendment review, as they are designed in some way to prevent the free expression and exercise of a person's speech.

10. First Amendment jurisprudence is replete with examples of exceptional speech that is not subject to the protections of the First Amendment.

11. Communications of "true threats" are one such exception; however, the United States Supreme Court has set minimum statutory requirements for the criminalization of such speech<sup>1</sup>.

---

<sup>1</sup> Defendant **does not concede** that any of the alleged speech actually constitutes a "true threat" for purposes of this motion. Rather, Defendant challenges whether the statute which is being used to prosecute these allegations is constitutionally sound where it alleges Defendant communicated speech that it alleges constitutes a "true threat" AND prohibits a charged Defendant with arguing that some level of intent to commit the act was necessary.

12. In *Counterman v. Colorado*, 600 U.S. 66; 143 S.Ct. 2106; 216 L.Ed.2d 775 (2023), the Supreme Court set forth a mandate that statutes criminalizing “true threats” **must contain, at minimum, a requisite intent of recklessness on the part of a charged Defendant.**

13. M.C.L. §750.543m(2)’s statement that the intent of the Defendant is, essentially, not something the Court, a jury, or any person can consider, is clearly unconstitutional under the First Amendment.

14. Given that fact, this Court must dismiss the charge against Defendant, because the prosecutor cannot be permitted to proceed with a prosecution against a Defendant where the statute with which he is charged is constitutionally unsound.

WHEREFORE, Defendant, MICHAEL KVASNICKA, respectfully requests that this Honorable Court GRANT Defendant’s motion and dismiss the charges against the Defendant, as they are constitutionally impermissible under the First Amendment’s requirements for prosecution of an alleged “true threat.”

Respectfully Submitted,

DODSON FOWLER WILLIAMS & NESI

*/s/ Daniel J. Williams, Esq.*

Daniel J. Williams, P72085

Aimee M. Fowler, P72736

Attorneys for Plaintiff

18538 Mack Ave.

Grosse Pointe Farms, MI 48236

(313) 458-8276 / (313) 469-7085 (FAX)

[danielnfw@gmail.com](mailto:danielnfw@gmail.com)

[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)

Dated: May 6, 2024

STATE OF MICHIGAN  
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STATE OF MICHIGAN,

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Case No. 24-001354-01-FY  
Hon. Shannon N. Walker

MICHAEL JOSEPH KVASNICKA,

*Defendant.*

WAYNE COUNTY PROS. OFC.  
Karishma Madhu Huber, P82419  
Assistant Prosecuting Attorney  
144I St. Antoine  
Detroit, MI 48226  
(313) 224-5777  
[khuber@waynecounty.com](mailto:khuber@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant*  
18538 Mack Avenue  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)

**BRIEF IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS ON GROUNDS  
THAT M.C.L. §750.543m IS UNCONSTITUTIONAL UNDER THE FIRST  
AMENDMENT**

Defendant, MICHAEL JOSEPH KVASNICKA, by and through his attorneys, DODSON, FOWLER, WILLIAMS & NESI, PLC, and Daniel J. Williams, and for his Brief in Support of Defendant’s Motion to Dismiss, states as follows:

**LAW AND ARGUMENT**

Defendant’s position appears to be an issue of first impression since the U.S. Supreme Court issued its opinion in *Counterman, supra.* on June 27, 2023. Here, Defendant is charged with a threat of terrorism for allegedly making threats to shoot up a school to a twelve-year old girl on

TikTok. Defendant suffers from significant Autism Spectrum Disorder. The Government contends that Defendant's language constitutes a "true threat," and therefore is punishable as criminal, outside the protections of the First Amendment to the Constitution.

*The Statutory Basis for Defendant's Charge*

Defendant is charged with threatening a terrorist act. Such conduct in Michigan is prohibited by M.C.L. §750.543m. M.C.L. §750.543m punishes a threat of terrorism with a possible twenty (20) years in prison, a Class B felony. The statute proscribes conduct as follows:

**750.543m Making terrorist threat or false report of terrorism; intent or capability as defense prohibited; violation as felony; penalty.**

Sec. 543m.

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.

M.C.L. §750.543m. Here, the Government has charged Defendant under subsection (1)(a), that he threatened to commit an act of terrorism and communicates the threat to any other person.

Arguably, a terrorist threat could fall under the ambit of unprotected speech as a true-threat, and the prosecution alleges here that Defendant's words constitute a true threat worthy of prosecution.

The problem for the Government's ability to move forward with a case is the language in M.C.L. §750.543m(2). There, the statute expressly eliminates the need for the Government to show intent or an ability to actually commit the acts complained of. The statute was passed in 2002 and has been used for a significant number of prosecutions. However, in 2023, the United States Supreme

Court invalidated an almost identical Colorado law and prosecution. A review of that case, and its rationale, demonstrate the Michigan statute is equally, if not more, facially unconstitutional.

***First Amendment's Legal Application and Invalidation of M.C.L. §750.543m***

Normally, speech is not actionable or prohibitible as criminal conduct, because the First Amendment protects speech from Government regulation and punishment. However, some speech has been determined to fall outside of the protection of the First Amendment. One such category of speech is classified as “true threats.” *Virginia v. Black*, 538 U.S. 343, 359; 123 S.Ct. 1536; 155 L.Ed.2d 535 (2003); c.f. *United States v. Alvarez*, 567 U.S. 709, 717-718; 132 S.Ct. 2537; 183 L.Ed.2d 574 (2012). “True threats are ‘serious expression[s]’ conveying that a speaker means to ‘commit an act of unlawful violence.’” *Black, supra*. 538 U.S. at 359 (2003). The issue then is, if the complained of speech is outside of the protections of the First Amendment, is the State free to prosecute such speech in whatever manner it chooses, or must the Government meet certain minimum requirements to obtain a conviction for a criminal charge that constitutes an alleged “true threat?”

The Court answered this question in its 2023 opinion in *Counterman, supra*. There, Defendant Billy Counterman “sent hundreds of Facebook messages to C.W., a local singer and musician. The two had never met, and C.W. never responded. In fact, she repeatedly blocked Counterman. ... And most critically, a number expressed anger at C.W. and envisaged harm befalling her: ‘Fuck off permanently’ *Ibid*. ‘Staying in cyber life is going to kill you.’ *Ibid*. ‘You’re not being good for human relations. Die.’” *Counterman, supra*. at 2112 (2023). The Government charged Counterman under a Colorado statute that prohibited “true threats.” Counterman challenged the charges, alleging that his words did not constitute a “true threat” as that term was defined under Colorado law. The Court disagreed, and Counterman was tried and

convicted. Critically, the Supreme Court noted the following problem with the Colorado statute and the trial conducted against Counterman:

Counterman moved to dismiss the charge on First Amendment grounds, arguing that his messages were not “true threats” and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an ‘objective reasonable person standard.’ [Citation Omitted]. 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’** C.W. *In re R.D.*, 2020 CO. 44, 464; P.3d 717, 731, n.21 (Colo. 2020). The court decided, after ‘considering the totality of the circumstances,’ that Counterman’s statements ‘rose to the level of a true threat.’ Because that was so, the court ruled, the First Amendment posed no bar to prosecution. The Court accordingly sent the case to the jury which found Counterman guilty as charged.

*Counterman*, *supra*. 143 S.Ct. at 2112-2113 (2023). Counterman’s case, at the trial court level is, essentially, a mirror image of the facts in this case, where Defendant is accused of sending messages to a person via TikTok, that are allegedly “true threats” that put the recipient in fear. The Michigan statute does not require proof of a subjective intent on the part of the speaker, just as was the state of the law in Colorado at the time Counterman was charged under Colorado’s equivalent “true threat” statutes. Counterman appealed, leading his matter to the hallowed halls of the United States Supreme Court, which determined that Colorado’s statute was unconstitutional, because it did not require the Government to prove a *mens rea* to commit the threatened act on the part of the Defendant. The Court’s analysis is best suited to explain the finding, rather than any poor attempt made by Defendant’s counsel here.

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment’s protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications. Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman’s view, we decide today, is the more consistent with our precedent. To combat the kind of chill

he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the Defendant had some understanding of his statement's threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection – and indeed posing real dangers – we do not require that the State prove the Defendant had any more specific intent to threaten the victim.”

*Counterman*, *supra*. 143 S.Ct. at 2113. The Court in *Counterman* asserted that the two-part analysis previously applied in other First Amendment speech prosecution cases, must apply here; namely, the State must first prove that a Defendant understood the statement's threatening character, and second, must prove that a defendant must have acted recklessly.

On two fronts, the Court's opinion eviscerates the constitutional standing that Michigan's Threat of Terrorism statute, M.C.L. §750.543m, might have had as a true-threat statute. The statute in question prohibits the consideration of any intent on the part of the Defendant. *Counterman*, *supra*. clearly holds such a statute is unconstitutional for two reasons. First, the Court held that true-threat statutes **MUST** contain a subjective mental state element in order to pass constitutional muster. Michigan's statute, by its own terms, expressly foregoes any such requirement for a jury to find a Defendant guilty. Second, the Court held that not only is there a subjective mental state requirement, it also held that the Government must prove that the Defendant had some understanding of his statement's threatening character, and that the Government must prove such knowledge to a recklessness standard. Michigan's statute imposes **NO** *mens rea* or subjective intent on the part of the Defendant.

The Defendant here recognizes that invalidating constitutionally unsound statutes like M.C.L. §750.543m may have certain unsavory consequences. The U.S. Supreme Court recognizes this also, and in fact relied upon it to explain why it was invalidating the Colorado statute at issue

in *Counterman*. After opining how the Court has applied a recklessness standard in analyzing other unprotected speech cases (i.e. defamation, obscenity or incitement), the Court in *Counterman* noted in making a comparative between “true-threat” prosecutions and obscenity law enforcement, that: “for a similar reason, the First Amendment demands proof of a defendant’s mindset to make out an obscenity case. Obscenity is obscenity whatever the purveyor’s mental state. But we have repeatedly recognized that punishment depends on a ‘vital element of scienter’ – often described as the defendant’s awareness of “the character and nature” of the materials he distributed.” *Counterman, supra.* at 143 S.Ct. 2115-2116 (2023); citing *Hamling v. United States*, 418 U.S. 886, 927-929; 102 S.Ct. 3409; 73 L.Ed.2d 1215 (1982). Similarly, a true threat is a true threat, but in order to properly punish the conduct, the Government must prove the element of scienter. They cannot be provided a free pass to avoid that proof. The Court in *Counterman* expounded the analogy further, indicating that the “rationale should by now be familiar. Yes, ‘obscene speech and writings are not protected.’ [Citation Omitted]. But punishing their distribution without regard to scienter would ‘have the collateral effect of inhibiting’ protected expression.” *Counterman, supra.* 143 U.S. at 2116 (2023); citing *Smith v. California*, 361 U.S. 147, 152; 80 S.Ct. 215; 4 L.Ed.2d 205 (1959).

Application of this principle to the facts of this case is fairly straightforward, but the Court’s guidance is also instructive. Where the Government seeks to prohibit even constitutionally unprotected speech, they are not permitted to do so without proving some form of intent or knowledge of the wrongfulness of the speech. A Defendant cannot be convicted without proof of criminal scienter. The Courts have long established that in non-protected speech prosecutions, the Government must prove, at minimum, reckless disregard on the part of a Defendant as it relates to the conduct complained of in the Government’s case. Defamation cases, obscenity cases and

incitement to riot cases (including prosecutions under Michigan's Peace Bond statute) require some level of recklessness as it regards a Defendant's conduct. True threat cases and statutes must be subject to the same requirements. The U.S. Supreme Court again makes that clear in their opinion in *Counterman*.

The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizens predictable tendency to steer 'wide of the unlawful zone.' [Citation Omitted]. 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 legal costs – all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only political hyperbole. [Citation Omitted]. The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats 'a wide berth.' [Citation Omitted]. And so use of that standard would discourage the 'uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.'"

*Counterman, supra*. 143 S.Ct. at 2116 (2023); citing *Speiser v. Randall*, 357 U.S. 513, 527; 78 S.Ct. 1332; 2 L.Ed.2d 1460 (1958); *Rogers v. United States*, 422 U.S. 35; 95 S.Ct.2091, 45 L.Ed.2d 1 (1975) (Marshall, J. Concurring Opinion). Justice Marshall's fears expressed so eloquently in his concurring opinion in *Rogers*, and the holdings of other non-protected speech cases, led the Court in *Counterman* to invalidate a defendant's conviction under a true-threat statute where the Government obtained a conviction without having to prove any intent or knowledge on the part of the defendant. Such an outcome was constitutionally abhorrent, and the Court applied the logic of those prior cases in explaining why it had no choice but to overturn the conviction.

The reasoning – and indeed some of the words – came straight from this Court's decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in

different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

*Counterman*, *supra*. 143 S.Ct. at 2117 (2023). In application, the Court need go no further in the *Counterman* decision to know and understand that Michigan's statute, as written, is unconstitutional, and that this matter cannot proceed. In invalidating the Colorado statute at issue, the Supreme Court made clear that true-threat statutes and prosecutions cannot proceed on an objective standard relative to intent or knowledge of the Defendant, regardless of the allegations. Michigan's statute expressly forbids consideration of subjective intent and knowledge on the part of Defendant by a trier of fact or the Court.

What *Counterman's* holding amounts to is simply that it is not enough that Defendant knowingly stated the complained of words and that he said those words to another person. Rather, in a true-threats prosecution, *Counterman* requires that the Government also prove the Defendant acted recklessly, or with a reckless disregard, as to the wrongfulness of his or her conduct. The Michigan statute scrutinized here, expressly decrees that the Government is not required to put forth such proofs and that a Defendant is prohibited from raising intent or capacity as a defense. Those positions are diametrically opposed, and there is no reading or rendition of the statute that would permit the Court to read *Counterman* and the First Amendment's requirements for prosecution harmoniously with the problematic language in the statute. As such, the statute is constitutionally impermissible and must be invalidated.

Alternatively, the Government may very well seek to argue that the statute contains a "knowingly" requirement in subsection (1)(b), which is a higher standard than the reckless standard adopted by the Supreme Court in *Counterman*. However, the plain language of the statute shows that such an argument improperly conflates the objective fact that the Defendant made

statements and that he knew he was making the statements, and the subjective intent of the Defendant to have acted recklessly or with reckless disregard for the effect of the words to impose fear or terror on another person, or whether Defendant had the capacity or ability to understand the consequences of knowingly making such statements. If the only standard the Government is required to prove is that Defendant knowingly spoke that alleged threatening incantation, and nothing more, then we are punishing speech without any showing of a reckless disregard on the part of the speaker and without having to prove that a Defendant had the capacity to formulate the *mens rea* necessary to be punished under the law. Such action on the part of the Government is exactly what the Court has expressed as the central concern in true threat cases; namely, the potential chilling effect on other speech. While Defendant understands the argument, any attempt by the Government to espouse this position would simply be an exercise in futility and conflation of the issues of objective and subjective intent. Of course, the Government desires a prosecution based solely on proof of objective facts, with no ability for the Defendant to assert a lack of proof upon the notion that he some subjective intent or capacity on the part of the Defendant actually existed. Such a case would be a simple exercise. However, the Supreme Court has determined that such a prosecution cannot be, if we mean to protect the rights that all citizens have under the First Amendment to the United States Constitution.

### CONCLUSION

The statutory provision of M.C.L. §750.543m(2) could not be more in conflict with the U.S. Supreme Court's ruling in *Counterman*. Looking at the Court's clear language in *Counterman*: "the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected non-threatening expression,"; there is no reading of the statutory language that would bring it into comport with the Supreme Court's mandate. The statutory language

asserts: “(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.” There is no reading or construction of the statutory language that would allow it to become constitutionally sound. As such, prosecution of the Defendant thereunder cannot proceed, and this matter should be dismissed. Because the charge of using a computer to commit a crime is predicated on the underlying charge in this matter, the Government cannot proceed on this count either. If the underlying offense is dismissed as unconstitutional, the charge of using a computer to commit a crime cannot be sustained. As a result, the entire prosecution against Defendant should be dismissed on constitutional grounds, as the Michigan statute under which Defendant is charged is constitutionally unsound. The Court’s conclusion in *Counterman* is perhaps most salient. “Counterman, as described above, was prosecuted in accordance with an objective standard. [Citation Omitted]. The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. For the reasons stated, that is a violation of the First Amendment.” *Counterman, supra.*, 143 S.Ct. at 2119 (2023). Here, if the Court replaces “Counterman” with “Kvasnicka” the outcome is clear.

Respectfully Submitted,

DODSON FOWLER WILLIAMS & NESI

/s/ Daniel J. Williams, Esq.

Daniel J. Williams, P72085

Aimee M. Fowler, P72736

Attorneys for Plaintiff

18538 Mack Ave.

Grosse Pointe Farms, MI 48236

(313) 458-8276 / (313) 469-7085 (FAX)

[danielnfw@gmail.com](mailto:danielnfw@gmail.com)

[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)

Dated: May 6, 2024

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record for all parties to the above cause at their respective addresses as disclosed by the pleadings of record herein on this 6<sup>th</sup> day of May, 2024

By: Electronically

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

/s/ Sharon M. McCarthy

SHARON M. McCARTHY,  
Sr. Litigation Paralegal

# EXHIBIT 1

THE MICHIGAN PENAL CODE (EXCERPT)  
Act 328 of 1931

**750.543m Making terrorist threat or false report of terrorism; intent or capability as defense prohibited; violation as felony; penalty.**

Sec. 543m. (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.

**History:** Add. 2002, Act 113, Eff. Apr. 22, 2002.

# EXHIBIT 2

Act No. 113  
 Public Acts of 2002  
 Approved by the Governor  
 March 29, 2002  
 Filed with the Secretary of State  
 April 1, 2002  
 EFFECTIVE DATE: April 22, 2002

**STATE OF MICHIGAN  
 91ST LEGISLATURE  
 REGULAR SESSION OF 2002**

Introduced by Senators DeGrow, Van Regenmorter, Bullard, Shugars, Johnson, McManus, Sikkema, Gougeon, Hammerstrom, North, Garcia, Sanborn, Schuette, Goschka, Steil, Schwarz, Stille, Peters, Hoffman, Byrum and McCotter

**ENROLLED SENATE BILL No. 930**

AN ACT to amend 1931 PA 328, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for restitution under certain circumstances; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," (MCL 750.1 to 750.568) by adding chapter LXXXIII-A.

*The People of the State of Michigan enact:*

CHAPTER LXXXIII-A

Sec. 543a. This chapter shall be known and may be cited as the "Michigan anti-terrorism act".

Sec. 543b. As used in this chapter:

- (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
  - (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
  - (ii) An act that the person knows or has reason to know is dangerous to human life.
  - (iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.
- (b) "Dangerous to human life" means that which causes a substantial likelihood of death or serious injury or that is a violation of section 349 or 350.
- (c) "Harmful biological substance", "harmful biological device", "harmful chemical substance", "harmful chemical device", "harmful radioactive material", and "harmful radioactive device" mean those terms as defined in section 200h.
- (d) "Material support or resources" means currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, including any related physical assets or intangible property, or expert services or expert assistance.
- (e) "Person" means an individual, agent, association, charitable organization, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee, trustee in bankruptcy, unincorporated organization, or any other legal or commercial entity.

(57)

(f) "Renders criminal assistance" means that the person with the intent to avoid, prevent, hinder, or delay the discovery, apprehension, prosecution, trial, or sentencing of a person who he or she knows or has reason to know has violated this chapter or is wanted as a material witness in connection with an act of terrorism pursuant to section 39 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.39, does any of the following:

- (i) Harbors or conceals that other person.
- (ii) Warns that other person of impending discovery or apprehension.
- (iii) Provides that other person with money, transportation, a weapon, a disguise, or false identification, or any other means of avoiding discovery or apprehension.
- (iv) Prevents or obstructs, by means of force, intimidation, or deception, anyone from performing an act that might aid in the discovery, apprehension, or prosecution of that other person.
- (v) Suppresses, by any act of concealment, alteration, or destruction, any physical evidence that might aid in the discovery, apprehension, or prosecution of that other person.
- (vi) Engages in conduct proscribed under section 120, 120a, or 122 or chapter XXXII.
- (g) "Terrorist" means any person who engages or is about to engage in an act of terrorism.
- (h) "Violent felony" means a felony in which an element is the use, attempted use, or threatened use of physical force against an individual, or the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.

Sec. 543f. (1) A person is guilty of terrorism when that person knowingly and with premeditation commits an act of terrorism.

(2) Terrorism is a felony punishable by imprisonment for life or any term of years or a fine of not more than \$100,000.00, or both. However, if death was caused by the terrorist act, the person shall be punished by imprisonment for life without eligibility for parole.

Sec. 543h. (1) A person is guilty of hindering prosecution of terrorism when he or she knowingly renders criminal assistance to a person who has committed an act of terrorism.

(2) This section does not apply to conduct for which a person may be punished as if he or she had committed the offense committed by another person as allowed under section 39 of chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.39.

(3) Hindering prosecution of terrorism is a felony punishable by imprisonment for life or any term of years or a fine of not more than \$100,000.00, or both.

Sec. 543k. (1) Any person who does any of the following is guilty of a crime punishable as provided in subsection (2):

(a) Knowingly raises, solicits, or collects material support or resources intending that the material support or resources will be used, in whole or in part, to plan, prepare, carry out, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government who knows that the material support or resources raised, solicited, or collected will be used by a terrorist or terrorist organization.

(b) Knowingly provides material support or resources to a person knowing that the person will use that support or those resources in whole or in part to plan, prepare, carry out, facilitate, or avoid apprehension for committing an act of terrorism against the United States or its citizens, this state or its citizens, or a political subdivision or any other instrumentality of this state or of a local unit of government.

(2) A person who violates subsection (1)(a) is guilty of soliciting material support for terrorism. A person who violates subsection (1)(b) is guilty of providing material support for terrorist acts. Soliciting material support for terrorism and providing material support for terrorist acts are felonies punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.

Sec. 543m. (1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

- (a) Threatens to commit an act of terrorism and communicates the threat to any other person.
- (b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.

Enacting section 1. This amendatory act takes effect April 22, 2002.

Enacting section 2. This amendatory act does not take effect unless House Bill No. 5495 of the 91st Legislature is enacted into law.

This act is ordered to take immediate effect.

*Carol Morey Viventi*

Secretary of the Senate.

*Jay E. Randall*

Clerk of the House of Representatives.

Approved .....

.....  
Governor.



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 3

STATE OF MICHIGAN  
IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE  
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs

Michael Kvasnicka

Defendant.

Hon. Shannon Walker

Case No. 24-001354-01-FH

---

Karishma Huber (P82419)  
Assistant Prosecuting Attorney  
Wayne County Prosecutor's Office

Daniel Williams (P72085)  
Attorney for Defendant

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**PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON GROUNDS THAT MCL 750.543M IS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT**

**NOW COMES** the People of the State of Michigan, by and through the Wayne County Prosecutor, Kym L. Worthy, and Karishma Huber, Assistant Prosecuting Attorney, and request this Honorable Court to DENY the Defendant's Motion to Dismiss on Grounds that MCL 750.543m is unconstitutional under the First Amendment.

**APPLICABLE LAW AND ARGUMENT** :

Defendant claims that the language of MCL 750.543(m)(2), fails to comply with the recent Supreme Court decision, in *Counterman v Colorado* 143 S. Ct. 2106 in that it fails assess any intent as it relates to true threats in First Amendment cases.

However, what the *Counterman* Court dictated is that as it relates to threatening statements, the People must prove that the defendant had **some** subjective understanding of his statements threatening nature, but the First Amendment requires no more than a showing of recklessness.

The court noted that “for true threats, recklessness strikes the right balance, offering enough ‘breathing space’ for protected speech without sacrificing too many of the benefits of enforcing laws against true threats.” *Id* citing *Elonis v United States*, 575 U.S. 723, 748. True threats are “serious expressions conveying that a speaker means to ‘commit an act of unlawful violence’.” *Virginia v. Black*, 538 U.S. 359, 369. This means that a speaker is aware “that others could regard [their] statements as threatening violence and delivers them anyways. *Elonis* at 746. In the aggravated stalking case at issue in *Counterman*, the prosecutor did not have to show **any** awareness on the part of the defendant regarding his “true threat” statements. The Court indicated that the People had to show that Counterman “consciously disregarded a substantial risk that his communication would be viewed as threatening violence.” *Id* at 2113. The Court noted that “[t]he existence of a threat depends not on ‘the mental state of the author’ but on ‘what the statement conveys’ to the person on the other end”, but that at least a reckless mens rea standard is required. *Id*. In order to survive First Amendment scrutiny, “the State must prove in true threats cases that the defendant had some understanding of his statements’ threatening character. *Id*. Essentially, “the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence[, but] need not prove any more demanding form of subjective intent to threaten another.” *Id* at 2111-2112.

In proving its case, the People would as it does in any prosecution use jury instructions in order for the jury to ascertain the elements of the case, and determine if the People met its burden. The jury instructions that could relate here are Model CJI 38.4 and/or Model CJI 38.4a.

The jury instructions are:

**M Crim JI 38.4 Making a Terrorist Threat**

(1) The defendant is charged with the crime of making a threat to commit an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant communicated with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant threatened to commit an act of terrorism. A threat does not have to be stated in any particular terms but must express a warning of danger or harm.<sup>1</sup> Further, it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.

To prove that the defendant threatened to commit an act of terrorism, the prosecutor must prove:

(A) that the defendant communicated that [he / she] would commit the felony crime of [*state felony*];<sup>2</sup>

(B) that the defendant knew or had reason to know that committing the felony would be dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury, or the felony involved a kidnapping;<sup>3</sup>

(C) that, by committing the felony, the defendant would intend to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

It does not matter whether the defendant actually could commit the felony or actually intended to commit the felony, but only whether the defendant threatened to commit the felony as an act of terrorism.

and/or

#### **M Crim JI 38.4a Communicating a False Report of Terrorism**

(1) The defendant is charged with the crime of communicating a false report of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant communicated with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant reported that an act of terrorism had occurred, was occurring, or would occur.

An act of terrorism<sup>1</sup> means committing the felony crime of [*state felony described in threat*], knowing that it would be dangerous to human life,<sup>2</sup> with the intent to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

(4) Third, that the report was false.

(5) Fourth, that the defendant knew that it was false.

It is clear that there is an intent requirement in both jury instructions requiring that the People have to show that the defendant has some understanding of his statements threatening nature. The People would agree that the statute states that “It is not a defense to prosecution that the defendant did not have the intent or capability of committing the act of terrorism”, however this is no way absolves the People of showing any type of intent, just that the Defendant cannot claim that it was not possible for the defendant to commit the crime. Both jury instructions clearly indicate the People must show intent that the defendant knew the consequences of his statements with the intent to intimidate or frighten. This clearly shows that the statute complies within the concerns that are raised by the *Counterman* case, and that the language needed to prove the charge codified by statute assess an intent requirement on the People as to the defendants actions in order to show that the statement was a “true threat” and no longer protected by the Fourth Amendment.

**WHEREFORE** , for all of the reasons outlined above, the People respectfully request this Honorable Court to DENY Defendant’s Motion for Walker Hearing and DENY Defendant’s Motion to Dismiss on Grounds that MCL 750.543m is unconstitutional under the First Amendment.

Respectfully Submitted,  
/s/ Karishma Huber  
 Karishma Huber P82419  
 Assistant Prosecuting Attorney

Dated: June 20, 2024.



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 4

STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

THE PEOPLE OF THE STATE OF MICHIGAN,

V

No. 24-001354-01

MICHAEL KVASNICKA,

Defendant (s).

\_\_\_\_\_ /

FINAL CONFERENCE

Before the Honorable Shannon Nicol Walker

Third Judicial Circuit Court Judge

Detroit, Michigan

On Friday, June 14, 2022

APPEARANCES:

KARISHMA HUBER, Assistant Prosecuting Attorney

Appearing on behalf of the People.

DANIEL WILLIAMS, ESQ.

Appearing on behalf of the Defendant (s)

GARY COURY

Official Court Reporter

CSMR/CER 3827

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WITNESSES:

(None.)

EXHIBITS:

(None.)

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Detroit, Michigan  
Friday, June 14, 2022  
At 9:35 A.M

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THE CLERK OF THE COURT: Calling case number  
2400135401, The State of Michigan versus Michael Kvasnicka here for a final  
conference.

Appearances for the record please.

MS. HUBER: Thank you, good morning your Honor, Karishma  
Huber on behalf of the People.

MR. WILLIAMS: And good morning Judge, Daniel Williams for  
the defense. We're ready to proceed.

THE COURT: All right, good morning everyone.  
All right sir, if you'd please state your first and last name for the record.

DEFENDANT KVASNICKA: Michael Kvasnicka

THE COURT: Alright, Deputy Pack can you remove the cuffs  
for the motion hearing, please?

DEPUTY PACK: Alright Judge.

THE COURT: Alright Mr. Williams, you filed two motions on  
behalf of your client, and you're going to have to refresh my memory. I'm

1 not sure if you argued the motions yet.

2 MR. WILLIAMS: No Judge.

3 MS. HUBER: We have not, Judge.

4 THE COURT: Okay. Alright, well let's start with the defense  
5 motion to suppress.

6 MR. WILLIAMS: Yes Judge.

7 On this particular motion with regards to suppression of the statement  
8 I will mostly rely on the written pleadings.

9 I received prosecution's response last night. I did have a chance to  
10 read it.

11 My, my specific reply with regard to People's position is even if the  
12 court agrees with the prosecution's analysis under Cheatum (sp) of the facts  
13 of this case, it still would require a Walker Hearing to determine whether or  
14 not the police knew of the defendant's significant intelligence impairments  
15 and whether they acted in manner by which they failed to take those into  
16 account in such a way that they essentially coerced him into speaking.

17 The Supreme Court, the United States Supreme Court, and the  
18 Michigan Supreme Court have both indicated that one of the most significant  
19 factors the court has to consider in determining whether to suppress a  
20 statement is if a defendant is of low intelligence, and in this case we've  
21 presented evidence not only that that is the case, but that the officers were  
22 aware of the defendant's condition at the time and before they made the  
23 statements, specifically my client's father had been in communication with  
24 them and had specifically told them of this issue.

25 Any my review led me to file the motion because it appeared that they

1 did not account for that either in reading him rights or in proceeding with  
2 taking a statement. They acted no differently than they would have with  
3 anyone else.

4 And given his situation I believe that was improper under the  
5 standards that the courts have set out. But at bare minimum, I believe a  
6 Walker Hearing would be necessary for the court to hear all of the evidence  
7 surrounding the taking of the statement so it can make a proper decision  
8 based on the totality of the circumstances.

9 And with that I will yield to the prosecution for response.

10 THE COURT: Thank you Mr. Williams.

11 On behalf of the People.

12 MS. HUBER: Thank you Your Honor.

13 Your Honor I would disagreed in that in counsel's indication that this  
14 would necessarily require a Walker Hearing, the court has the opportunity to  
15 determine based on the merits of the case and based on the law, as I did  
16 indicate in my motion whether or not the officers acted within the totality of the  
17 circumstances, the People are requesting the, I didn't get a chance to talk to  
18 counsel, to stipulate for the court to actually watch the recorded hearing.

19 Your Honor--

20 THE COURT: And actually that was the first note on the motion  
21 whether or not the interview was recorded.

22 MS. HUBER: It was absolutely recorded, Your Honor, it is  
23 recorded. It looks like it's in four parts, but its approximately 45 minutes in  
24 totality.

25 And it is recorded, and I can send it evidence.com link once I get a

1 stipulation from counsel.

2 And Your Honor, I would indicate that as I did in the, in my response  
3 that a low intelligence does not itself render a, a statement in fact involuntary  
4 or unintelligible, unknowingly; in fact in Cheatum the court did discuss that  
5 and indicated that the range base from the DSM-5 is 70 is kind of a threshold  
6 number.

7 And in Cheatum the number, the IQ of the individual was  
8 significantly less, I believe it was 62.

9 In this case counsel's own expert places Mr. Kvasnicka's IQ as 74,  
10 which is again above that threshold amount, and at that threshold amount  
11 Your Honor, when you look at the DSM-5 relates to the, of, and I'm using their  
12 terms, not my own, mental retardation rate.

13 And in this case we don't have that. I mean, there's no denying that  
14 Mr. Kvasnicka has some mental deficiency, but the Cheatum court uses that  
15 70 number as a threshold number, and that number is not something that  
16 we've met here, as Mr. Kvasnicka does have an IQ of greater than 70; but not  
17 only that, the facts are undisputed that Mr. Kvasnicka holds almost a full time  
18 job, I believe it's 30 to 40 hours at Kroger. He's been promoted based on his  
19 work. He drives a car. He has a valid driver's license. This is an individual  
20 who absolutely has an understanding of what is happening in the world.

21 And even given any, any, not credence but even taking into  
22 consideration Mr. Kvasnicka's, you know, autism, he – autism is a, is a range,  
23 and it's clear from the evidence from the totality of the circumstances that Mr.  
24 Kvasnicka's autism is at least functioning.

25 And all that matters in order for a, for a, a statement or for officers, for

1 a statement—I'm sorry—for Miranda Rights to be intelligible and voluntary and  
2 knowing is that Mr. Kvasnicka understood the rights, and that's it, that he  
3 understood those rights. That he has a right to remain silent, the right to an  
4 attorney, and that, that one could be appointed to him if he could not afford  
5 one, and that any statement he said could be used against him.

6 And Your Honor, I would indicate that based on the totality of the  
7 circumstances the officers absolutely made attempts and did alter their  
8 Miranda warnings in order to ensure that Mr. Kvasnicka understood. And  
9 Your Honor, I believe when you review the, the, the recorded statement you'll  
10 hear that the officers say, "Anything you say orally or in writing can be used  
11 against you. You have a right to speak to a lawyer and have him present  
12 while you're being questioned. If you can't afford to hire a lawyer, you will be  
13 appointed one to represent you before any questioning, if you wish. And you  
14 can decide at any time to exercise these rights, not answer, or stop  
15 answering my questions."

16 That goes well beyond what is required of Miranda in order to notify a  
17 defendant of their rights prior to waiving and them making a statement.

18 And the officer did that in order that, to ensure that Mr. Kvasnicka  
19 could understand and did understand.

20 And Judge, I believe that when you review the statement you'll see  
21 that Mr. Kvasnicka at no point does not understand what's happening,  
22 understands why he's there, is giving detailed explanations to the questions  
23 that are being posed to him by police, and is giving what I would call nuanced  
24 responses in that they are, they make sense, they are rooted in reality, they  
25 are, they are well, they, they show that Mr. Kvasnicka is clearly functional.

1 And that is what the court needs to determine, and that's a legal  
2 determination.

3 And I believe based on the interview itself the court would be able to  
4 find that a Walker Hearing is not necessary because Mr. Kvasnicka was  
5 aware and was capable of waiving his Miranda rights.

6 Your Honor, I will rely on the remainder of my, my pleadings, and I  
7 would ask the court to review the interrogation.

8 THE COURT: Rebuttal.

9 MR. WILLIAMS: Thank you Judge.

10 So I appreciate the prosecution and sister counsel's position that  
11 because the defendants IQ is 72 and not 70 that that is somehow a magic  
12 line that you must cross in order to qualify; hence why I attached the 60 page  
13 single spaced psychological evaluation and neuropsychological evaluation  
14 and testing that my client submitted to help demonstrate to the court that as  
15 Cheatum indicates the IQ, the number in and of itself is not sufficient. You  
16 have to look at other factors.

17 And one point I made in the brief that I think is worth emphasizing on  
18 the record quoting the Supreme Court's opinion in Colorado versus Spring,  
19 the Cheatum court indicated that Spring seems to assume with no reference  
20 to Connelly (sp), a prior case, we must conclude that until the Supreme Court  
21 clarifies the inconsistency between voluntary, knowing, and intelligent prongs  
22 of the waiver analysis, a subject inquiring into the suspect's level of  
23 understanding is required and must be assessed under the totality of the  
24 circumstances irrespective of police behavior.

25 That last section is critical because it doesn't really matter whether or

1 not the police gave an incantation of Mr. Kvasnicka's rights that complies with  
2 Miranda. That's not the issue.

3 Clearly they told him he had a right to remain silent. He had a right to  
4 an attorney. That's the first part.

5 The second part is whether the waiver that they're claiming was  
6 knowing, voluntary, and intelligent.

7 And in Cheatum, the court was able to conclude that it was because  
8 they have a written signed waiver. They had other direct written evidence that  
9 the prosecution could rely on to demonstrate that there was in fact a waiver,  
10 and that the defendant had read his rights and understood them.

11 I have yet to receive a copy of a signed Waiver of Constitutional Rights  
12 prior to the interview; and while I appreciate that the majority of the folks in  
13 this courtroom understand what the right to remain silent means, and the  
14 things that that conveys to an individual, does not mean that Mr. Kvasnicka  
15 understood what it meant or the consequences therefrom.

16 The report by Dr. Wooten makes very clear this man did not and could  
17 not have understood something of that complexity. And the type of autism  
18 that he suffers from causes him to want to tell people what he thinks they  
19 want to hear whether he understands it or not.

20 The determination of whether his waiver was knowing, voluntary, and  
21 intelligent is not something frankly that the court can believe from simply  
22 looking at the interview. Although I have no problem and I think the court  
23 should review the video. It would certainly be admissible evidence at a  
24 hearing, and I don't have a basis to object. But until the court hears from the  
25 witnesses, not just the officers, but potentially, I'm not saying I would call him,

1 but potentially from the client and his father, both of whom were integral parts  
2 to this process, and potentially from Dr. Wooten to give the court some  
3 direction as to why it is that Mr. Kvasnicka could not and would not have  
4 actually understood and contemplated the consequences of his rights, do I  
5 think a proper and full determination by this court can be made.

6 And so my position remains with those arguments that the court  
7 should at minimum grant a Walker Hearing, hear the testimony so it can  
8 glean all of the circumstances that are part of this totality and make a full  
9 educated and appropriate decision one way or the other.

10 But until that happens I don't think we're in a position to, to move  
11 forward.

12 And so I would ask the court to grant the motion, but alternatively grant  
13 the Walker Hearing, allow the parties to call necessary witnesses for the court  
14 to make that determination.

15 Thank you Judge.

16 THE COURT: Thank you Mr. Williams.

17 Alright, so the parties have indicated that the interview was recorded  
18 and is approximately 45 minutes?

19 MS. HUBER: Yes, in totality it is separated in 4 sections,  
20 Judge.

21 THE COURT: Okay. And how many officers were present for  
22 the interview?

23 MS. HUBER: 2 officers Your Honor.

24 THE COURT: Alright.

25 The Court is going to grant the defense motion for a Walker Hearing.

1 Ms. Huber are you able to provide the court with a copy of the  
2 recorded interview?

3 MS. HUBER: Absolutely Judge, I'm working on it now.

4 THE COURT: Okay. And how much time do you need to  
5 subpoena your officers?

6 MS. HUBER: Judge if the court is only requiring the officers I  
7 would ask for at least three weeks Judge.

8 MR. WILLIAMS: Judge, for scheduling purposes I'm going to  
9 ask the court for a date sometime after July 22nd. I'm going to be gone from  
10 the 23rd to the 2nd, and then I'll be gone again from the 9th to the 19th.

11 THE COURT: So you can do it before the 26th, like the 19th?

12 MR. WILLIAMS: of - -

13 THE COURT: July

14 MR. WILLIAMS: I will be gone the 19th of July Judge.

15 THE COURT: Give me your dates again.

16 MR. WILLIAMS: I will be gone from the 23rd of June - -

17 THE COURT: Okay.

18 MR. WILLIAMS: - - to the 2nd of July, and then I will be gone  
19 from the 9th of July to the 19th of July. I'll be flying back that day.

20 THE COURT: Okay.

21 MR. WILLIAMS: So basically the 22nd and after I can, I can be  
22 available any of those days.

23 THE COURT: Okay.

24 So essentially, you're available the end of July going into August?

25 MR. WILLIAMS: Correct Judge.

1 THE COURT: Alright, how is Friday, August 9th?

2 MS. HUBER: Fine for the People Judge.

3 THE COURT: Okay.

4 Alright and in light of the fact that the court granted the defense motion  
5 for a Walker Hearing, the court's going to adjourn the June 17th trial.

6 MR. WILLIAMS: Thank you Judge.

7 MS. HUBER: Thank you Judge.

8 MR. WILLIAMS: And August 9th is a good date for the defense.  
9 I'm available at any time that morning.

10 THE COURT: Alright. One second, I've got to switch calendars  
11 to give you a time.

12 MR. WILLIAMS: No problem.

13 THE COURT: Alright, can we do 11?

14 MR WILLIAMS: 11 o'clock's fine Judge.

15 MS. HUBER: 11 is fine Judge.

16 THE COURT: Alright Mr. Williams you filed a second motion, a  
17 motion to dismiss.

18 MR. WILLIAMS: Correct Judge.

19 THE COURT: And I'm assuming you received the People's  
20 response?

21 MR. WILLIAMS: I did Judge, and I did have a chance to review  
22 it.

23 THE COURT: Alright. The court's ready for arguments  
24 whenever you are.

25 MR. WILLIAMS: Thank you Judge.

1 First I will adopt the arguments and the written brief as I typically do.  
2 This is sort of an interesting issue, and I spent some time again a couple of  
3 nights ago reviewing subsequent state court decisions since Counterman (sp)  
4 came out, and there were 48 different states that have issued rulings on  
5 Counterman, but none of them have involved, outside of Colorado's  
6 challenge, a direct challenge to a statute, but none of the states have a  
7 statute that was in, in my position as grossly unconstitutional as this one.

8 The, the first amendment has certain levels of speech that are deemed  
9 non protected. Truth, threats, are one of them. I'm not going to bore the court  
10 with a truth threats analysis. I know the court's familiar with them and read the  
11 brief.

12 The critical problem with Michigan statute is the section where it  
13 indicates a defendant's intent and capacity are not a defense. It takes the  
14 subjective intent element essentially out of the case, and that problem goes to  
15 the heart of the prosecution's response, which is what I, I primarily want to  
16 address now.

17 In the response the prosecution rightly provides the jury instruction to  
18 the court, which indicates a definition of a true threat, and that the court and  
19 the jury must consider at least a degree of recklessness on the part of the  
20 defendant.

21 And the jury instruction does cite the proper standard for what  
22 Counterman established; however, one, a jury instruction cannot save a  
23 facially unconstitutional statute. Two, the jury instruction creates a different  
24 constitutional problem. If the statute forbids me from raising intent or capacity  
25 as a defense and the court then instructs the jury that there's a subjective

1 intent of recklessness that I have no ability to defend or counteract in any  
2 meaningful way, my client is presented with a situation where he can't raise a  
3 meaningful defense. His sixth amendment right to a fair trial would then be  
4 impuded. This is the creature of a first amendment violative statute. It leads to  
5 other pervasive constitutional problems.

6 Whether we like it or not, the Michigan statute only requires an  
7 objective intent. The knowing communication of words. It does not allow for  
8 and does not require on its face the prosecution to prove a subjective intent to  
9 any level.

10 And the only vehicle by which the statute can be cured and a  
11 defendant can fairly proceed with protective first, fifth, and sixth amendment  
12 constitutional rights is to have the legislature change the statute to comply  
13 with what the Supreme Court mandates the law has to be in these cases.

14 And unfortunately for this particular case, at least as far as the  
15 prosecution's position, that change could not be retroactive. Meaning if the  
16 legislature were to change the law it could not be reapplied to Mr. Kvasnicka  
17 for something that happened previously.

18 The court can look to guidance in three other areas where the U.S.  
19 Supreme Court has set forth mandates for these kinds of unprotected speech  
20 and the prosecution thereof. Including Michigan's peace bond statute where  
21 there is the ability for the prosecutor's office to attempt to prevent a crime  
22 before it happens based on speech. And that statute requires a subjective  
23 intent to prevent speech based offenses like inciting a riot or civil unrest.

24 In defamation cases you have to show at least recklessness in order  
25 to proceed in an action, Michigan's libel and slander statute

1 MCL 600.2911 requires recklessness as the minimum standard by which a  
2 person may act.

3 The statute also prescribes additional penalties in civil court if you act  
4 with a degree higher than recklessness because the courts want to prevent  
5 and punish unprotected speech that actually hurts people, or puts them in  
6 fear or in harm.

7 There are elements of Michigan's domestic violence and assault  
8 statutes where words can be prosecuted by putting someone in fear, but you  
9 have to prove intent on the part of the defendant when they speak the words  
10 to put the person in fear.

11 This is the only statute in the state of Michigan that punishes criminal  
12 conduct by words that expressly prohibits a challenge to intent or capacity  
13 and only requires the prosecution to punish subjective intent. The reason for  
14 that was when the legislature passed this law it was in the wake of the 9-11  
15 terrorist attack. It was early 2002. And the legislature's goal was to ensure  
16 that we didn't have conduct that was going to be a reported threat of terrorism  
17 or a terrorist act in the state of Michigan that they couldn't punish or prevent.  
18 That was the background of when this law was put forth.

19 Unfortunately times have changed and the law has changed in terms  
20 of what is required, but the legislature in their infinite wisdom has not kept up.  
21 Probably because they're very busy like the courts are with the changes in  
22 what the Supreme Court has required.

23 But what I'm asking the court to do by invalidating this prosecution and  
24 saying the statute is unconstitutional is simply to follow the law of what the  
25 Supreme Court has said in every other kind of case where we punish words

1 under the first amendment. The defendant must have a meaningful ability  
2 either to challenge the intent, the prosecution has to prove on a subjective  
3 basis, or require the prosecution to prove a subjective intent.

4 The statute does neither. It could not be a more clearly  
5 unconstitutional statute in violation of the first amendment. And even if the  
6 court accepts the prosecution's argument that somehow the jury instructions  
7 saves the statute it creates a whole different issue which is that now the  
8 defendant can't meaningfully present a defense under the sixth amendment  
9 to intent and capacity because while recklessness is a low subjective intent  
10 standard, if a defendant is found not to have the capacity to formulate that  
11 reckless intent, they cannot be convicted. I have no meaningful means by  
12 which to challenge that.

13 And so for those two reasons Judge, this statute is unconstitutional  
14 and I would ask you to dismiss this case.

15 THE COURT: Alright, Mr. Williams you made some interesting  
16 arguments, but you will agree that the states are divided on this issue,  
17 correct?

18 MR. WILLIAMS: I, I would agree that there are opinions that  
19 don't challenge constitutionality where the statutes have differing degrees of  
20 complex language.

21 I don't agree that there is a dispute as to what the law requires, and  
22 the Supreme Court has made very clear what the law requires.

23 And this statute is extremely similar in terms of what it requires to the  
24 one that was struck down in Colorado.

25 THE COURT: Alright.

1 And looking at the jury instruction 38.4- -

2 MR. WILLIAMS: Yes Judge.

3 THE COURT: - -Which states that the prosecutor has to prove  
4 beyond a reasonable doubt quote the first three elements that the defendant  
5 committed, communicated that he would commit a felony crime, in this  
6 particular case false report of threat or terrorism, that the defendant knew or  
7 had reason to know that committing the felony would be dangerous to human  
8 life, and third that by committing the felony the defendant would intend to  
9 intimidate, frighten, or coerce a civilian population or influence or effect the  
10 conduct of the government or a unit of government through intimidation or  
11 coercion.

12 But then it states further, it does not matter whether the defendant  
13 actually could commit the felony or actually intended to commit the felony, but  
14 only whether the defendant threatened to commit the felony as an act of  
15 terrorism.

16 MR. WILLIAMS: Yes Judge.

17 THE COURT: So the People have to prove knowledge, not  
18 intent.

19 MR. WILLIAMS: It's, and that's the problem, and that's what  
20 Counterman was addressing. That's the objective standard is the defendant  
21 knowingly communicated the threat to another person.

22 THE COURT: Well the court is to adopt their position then I can  
23 make a threat today and say, "Oh, well I didn't mean it, so therefore I'm not  
24 guilty."

25 MR. WILLIAMS: Not necessarily.

1           There would be an opportunity if the statute was constitutional for an  
2 attorney to make arguments about intent or capacity of your ability or desire  
3 to communicate it as a threat to another person. And that's the critical part.  
4 It's not simply about saying words. For example, in this case someone  
5 randomly indicating I'm going to, I'm going to shoot up a school. That certainly  
6 would qualify on the objective standard of the Colorado statute, or Michigan's  
7 objective statute, as a threat. But if that's all the prosecution has to prove, as  
8 the court said in Counterman, that is the problem. It causes a chilling effect  
9 on speech we don't like because then where do you draw the line?

10           The issue is there's a second element. They have to have done it  
11 either recklessly as the minimum standard or to some intent of scaring an  
12 individual or another person. And I appreciate that the jury instruction says  
13 that. The problem is the jury instruction is inconsistent with the statute and the  
14 language in the statute. And you can't take a jury instruction and say oh, this  
15 saves it; this saves the statute. You can't do that. Because I can't  
16 meaningfully attack a subjective intent of recklessness by arguing my client  
17 doesn't have the capacity to form that intent, or that he didn't have a reckless  
18 intent. The words were not intended to scare that individual person.

19           I, I have no meaningful way to challenge that because the statute  
20 forbids it. The same way it did in Counterman.

21           And so if the court, if the court were to take the position that the jury  
22 instruction saves the day, it's the knight on a white horse riding in at the end  
23 to save the statute, it's going to get flanked by the fact that there's a sixth  
24 amendment problem that I can't meaningfully put up a defense on capacity or  
25 intent against that standard of recklessness that the statute forbids me from

1 presenting.

2 And so it's lose lose, and I don't sense the statute is facially  
3 unconstitutional because it does not contain a subjective intent element. And I  
4 would note in the prosecution's response they didn't argue that the statute  
5 contains a subjective intent element. Their only argument was the jury  
6 instruction presents the jury with a subjective intent element. That doesn't  
7 mean the prosecution's conceding that the statute doesn't have it, but they  
8 don't make a meaningful legal argument that the statute on its face without  
9 the jury instruction is somehow constitutional because I don't think they can.

10 I think this case needs to be dismissed, and I would ask you to dismiss  
11 this case and deem the statute to be unconstitutional on its face.

12 Thank you Judge.

13 THE COURT: Thank you Mr. Williams.

14 Ms. Huber.

15 MS. HUBER: Thank you Judge, well let's address that right on  
16 its head. Statute 750.543 at section 1(B) states knowingly making a false  
17 report of an act of terrorism and communicates the false report to any other  
18 person knowing the report is false, Judge, that is itself a knowing requirement  
19 within the body of the statute. We are not conceding that the statute by any  
20 means is not, is, on its face fails to assess an intent. It assesses that knowing  
21 intent as I just stated, and as the court just stated the jury instructions define  
22 what that knowing intent is. We believe that based on the statute and based  
23 on the illumination further given in the jury instruction the statute is  
24 constitutional on its face. I would rely on my brief.

25 Thank you Judge.

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THE COURT: Rebuttal?

MR. WILLIAMS: May I Judge?

THE COURT: You may.

MR. WILLIAMS: And I appreciate it.

The argument that the prosecution just made proves the point. The section she read indicates that they know the report is false. That's the, that's the objective intent standard. The statute doesn't address subjective intent which is that when they made the knowingly false report, they intended recklessly or to some other more significant degree to put a person in fear, and that they had the ability when they made the statement to understand that they were going to put somebody in fear by making the statement.

There is no subjective intent. We agree there's an objective intent portion of the statute. Everybody agrees on that. In *Counterman* the court agreed on that. It's the lack of a definitive subjective intent or an ability to present a defense that is the constitutional problem. And nothing in the prosecution's argument addresses that because they can't. It's not there. And because of that the statute's unconstitutional and I would ask you to dismiss this case and find that it's unconstitutional, Judge.

Thank You.

THE COURT: Alright, based on the briefs and arguments this morning the defendant's motion to dismiss is denied. The issue's been preserved.

Alright, bond continued. I'll see the parties back on August 9th at 11 A.M.

MS. HUBER: Thank you Judge.

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MR. WILLIAMS: Thank you Judge.

THE COURT: And happy Father's Day, Mr. Williams.

MR. WILLIAMS: Thank you Your Honor.

I have one request.

THE COURT: Yes.

MR. WILLIAMS: Will the court enter a written order with regard to my motion to dismiss?

THE COURT: Mr. Phillips is going to give you an order.

MR. WILLIAMS: I appreciate that Judge.

MS. HUBER: Thank you Judge.

MR. WILLIAMS: And I'm perfunctorily going to ask the court for a stay because I think this is an issue that I've got to go up on.

THE COURT: Alright. Motion denied.

MR. WILLIAMS: I appreciate it, and the court knows I have another avenue I can seek that if I want one - -

THE COURT: Yes.

MR. WILLIAMS: - -so I appreciate it.

MS. HUBER: Thank you Judge.

MR. WILLIAMS: Thank you, Your Honor.

THE COURT: Have a good weekend everyone.

(At 9:38 A.M proceedings concluded.)

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CERTIFICATE OF COURT REPORTER

STATE OF MICHIGAN )  
 )  
COUNTY OF WAYNE )

I, Gary Coury, Certified Court Reporter, do hereby certify that I reported the proceedings had in the above-entitled matter of

The People of the State of Michigan

V

MICHAEL KVASNICKA

Case Number 24-001354-01

at the time and place hereinbefore set forth, and that the foregoing transcript consisting of TWENTY-TWO (22) pages, is a full, true, and accurate transcript of the proceedings so taken.

DATE \_\_\_\_\_



Gary Coury  
Certified Court Reporter  
CSMR/CER 3827



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 5

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	ORDER DENYING/GRANTING MOTION	CASE NO. 24-001354-01-FH
---	-------------------------------------	-----------------------------

ORI MI- 821095J Court Address 1441 St. Antoine, Detroit MI 48226 Courtroom 703 Court Telephone No. 313-224-5237

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Michael Joseph Kvasnicka

Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice  
at Detroit in Wayne County on 06/14/2024

PRESENT: Hon. Shannon N. Walker

A Motion for: TO DISMISS

\_\_\_\_\_ having been filed; and

the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for AS STATED ABOVE

\_\_\_\_\_ be and

is hereby  denied  granted.

/s/ Shannon N. Walker

June 14, 2024  
Hon. Shannon N. Walker

62421



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 6

STATE OF MICHIGAN THIRD JUDICIAL CIRCUIT WAYNE COUNTY	ORDER DENYING/GRANTING MOTION	CASE NO. 24-001354-01-FH
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ORI MI- 821095J Court Address 1441 St. Antoine, Detroit MI 48226 Courtroom 703 Court Telephone No. 313-224-5237

THE PEOPLE OF THE STATE OF MICHIGAN

vs.

Michael Joseph Kvasnicka

Defendant

At a Session of Said Court held in The Frank Murphy Hall of Justice  
at Detroit in Wayne County on 06/14/2024

**PRESENT:** Hon. Shannon N. Walker

A Motion for: TO STAY PRECEEDINGS

\_\_\_\_\_ having been filed; and

the People having filed and answer in opposition; and the Court having reviewed the briefs and records in the Cause and being fully advised in the premises;

IT IS ORDERED THAT the Motion for AS STATED ABOVE

\_\_\_\_\_ be and

is hereby  denied  granted.

/s/ Shannon N. Walker

June 14, 2024  
Hon. Shannon N. Walker

62421



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 7

**Court of Appeals, State of Michigan**

**ORDER**

PEOPLE OF MI V MICHAEL JOSEPH KVASNICKA

Docket No. 371542

LC No. 24-001354-01-FH

Christopher P. Yates  
Presiding Judge

Mark T. Boonstra

Sima G. Patel  
Judges

---

The application for leave to appeal is GRANTED. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(E)(3). This appeal is limited to the issues raised in the application and supporting brief. MCR 7.205(E)(4).



---

Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

October 10, 2024  
Date



Chief Clerk



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

---

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 8

**Court of Appeals, State of Michigan**

**ORDER**

**PEOPLE OF MI V MICHAEL JOSEPH KVASNICKA**

Docket No. **371542**

LC No. **24-001354-01-FH**

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Christopher M. Murray, Judge, acting under MCR 7.211(E)(2), orders:

The motion to extend time to file appellant's brief is GRANTED until November 11, 2024.

*Christopher Murray*

---



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

December 11, 2024

Date

*Jerome W. Zimmer Jr.*  
Chief Clerk



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

---

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 9

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**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH KVASNICKA,

Defendant-Appellant.

---

FOR PUBLICATION

February 13, 2025

2:05 PM

No. 371542

Wayne Circuit Court

LC No. 24-001354-01-FH

Before: BOONSTRA, P.J., and M. J. KELLY and MALDONADO, JJ.

M. J. KELLY, J.

In this interlocutory appeal, defendant, Michael Kvasnicka, appeals by leave granted the trial court order denying his motion to dismiss the charges against him. Kvasnicka was charged with making a threat of terrorism, MCL 750.543m, and using a computer to commit a crime, MCL 752.796. The charges stem from a message he sent to a young girl via social media stating that she was “not gonna be laughing once I come to your school and shoot it up or blow it up like [C]olumbine.” On appeal, Kvasnicka argues that MCL 750.543m is facially unconstitutional because, contrary to the United States Supreme Court’s recent opinion in *Counterman v Colorado*, 600 US 66; 143 S Ct 2106; 216 L Ed 2d 775 (2023), MCL 750.543m does not require proof that the defendant had some subjective understanding of the threatening nature of his statements and, in particular, that he acted “recklessly” when making the statements. For the reasons stated in this opinion, we conclude that MCL 750.543m is facially unconstitutional. Accordingly, we reverse the trial court order and remand for entry of an order dismissing the charges against Kvasnicka.

II. CONSTITUTIONALITY OF MCL 750.543m

A. STANDARD OF REVIEW

Questions involving the constitutionality of a statute are reviewed de novo. *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014). “[L]aws are presumed constitutional, and this Court must construe a statute as constitutional unless its unconstitutionality is clearly apparent.” *People v Harris*, 495 Mich 120, 134; 845 NW2d 477 (2014). “A party challenging the facial constitutionality of a statute faces an extremely rigorous standard, and must show that no set of circumstances exists under which the act would be valid.” *In re Request for Advisory Opinion*

*Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007) (quotation marks, citations, and alteration omitted). Questions of statutory interpretation are reviewed de novo. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008).

## B. ANALYSIS

Both the United States Constitution and the Michigan Constitution prohibit the government from making laws that abridge the freedom of speech. *People v Burkman*, \_\_\_ Mich \_\_\_, \_\_\_; \_\_\_ NW3d \_\_\_ (2024) (Docket Nos. 164638 and 164639); slip op at 21, citing US Const Am I and Const 1963, art 1, § 5. However, “[t]rue threats of violence are outside the bounds of First Amendment protection and [are] punishable as crimes.” *Counterman*, 600 US at 69. “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Id.* at 359-360 (quotation marks, alterations, and citation omitted). “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 (say, ‘I am going to kill you for showing up late’).” *Counterman*, 600 US at 74, citing *Watts v United States*, 394 US 705, 708; 89 S Ct 1399; 22 L Ed 2d 664 (1969). “Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat[.]” *Counterman*, 600 US at 74, citing *Elonis v United States*, 575 US 723, 733; 135 S Ct 2001; 192 L Ed 2d 1 (2015). “The existence of a threat depends not on the mental state of the author but on what the statement conveys to the person on the other end.” *Id.* (quotation marks and citation omitted). Because a statement can qualify as a true threat “solely on its objective content,” the United States Supreme Court recently considered “whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.” *Counterman*, 600 US at 72.

The defendant in *Counterman* was charged and convicted of stalking and harassment based upon hundreds of messages sent via social media over a two-year period to a local musician. *Id.* at 70. The messages included statements indicating that the defendant was surveilling the musician and statements expressing anger and indicating that the defendant wished that harm would come to her. *Id.* The statements caused the musician to live in fear and she eventually reported the messages to the police. *Id.* The trial court instructed the jury that, when considering the defendant’s statements, it need only conclude that they would have been viewed as threatening by a reasonable person, i.e., under an objective standard. *Id.* at 71. The defendant appealed, arguing that the First Amendment required that the prosecution show that he “was aware of the threatening nature of his statements.” *Id.* The Colorado Court of Appeals disagreed, holding that the prosecution did not need to show a speaker’s subjective intent to threaten and that it was appropriate to use an objective standard. *Id.* at 72.

In *Counterman*, the United States Supreme Court determined that a subjective mental-state was constitutionally required in order to avoid chilling constitutionally protected speech. *Id.* at 75.

The Court reasoned that a recklessness *mens rea* was the subjective standard required by the First Amendment. *Id.* at 78. It explained:

A person acts recklessly, in the most common formulation, when he “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.” *Voisine v United States*, 579 US 686, 691; 136 S Ct 2272; 195 L Ed 2d 736 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden v United States*, 593 US \_\_\_, \_\_\_; 141 S Ct 1817, 1823–1824; 210 L Ed 2d 63 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a “deliberate decision to endanger another.” *Voisine*, 579 US at 694. In the threats context, it means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.” *Elonis*, 575 US at 746 (Alito, J., concurring in part and dissenting in part). [*Counterman*, 600 US at 79.]

Accordingly, the court held that, in a true-threats case, “[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Id.* at 69.

On appeal, Kvasnicka argues that MCL 750.543m is facially unconstitutional because it does not require the prosecution to prove that he acted recklessly—i.e. that he disregarded a substantial risk that his communication would be viewed as threatening violence—when he sent a social media message suggesting that he would “shoot up” a school. We agree.

When construing a statute, the goal is “to ascertain and give effect to the intent of the Legislature.” *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). “The touchstone of legislative intent is the statute’s language.” *Gardner*, 482 Mich at 50. “If the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.” *Id.* (quotation marks and citation omitted).

MCL 750.543m provides:

A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

In turn “act of terrorism” is defined as:

(a) “Act of terrorism” means a willful and deliberate act that is all of the following:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [MCL 750.543b.]

This Court has previously interpreted MCL 750.543m as constitutional because it only applies to true threats. *People v Osantowski*, 274 Mich App 593; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008) and *People v Byczek*, 337 Mich App 173; 976 NW2d 7 (2021). The *Byczek* Court explained:

[T]o demonstrate that a defendant is guilty of making a terrorist threat under MCL 750.543m(1), the prosecution must prove that the defendant (1) threatened to commit an act of terrorism and (2) communicated the threat to another person. MCL 750.543m(1)(a). An act of terrorism is a willful and deliberate act that (1) would be a violent felony under the laws of this state, (2) is an act that the defendant knows or has reason to know is dangerous to human life, and (3) is an act that is intended to intimidate or coerce a civilian population or to influence or affect the conduct of government or a unit of government through intimidation or coercion. MCL 750.543b(a). The prosecution is not required to prove that the defendant had the intent or the capability to actually carry out the threatened act of terrorism, MCL 750.543m(2), but *the prosecution must prove the defendant's general intent to communicate a true threat*; that is, the “communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,” made with “an intent to ‘intimidate or coerce.’” *Osantowski*, 274 Mich App at 603. [*Byczek*, 337 Mich App at 185-186 (footnote omitted).]

Both *Osantowski* and *Byczek*, however, are silent as to whether the defendant’s general intent to communicate a true threat must be judged by an objective standard or by a subjective standard. Accordingly, they do not resolve the issue present in this appeal, which is whether the plain language of MCL 750.543m requires the prosecution to prove, at a minimum, that the defendant “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman*, 600 US at 69.

On appeal, the prosecution turns to the dictionary definition of “threat,” noting that multiple dictionaries indicate that a threat is an expression of intent to inflict harm. It then directs this Court to M Crim JI 38.4(3), arguing that it requires the jury to find that the defendant made a true threat and that a subjective-intent element is included in the definition of such a threat. M Crim JI 38.4(3) provides that the defendant’s threat of an act of terrorism

does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. *It must*

*have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.* [M Crim JI 38.43(3) (emphasis added).]

The prosecution contends that this instruction requires more than a reckless state of mind because it requires the jury to find the defendant understood that the language he used would reasonably cause others to believe that he was expressing an intent to inflict harm or damage. The prosecution is incorrect. Although the last sentence asks the jury to consider how the threat is perceived by “others,” its reference to a reasonable person makes clear that the jury is tasked with deciding what a reasonable person in the defendant’s shoes would have thought, not necessarily what the defendant would have thought himself. This language is not aligned with the *Counterman* standard, which requires the prosecution to show a defendant’s subjective intent, by at least a standard of recklessness. *Counterman*, 600 US at 72-79.

Moreover, we are perplexed by the prosecution’s decision to defend the constitutionality of MCL 750.543m by relying upon the jury instructions rather than the language used in the statute. When considering whether a statute is or is not constitutional, it is the words of the statute that must be examined, not the model jury instructions. *Osantowski*, 274 Mich App at 601 (“To determine whether a statute is unconstitutional, the entire text of the statute should be examined and the words of the statute should be given their ordinary meanings.”) (quotation marks and citation omitted). We reject as unpersuasive the prosecution’s reliance on the jury instructions and turn instead, as we must, to the statutory language.

Again, MCL 750.543m provides that “[a] person is guilty of making a terrorist threat . . . if the person . . . [t]hreatens to commit an act of terrorism and communicates the threat to any other person.” Notably, the statute does not provide that the defendant has to purposefully, knowingly, or recklessly threaten to communicate an act of terrorism to another person. Rather, it is silent as to what state-of-mind the defendant must have when he “threatens to commit an act of terrorism.” Instead, it is the “act of terrorism” definition that includes a specific intent requirement. MCL 750.543b provides that the phrase “act of terrorism” requires that *the act* be one that “the person knows or has reason to know is dangerous to human life” and that *the act* be one that “is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.” Although consideration of MCL 750.543m and the definition of “act of terrorism” shows the Legislature’s intent to only prohibit true threats, *Osantowski*, 274 Mich App at 602-603, the statute does not require the prosecution to prove that the defendant made the threat recklessly, i.e., that he “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman*, 600 US at 69.

In summary, because there is no statutory language suggesting that the prosecutor must prove that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence, we conclude that MCL 750.543m(1)(a)(i) is facially unconstitutional. Accordingly, we reverse the court’s order denying the motion to dismiss the charges against Kvasnicka and remand for entry of an order dismissing the charges.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ Mark T. Boonstra  
/s/ Allie Greenleaf Maldonado



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

---

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 10

STATE OF MICHIGAN  
THIRD JUDICIAL CIRCUIT  
WAYNE COUNTY

ORDER OF  
ACQUITTAL/DISMISSAL  
OR REMAND

CASE NO.  
24-001354-01-FH

ORI Court Address 5301 Russell Street, Suite 700 Detroit, MI 48211 Courtroom 603 Court telephone no. 313-224-5237  
MI-  
Police Report No.

The State of Michigan  
THE PEOPLE OF  \_\_\_\_\_  
\_\_\_\_\_

v Defendant/Juvenile name, address, and telephone no.  
Michael Joseph Kvasnicka  
8965 Bridge Rd Grosse Ile, MI 48138  
CTN/TCN SID DOB  
23720960-01 \_\_\_\_\_

Juvenile In the matter of \_\_\_\_\_

Count	CRIME	CHARGE CODE(S) MCL citation/PACC Code
1	False Report or Threat Of Terrorism	750.543M
2	Computers - Using To Commit A Crime	752.7973F

IT IS ORDERED:

1. The case is dismissed on the motion of the court  with  without prejudice.  
**COA reversed and remanded for dismissal.**
2. Defendant's/Juvenile's motion for dismissal is granted  with  without prejudice and the case is dismissed.
3. Defendant/Juvenile's motion for dismissal is granted in part  with  without prejudice and the following charge(s) is/are dismissed: \_\_\_\_\_

4. Defendant/Juvenile is acquitted on all charge(s) in this case after trial by  judge.  jury
5. Defendant/Juvenile is acquitted after trial by  judge  jury only on the following charge(s): \_\_\_\_\_

6. Defendant/Juvenile shall be immediately discharged from confinement in this case.

7. Bond is canceled and shall be returned after costs are deducted.

8. Bond/Bail is continued on the remaining charge(s)

9. The case is remanded \_\_\_\_\_ District court for further proceedings for the following reasons:

10. The Michigan State Police and arresting agency shall destroy the arrest record, biometric data, and , as applicable Profile for the dismissed charge(s). The Michigan State Police shall also remove any LEIN entry concerning any Dismissed charge(s).

02/24/2025  
Date

/s/ Shannon N. Walker 62421  
February 24, 2025  
Judge Shannon N. Walker Bar no.

If item 10 is checked, the clerk of the court shall provide a copy of this order to the Michigan State Police upon entry.

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WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

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Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

---

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 11

# Order

conv  
March 28, 2025

168181 & (45)(46)

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,

v

MICHAEL JOSEPH KVASNICKA,  
Defendant-Appellee.

SC: 168181  
COA: 371542  
Wayne CC: 24-001354-FH

Michigan Supreme Court  
Lansing, Michigan

Elizabeth T. Clement  
Chief Justice

Brian K. Zahra  
Richard H. Bernstein  
Megan K. Cavanagh  
Elizabeth M. Welch  
Kyra H. Bolden  
Kimberly A. Thomas,  
Justices

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On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the February 13, 2025 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for further consideration. We express no opinion on whether MCL 750.543m violates constitutional free-speech protections by imposing criminal liability without proof “that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman v Colorado*, 600 US 66, 69 (2023). On remand, the Court of Appeals shall address the proper interpretation of MCL 750.543m in light of: (1) MCL 750.543z, which provides that “a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”; and (2) the constitutional-doubt canon, see *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419-420 (2022). The Court of Appeals shall also address: (3) whether it is appropriate to adopt a limiting construction of MCL 750.543m to remedy any remaining constitutional deficiency, see *People v Burkman*, 513 Mich 300, 340 (2024); see also *Osborne v Ohio*, 495 US 103, 115 (1990); (4) if so, what that limiting construction should be; and (5) whether the Wayne Circuit Court abused its discretion by dismissing the case without prejudice on February 24, 2025, where doing so necessarily implicated “aspects of the case involved in the interlocutory appeal” while an application for leave to appeal remained pending with this Court. *People v Scott*, 513 Mich 180, 200 (2024); see

MCR 7.215(F)(1)(a); MCR 7.305(C)(6)(a). The motion to expedite and/or stay precedential effect is GRANTED to the extent it requests expedited consideration of the application and is DENIED in all other respects.

We do not retain jurisdiction.



b0326

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 28, 2025

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Clerk



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 12

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellee,

v.

MICHAEL JOSEPH KVASNICKA  
Defendant-Appellant.

No. 371542

---

L.C. No. 24-001354-01-FH  
MSC No.168181

---

**SUPPLEMENTAL BRIEF ON REMAND FROM THE SUPREME COURT**

**\*\*\*This Appeal Involves a Claim  
That a State Statute Is Facially Unconstitutional\*\*\*  
\*\*Oral Argument Requested  
(if argument is had on remand)**

**KYM L. WORTHY**  
Prosecuting Attorney  
County of Wayne

**JON P. WOJTALA**  
Chief, Research, Training, and Appeals

**TIMOTHY A. BAUGHMAN (P 24381)**  
Special Assistant Prosecuting Attorney  
5301 Russell St. Suite 200  
Detroit, Michigan 48211  
Phone: (313) 224-5792

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## Statement of the Question

### I.

A statute is presumed to be constitutional, with the duty of a reviewing court being to adopt any construction of the statute *other than* one that renders it unconstitutional if that construction is “fairly possible.” The term “threat” by its ordinary definition is a declaration of one’s “*purpose or intention* to work injury to the person, property, or rights of another.” Consistent with the First Amendment as explicated by the United States Supreme Court in *Counterman*, may that mens rea readily be expressed to the jury in terms of recklessness so that it is thus “fairly possible” to construe MCL 750.543m as consistent with the First Amendment?

Defendant answers: NO

The People answer: YES

## Statement of Material Facts and Proceedings

This case has not yet gone to trial. As laid out by this court, the procedural history of this case is:

[D]efendant, Michael Kvasnicka, appeals by leave granted the trial court order denying his motion to dismiss the charges against him. Kvasnicka was charged with making a threat of terrorism, MCL 750.543m, and using a computer to commit a crime, MCL 752.796. The charges stem from a message he sent to a young girl via social media stating that she was “not gonna be laughing once I come to your school and shoot it up or blow it up like [C]olumbine.” On appeal, Kvasnicka argues that MCL 750.543m is facially unconstitutional because, contrary to the United States Supreme Court’s recent opinion in *Counterman v Colorado*, 600 U.S. 66, 143 S Ct 2106, 216 L Ed 2d 775 (2023), MCL 750.543m does not require proof that the defendant had some subjective understanding of the threatening nature of his statements and, in particular, that he acted “recklessly” when making the statements. For the reasons stated in this opinion, we conclude that MCL 750.543m is facially unconstitutional. Accordingly, we reverse

the trial court order and remand for entry of an order dismissing the charges against Kvasnicka.<sup>1</sup>

The People sought leave, and on March 28, 2025 the Supreme Court remanded to this court to consider certain specified questions.<sup>2</sup> The People seek to file a supplemental brief on those questions.

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<sup>1</sup> *People v. Kvasnicka*, —Mich. App.—, 2025 WL 492469, at 1 ( No. 371542, Mich. Ct. App. Feb. 13, 2025).

<sup>2</sup> *People v. Kvasnicka*, —Mich.—, 2025 WL 945738 (Mich. Mar. 28, 2025).

## Argument

### I.

A statute is presumed to be constitutional, with the duty of a reviewing court being to adopt any construction of the statute *other than* one that renders it unconstitutional if that construction is “fairly possible.” The term “threat” by its ordinary definition is a declaration of one’s “*purpose or intention* to work injury to the person, property, or rights of another.” Consistent with the First Amendment as explicated by the United States Supreme Court in *Counterman*, that mens rea may readily be expressed to the jury in terms of recklessness, so that it is thus “fairly possible” to construe MCL 750.543m as consistent with the First Amendment.

### Introduction

The Michigan Supreme Court has, on the People’s application for leave to appeal, remanded to this court to consider “the proper interpretation of MCL 750.543m in light of”:

- MCL 750.543z, which provides that “a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”;
- the constitutional-doubt canon, see *Sole v. Mich. Econ. Dev. Corp.*, 509 Mich. 406, 419-420 (2022);
- whether it is appropriate to adopt a limiting construction of MCL 750.543m to remedy any remaining constitutional deficiency, see *People v. Burkman*, 513 Mich. 300, 340 (2024); see also *Osborne v. Ohio*, 495 U.S. 103, 115 (1990);
- if so, what that limiting construction should be; and
- whether the Wayne Circuit Court abused its discretion by dismissing the case without prejudice on February 24, 2025, where doing so necessarily implicated “aspects of the case involved in the interlocutory appeal” while an application for

leave to appeal remained pending with this Court. *People v Scott*, 513 Mich 180, 200 (2024); see MCR 7.215(F)(1)(a); MCR 7.305(C)(6)(a).<sup>3</sup>

The People proceed with the last question first.

### **Discussion**

#### **A. Dismissal was improper where not only had the time not run for an application for leave to appeal but one had been filed in the Supreme Court**

This court has been directed to answer “whether the Wayne Circuit Court abused its discretion by dismissing the case without prejudice on February 24, 2025, where doing so necessarily implicated ‘aspects of the case involved in the interlocutory appeal’ while an application for leave to appeal remained pending with this Court. *People v Scott*, 513 Mich 180, 200 (2024); see MCR 7.215(F)(1)(a); MCR 7.305(C)(6)(a).” It did.

On 2-13-2025 this court found MCL § 750.543m facially unconstitutional, and remanded for an order dismissing the charges against defendant.<sup>4</sup> On February 20, 2025, a week later, the People filed an application for leave to appeal in the Michigan Supreme Court, along with a motion to expedite and to stay precedential effect, and a motion for immediate consideration. Nonetheless, the trial court on February 25, 2025, dismissed the case without notice to either the trial prosecutor on the case or the appellate prosecutor.<sup>5</sup> It should not have done so. This court should

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<sup>3</sup> *People v. Kvasnicka*, —Mich.—, 2025 WL 945738 (Mich. Mar. 28, 2025).

<sup>4</sup> *People v. Kvasnicka*, 2025 WL 492469, at 4

<sup>5</sup> See email from assistant prosecutor Stoloff to special assistant prosecutor Baughman, and then email chain:

I have no idea that it even got dismissed. If it was dismissed it was done without me there as I had every intention to object to that. I haven't had any vacations other than taking a day or 2 off when the Judge was also off, so it's not even a situation where someone could have stood in for me. I know the defense attorney filed a motion to dismiss, but I informed the Court clerk that I intended to object to that. We had a review date set for

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4/4/25 and the issue was supposed to be addressed on that day. No idea why it got dismissed before then.

Email chain:

**From:** Matthew Stoloff [assistant prosecuting attorney]  
**Sent:** Wednesday, February 19, 2025 11:01 AM  
**To:** McCrary, Mary <[Mary.McCrary@3rdcc.org](mailto:Mary.McCrary@3rdcc.org)>  
**Subject:** RE: People v. Michael Kvasnicka - Case No. 24-001354-01-FH - COA Opinion - Need Review Date

I don't believe that he has yet. We can get a return date prior to 4/4, but I will be objecting to a dismissal since we will be appealing to the MSC and there will be an automatic stay in place once that happens.

**From:** McCrary, Mary <[Mary.McCrary@3rdcc.org](mailto:Mary.McCrary@3rdcc.org)>  
**Sent:** Tuesday, February 18, 2025 10:40 AM  
**To:** Matthew Stoloff <[Mstoloff@waynecountymi.gov](mailto:Mstoloff@waynecountymi.gov)>  
**Subject:** RE: People v. Michael Kvasnicka - Case No. 24-001354-01-FH - COA Opinion - Need Review Date

Good morning Matt,

I am going through my email and came across this one. Did Jamar respond to it? I see a Review Date on 04/04. I cannot schedule; just cleaning out my email.

Thanks.

**From:** Matthew Stoloff <[Mstoloff@waynecountymi.gov](mailto:Mstoloff@waynecountymi.gov)>  
**Sent:** Friday, February 14, 2025 12:36 PM  
**To:** Daniel Williams <[danielnfw@gmail.com](mailto:danielnfw@gmail.com)>; Phillips, Jamar <[Jamar.Phillips@3rdcc.org](mailto:Jamar.Phillips@3rdcc.org)>; McCrary, Mary <[Mary.McCrary@3rdcc.org](mailto:Mary.McCrary@3rdcc.org)>  
**Subject:** RE: People v. Michael Kvasnicka - Case No. 24-001354-01-FH - COA Opinion - Need Review Date

I have spoken with our chief of appeals, Mr. Wojtala, he informed me that our office will be appealing up to the Michigan Supreme Court and they are working on filing to seek leave to appeal at the Michigan Supreme Court, and once that is filed there should be an automatic stay provision under MCR 7.305(C)6), so I don't believe a dismissal will be appropriate at this time. If we want to come in to update the court and make a record I think that would be appropriate. Mr. Wojtala told me that he would update me with any dates that he receives to provide the court as best of a timeline as possible. Thanks.

conclude that the statute is not facially unconstitutional, reinstate the case, and remand for trial.

Under MCL 7.215(F)(1)(a), “the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal in the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court.” Time had not only not expired here, but an application for leave to appeal had been filed. This court’s judgment was thus not effective at the time the trial court, believing, apparently, it was acting in compliance with that judgment, dismissed the case (see order of dismissal). Further, MCR 7.305(C)(6)(a) provides that “If a party

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APA  
Matt Stoloff

**From:** Daniel Williams <[danielnfw@gmail.com](mailto:danielnfw@gmail.com)>  
**Sent:** Thursday, February 13, 2025 2:41 PM  
**To:** Jamar.Phillips <[Jamar.Phillips@3rdcc.org](mailto:Jamar.Phillips@3rdcc.org)>; Matthew Stoloff <[Mstoloff@waynecountymi.gov](mailto:Mstoloff@waynecountymi.gov)>; Mary.McCrary <[Mary.McCrary@3rdcc.org](mailto:Mary.McCrary@3rdcc.org)>  
**Subject:** People v. Michael Kvasnicka - Case No. 24-001354-01-FH - COA Opinion - Need Review Date

Dear Mr. Phillips,

Happy Thursday. I hope that you and the whole staff there are well. On the above matter, I have received the opinion from the Court of Appeals. COA has reversed and remanded for this case to be dismissed. I have attached the opinion for your review and reference per the Court's order staying the proceedings. Please let me know if the Court is able to set this matter for a day next week after Tuesday. Obviously Monday the Court's are closed for President's Day, and I am in a Jury Trial at 36th District Court with Judge King on Tuesday. Please let me know. I have included APA Stoloff to this email chain as well. If you need anything else, please do not hesitate to let me know, either by email, or by phone at 313-421-8083.

Best Regards,

Daniel J. Williams, Esq.

appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply: (a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal *stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise*” (emphasis supplied). This court’s opinion was a judgment under MCR 7.215(E)(1) (“When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment”). There is no question that the trial court jumped the gun and proceeded without authority while an automatic stay was in effect. See *People v. Scott* (“by operation of court rule the proceedings were stayed upon [a party’s] application for leave to appeal in this Court”).<sup>6</sup> The Court there found an abuse of discretion in the trial court proceeding to trial and including in that trial the evidence that was the subject of the interlocutory appeal on which the prosecution had prevailed and regarding which the defendant was seeking leave from the Supreme Court: “While an automatic stay does not necessarily prevent a court from commencing trial when an interlocutory appeal is pending and the question on review is collateral to the trial, the trial court here abused its discretion because the trial included the very evidence that was the subject of the application pending before this Court.”<sup>7</sup> The question here was hardly collateral—it was *the* question on the appeal (whether the statute is facially unconstitutional)—and the trial court should not have proceeded while the application was pending<sup>8</sup> (indeed, even before the time had run to file one), and this court should set that dismissal aside and hold the statute constitutional.<sup>9</sup>

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<sup>6</sup> *People v. Scott*, 513 Mich. 180, 198 (2024).

<sup>7</sup> *Id.*, at 202.

<sup>8</sup> See also *Id.*, at 212 (“We hold that a trial court’s failure to adhere to court rules staying a proceeding while an interlocutory appeal is pending is a procedural error and that any such error can be remedied through subsequent appellate review after a final judgment is entered”).

<sup>9</sup> Though the procedural position here is odd, as the defendant technically remains the appellant here, the situation is really no different than if the trial court had granted the defendant’s pretrial motion to dismiss, and the prosecution had appealed.

**B. Application of the constitutional-doubt canon, as well as MCL § 750.543z, requires a construction of the word “threat” consistent with the First Amendment<sup>10</sup>**

Both our Supreme Court and the United States Supreme Court have made clear that when the validity of a statute is drawn in question, even if a serious doubt of its constitutionality is raised “it is a cardinal principle that this Court will first ascertain *whether a construction of the statute is fairly possible by which the question may be avoided. . . . under the constitutional-doubt canon, courts reasonably presume that the Legislature did not intend to enact a statute that raises serious constitutional doubts.*”<sup>11</sup> The constitutional-doubt principle requires a reviewing court, if necessary, to adopt any construction of a statute other than one that renders it unconstitutional if that construction is “fairly possible.”<sup>12</sup> Here, it could not be more clear that the Legislature did not intend to “enact a statute that raises serious constitutional doubts,” as it expressly provided in MCL § 750.543z that “a prosecuting agency shall not prosecute any person . . . for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision,” and so speech that is protected by the First Amendment is not within the statute, but that which, by a reasonable construction of the statute, is *not* so protected may be prosecuted—and this includes a threat, as defined by the *Counterman*<sup>13</sup> case.

Courts “must exercise self restraint” and “must be loath to discard statutes enacted by a majority of the elected representatives of the people through the legislative

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<sup>10</sup> Questions 1 and 2 in the Michigan Supreme Court order.

<sup>11</sup> *Sole v. Michigan Econ. Dev. Corp.*, 509 Mich. 406, 419–420 (2022) (emphasis supplied) (cleaned up) (cited by the Supreme Court in its order of remand); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348, 56 S. Ct. 466, 80 L. Ed. 688 (1936); *Clark v. Martinez*, 543 U.S. 371, 381, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005).

<sup>12</sup> *Sole*, at 421 (emphasis supplied).

<sup>13</sup> See *infra*.

process.”<sup>14</sup> They must presume that all legislation is constitutional and attempt to construe a statute so as to preserve its constitutionality by reasonable and permissible interpretation,<sup>15</sup> with all doubts to be resolved in favor of upholding its validity.<sup>16</sup> A reviewing court is “*duty bound under the Michigan Constitution to preserve the laws of this state and to that end to construe them if [it] can so that they conform to Federal and state constitutional requirements.*”<sup>17</sup> If a statute can be construed in a manner consistent with the Constitution, the party alleging unconstitutionality has failed to meet the burden of proving the alleged constitutional violation.<sup>18</sup> No “saving construction” is actually needed here, as all that is required is for the term “threat”—which as a matter of definition includes intent—be described to the jury in terms consistent with *Counterman*.

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<sup>14</sup> *People v Mell*, 227 Mich App 508, 510-511 (1998), rev’d on other grounds, 459 Mich 881 (1998).

<sup>15</sup> *Fritts v Krugh*, 354 Mich. 97, 114 (1958).

<sup>16</sup> *People v Neumayer*, 405 Mich 341 (1979).

<sup>17</sup> *People v Bricker*, 389 Mich. 524, 528 (1973) (emphasis supplied).

Of course, a court may not adopt a saving construction that is contrary to the text of a statute; “no judicially created saving construction is permitted to avoid a clear statutory mandate.” *McCahan v. Brennan*, 492 Mich. 730, 733 (2012).

See also *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L. Ed. 2d 830 (1973) (“Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute”); *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (cited in the Michigan Supreme Court’s order of remand).

<sup>18</sup> *Brown v Siang*, 107 Mich. App. 91 (1981).

C. **It is appropriate to adopt a limiting construction of MCL 750.543m to assuage any possible doubt as to its constitutionality by simply employing the language used in *Counterman*, as have other states**

1. **If needs be, a limiting construction may readily be based on language in *Counterman*, and the jury so instructed**

In *People v. Burkman*<sup>19</sup> the Supreme Court found that the statute there at issue was overbroad under the First Amendment, regulating “substantially more political speech than its plainly legitimate sweep allows.” But observing that “the invalidation of a statute on the basis of overbreadth is ‘strong medicine’” to be employed “only as a last resort,” the Court found that the statute could be saved by a limiting construction; indeed, that the Court was “duty bound” to do so if possible.<sup>20</sup> Because it found a limiting construction possible, the statute was not facially unconstitutional. Either as construed according to a reasonable meaning of its terms, or by way of a “saving construction,” if that is viewed as needed, the statute here is not facially unconstitutional.

In its original opinion, this court said it found that “there is no statutory language suggesting that the prosecutor must prove that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.”<sup>21</sup> The People are perplexed, as the use of the term “threat” in the statute itself contains an intent element, which needs only be explained to the jury in a manner consistent with *Counterman*. Indeed, everyone knows that to constitute a threat speech must be intended as “serious,” and “not idle talk or hyperbole.” It is something of a misnomer to talk of a “true threat,” which has become the legal term of art, as the phrase is redundant. The better term might be “actual threat,” to distinguish the speech from joking, idle talk, or hyperbole, but in any event if not intended as “serious” all know the speech is not a threat.

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<sup>19</sup> *People v. Burkman*, 513 Mich. 300, 339–340 (2024.)

<sup>20</sup> *Id.*, at 339-340 (cleaned up).

<sup>21</sup> *People v. Kvasnicka*, 2025 WL 492469, at 4.

As the People said in their original brief—in explaining the meaning of the text—when considering the meaning—and constitutionality—of a statute, it is wise to keep its actual text to the forefront:

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.<sup>22</sup>

Further, an “act of terrorism” is defined in the statutory scheme:

(I) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.<sup>23</sup>

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<sup>22</sup> MCL § 750.543m.

<sup>23</sup> MCL § 750.543b(a). “Dangerous to human life” and “violent felony” are also defined.

And the Model Criminal Jury Instructions provide an instruction for the offense, which was adopted before the Supreme Court's *Counterman*<sup>24</sup> decision, and which by its terms excludes all "non-serious" speech that might on its face appear to be a threat:

(1) The defendant is charged with the crime of making a threat to commit an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant communicated with [identify recipient(s) of communication] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant threatened to commit an act of terrorism.

A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, *it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.*

To prove that the defendant threatened to commit an act of terrorism, the prosecutor must prove:

(A) that the defendant communicated that [he / she] would commit the felony crime of [state felony];

(B) that the defendant knew or had reason to know that committing the felony would be dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury, or the felony involved a kidnapping;

(C) that, by committing the felony, the defendant would intend to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

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<sup>24</sup> *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

It does not matter whether the defendant actually could commit the felony or actually intended to commit the felony, but only whether the defendant threatened to commit the felony as an act of terrorism.<sup>25</sup>

What is the meaning of “threat,” and if there be any doubt, may it be construed consistently with *Counterman*? Of course.

A threat—a “true threat,” or actual or real threat (that is, a *threat*)—requires intent on the part of the speaker because the term requires intent. It is by definition “an expression of *intention* to inflict evil, injury, or damage.”<sup>26</sup> As Black’s Law Dictionary puts it, a threat is “a declaration of one’s *purpose or intention* to work injury to the person, property, or rights of another.”<sup>27</sup> A “true” threat is something of a redundancy, then, as the “true” encapsulates the intention of the declarant threatener; that is, as the Supreme Court has said, “[t]he ‘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 (say, ‘I am going to kill you for showing up late.’)”<sup>28</sup> What is required with regard to MCL 750.543m is simply a definition of the

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<sup>25</sup> M Crim JI 38.4. There are also use notes to the instruction:

1. Drawn from M Crim JI 21.3 and dictionary definitions.
2. Under MCL 750.543b(a)(I), an act of terrorism requires a “violent felony.” The definitional statute provides in MCL 750.543b(h) that a “violent felony” is one that has an element of the use, attempted use, or threatened use of physical force against an individual, or of the use, attempted use, or threatened use of a harmful biological substance, a harmful biological device, a harmful chemical substance, a harmful chemical device, a harmful radioactive substance, a harmful radioactive device, an explosive device, or an incendiary device.
3. The definition of “dangerous to human life” is found at MCL 750.543b(b).

Adopted August 1, 2020.

<sup>26</sup> Merriam-Webster Dictionary (emphasis supplied).

<sup>27</sup> Black’s Law Dictionary (emphasis supplied).

<sup>28</sup> *Counterman*, 143 S. Ct. at 2114.

term employed in the statute—threat—according to ordinary usage, and in accordance with First Amendment requirements as laid out by the Supreme Court.

**2. MCL 750.543m requires proof of true or actual threats as required by *Counterman***

The People will not here repeat the review of United States Supreme Court threat decisions contained in their original brief, but limit themselves to *Counterman*.

*Counterman* involved a statute prohibiting a form of stalking:

(1) A person commits stalking if directly, or indirectly through another person, the person knowingly: \*\*\*\*\*

(c) Repeatedly follows, approaches, contacts, places under surveillance, or makes *any form of communication* with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would *cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress.*<sup>29</sup>

The issue was whether the jury must be instructed that defendant possessed some form of *mens rea*. The State argued that it was sufficient if it showed that a reasonable person—the recipient, not the maker—would regard the statement made as a threat of violence, while the defendant argued that under the First Amendment the speaker must intend or know the threatening nature of the statement.<sup>30</sup> The instructions given did not include a definition of “true threat.”<sup>31</sup> The prosecution was thus required only to show that a reasonable person would have viewed the Facebook messages as threatening, with no need to show that the defendant had any kind of actual intent to threaten, and on

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<sup>29</sup> Colo. Rev. Stat. Ann. § 18-3-602 (emphasis supplied).

<sup>30</sup> *Counterman*, 143 S. Ct. at 2133 (Barrett, J., dissenting).

<sup>31</sup> *People v. Counterman*, 497 P.3d 1039, 1050 (Colo. App., 2021), vacated and remanded sub nom. *Counterman v. Colorado*, 600 U.S. 66, 143 S. Ct. 2106, 216 L. Ed. 2d 775 (2023).

appeal by the defendant from conviction the Colorado Court of Appeals “decline[d] today to say that a speaker’s subjective intent to threaten is necessary” under the First Amendment.<sup>32</sup>

The Supreme Court held that some mens rea was required, and after canvassing the possible types of *mens rea*, concluded that *recklessness* is the appropriate standard, where a person “consciously disregards a substantial and unjustifiable risk that the conduct will cause harm to another,” so that in the threats context, “it means that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”<sup>33</sup> Because *Counterman* was convicted with the prosecution only required to prove that a reasonable person/recipient would *understand* his statements as threats, his conviction violated the First Amendment and was vacated.<sup>34</sup>

*Counterman*, and cases like it, are post-conviction cases, resulting in reversal of convictions and *remand for trial with instructions consistent with Counterman* but not, as here, a finding that the statute involved was facially unconstitutional.

- [W]e reverse the judgment of the trial court, and remand the case for a new trial. On retrial, the court should instruct the jury on the elements of true threats and recklessness consistent with *Counterman*.<sup>35</sup>
- Where a party contends a statute is unconstitutional on its face, that party will prevail only if there is no set of circumstances in which a constitutional application of the statute is possible. . . . *We hold that RCW 9A.46.020<sub>1</sub> remains constitutional on its face because we can recognize that Washington must now comply with Counterman’s articulation of what amounts to a true threat without undermining the statute. We need only*

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<sup>32</sup> 497 P.3d at 1050.

<sup>33</sup> *Counterman*, 143 S. Ct. at 2117.

<sup>34</sup> *Id.*, at 2119.

<sup>35</sup> *People v. Counterman*, No. 17CA1465, 2024 WL 3783589, at 3 (Colo. App. June 13, 2024) (unpublished decision).

hold, consistent with *Counterman*, that the State must prove the defendant was at least “aware that others could regard [the] statements as threatening violence and [delivered] them anyway.”<sup>36</sup>

- [W]e construe the statute to require that the Commonwealth prove beyond a reasonable doubt, inter alia, that the defendant acted with at least a mens rea of recklessness—that is, that the defendant consciously disregarded a substantial risk that the communication would be viewed as threatening violence and delivered it anyway. See *Counterman* . . . . Accordingly, we conclude that the threatening to commit a crime statute is not overbroad.<sup>37</sup>

#### D. Conclusion

A threat requires intent, as it is by definition “an expression of *intention* to inflict evil, injury, or damage.” As Black’s Law Dictionary puts it, a threat is “a declaration of one’s *purpose or intention* to work injury to the person, property, or rights of another.” What is required with regard to MCL 750.543m is simply a definition of the term employed in the statute—threat—according to ordinary usage that comports with First Amendment requirements as laid out by the Supreme Court. The People believe that M Crim JI. 38.4 accomplishes that in two respects—the instruction tells the jury that the threat 1) must have been a true threat, and explains that which is *not a true threat*, something like idle talk, or a statement made in jest, or a political comment, leaving only an “intentional” or “true” or “actual” threat, and 2) the threat “must have been made under circumstances where a reasonable person would think *that*

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<sup>36</sup> *State v. Calloway*, 550 P.3d 77, 84, 86 (Wash.App., 2024), review granted, 559 P.3d 1023 (Wash. 2024) (emphasis supplied) (cleaned up).

See also *State v. Dagnon*, 31 Wash. App. 2d 1043, 2024 WL 3043271, at 4 (Wash. Ct. App., 2024), as amended on reconsideration (July 30, 2024), reversing because of an improper instruction under *Counterman* and remanding for a new trial, noting that the instruction given at trial “was based on a Washington pattern jury instruction that has since been revised to incorporate the rule *Counterman* announced. In defining a true ‘threat,’ the revised instruction states that ‘the speaker must know of and disregard a substantial risk that the statement or act would be interpreted’ as ‘a serious expression of intention to carry out the threat.’ Washington Pattern Jury Instructions: Criminal 2.24 (updated Jan. 2024),”

<sup>37</sup> *Commonwealth v. Cruz*, 247 N.E.3d 25, 30–31 (Mass., 2024).

*others* may take the threat seriously as expressing an intent to inflict harm or damage,” so the jury is informed that the threat must be serious, not idle talk or hyperbole, and, not that the *listener* might reasonably take it to be an expression of an intent to work injury—the so-called “objective” test—but that the *declarant threatener* would understand that the language used would cause *others* reasonably to take the threat seriously as expressing an intent to inflict harm or injury—the so-called “subjective” test endorsed by *Counterman*. But the safest course likely is, as other states have done, use of the recklessness language of *Counterman* in the instruction:

A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances *where the defendant was aware that others could regard the statement[s] as threatening harm or injury and delivered it/them anyway*.<sup>38</sup>

Using this language, the explanation of the meaning of “threat” comports precisely with the First Amendment as explained by the United States Supreme Court. Consistent with its duty to “adopt any construction of a statute other than one that renders it unconstitutional if that construction is ‘fairly possible,’”<sup>39</sup> this court should uphold the statute and reinstate the case, allowing the case to proceed to trial under appropriate instructions.

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<sup>38</sup> *Counterman*, 143 S. Ct. at 2117.

<sup>39</sup> *Sole*, at 421.

**Relief**

Wherefore, the People request that the improper order of dismissal be set aside, the statute upheld, and the case remanded for trial with proper instructions to be given the jury.

Respectfully submitted,

KYM L. WORTHY  
Prosecuting Attorney  
County of Wayne

JON P. WOJTALA  
Chief, Research, Training, and Appeals

/S/  
**TIMOTHY A. BAUGHMAN**  
**(P24381)**  
Special Assistant Prosecuting Attorney  
5301 Russell St. Fl. 2  
Detroit, Michigan 48211  
313 224-5792

**Certificate of Compliance**

I certify that the foregoing brief text font is 12 point set to 150% line spacing. This document contains 5176 countable words.

*/s/ Timothy A. Baughman*

**TIMOTHY A. BAUGHMAN (P24381)**  
Special Assistant Prosecuting Attorney



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 13

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee,*

COA Docket No. 371542  
MSC Docket No. 168181  
Lower Ct.: Wayne County Circuit Court  
Lower Ct. Case No: 24-001354-01-FH

vs.

MICHAEL JOSEPH KVASNICKA,

*Defendant-Appellant.*



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

ffwplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROSECUTOR'S OFC.  
Timothy A. Baughman, P24381  
*Special Assistant Prosecuting Attorney*  
Wayne County Justice Center  
5301 Russell St., Ste. 200  
Detroit, MI 48211  
(313) 224-5792  
[tbaughman@waynecounty.com](mailto:tbaughman@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant/Appellant*  
18538 Mack Avenue  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfowler@gmail.com](mailto:aimeenfowler@gmail.com)  
[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

**DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF**  
**ON REMAND FROM THE MICHIGAN SUPREME COURT**

***ORAL ARGUMENT REQUESTED***

***\*\*\*This appeal involves a claim that a  
state statute is facially unconstitutional.***

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DODSON FOWLER WILLIAMS & NESI, PLC

Main Office

18538 Mack Ave. Grosse Pointe Farms, MI, 48236

(313) 458-8276 (313) 469-7085 (Fax)

Village Office

722 Notre Dame Grosse Pointe, MI 48230

(313) 886-5769 (313) 886-5851 (Fax)

ffwplc.com

Attorneys

Nathan A. Dodson, Esq. Aimee M. Fowler, Esq. Daniel J. Williams, Esq. Christopher J. Nesi, Esq. Michael Wightman, Esq.

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**STATEMENT OF QUESTION PRESENTED**

- I. Did the Court of Appeals correctly strike down M.C.L. §750.543m as facially unconstitutional because the statute fails to meet the requirements of the First Amendment in prosecuting “true threats” where M.C.L. §750.543m improperly permits prosecution of an individual Defendant without application of a subjective intent *mens rea* requirement, as established by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66; 143 S.Ct. 2106; 216 L.Ed.2d 775 (2023)?

**Plaintiff-Appellant Answers: NO**

**Defendant-Appellee Answers: YES**

**The Court of Appeals Answers: YES**

**STATEMENT OF JURISDICTION**

The court has continuing jurisdiction over this matter for the reasons previously submitted by Appellant, and additionally, based upon an order from the Michigan Supreme Court remanding this matter for further consideration.

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**STATEMENT OF FACTS**

The Government has charged Defendant-Appellant (hereinafter “Kvasnicka”) with two felony counts: Count 1 – False Report or Threat of Terrorism/Terrorist Act; and Count 2 – Using Computer to Commit Crime - 20 Years or More. Kvasnicka, who was diagnosed with autism spectrum disorder at five (5) years old, is accused of sending threatening communications on a social media messenger app (TikTok Messenger). The statements, wherein Kvasnicka allegedly threatened to shoot up a school, were allegedly sent on September 16, 2023, but were not reported to police until the following day. A search warrant was executed on September 17, 2023, at Kvasnicka’s home, where he resides with his father. No firearms or any other such devices were recovered, but Defendant was nevertheless placed under arrest. Defendant’s father repeatedly told detectives about Kvasnicka’s autism spectrum disorder diagnosis, and his inability to comprehend conversation. Despite knowing of his disability, the Detectives took a statement from Kvasnicka, without any additional safeguards that would be required by the Fifth Amendment or the Americans with Disabilities Act.

In the District Court, Kvasnicka raised challenges to his competency and to the constitutionality of the M.C.L. §750.543m. The District Court held a hearing regarding Defendant’s competency on February 27, 2024, hearing from competing experts. The experts both agreed that Defendant suffered from autism and that he had suffered from autism his entire life. The experts disagreed about the ultimate issue: Kvasnicka’s competency to stand trial. Ultimately, the District Court deemed Kvasnicka competent. Kvasnicka then filed his motion to dismiss before the District Court, which heard arguments on March 5, 2024, and ultimately denied the motion. At that time, Kvasnicka waived his right to a preliminary examination and was bound over to the Circuit Court.



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

ffwplc.com

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

Kvasnicka was arraigned before the Honorable Deborah Thomas in Circuit Court on March 12, 2024, at which time the matter was blind drawn to the Honorable Shannon N. Walker. On March 21, 2024, the Circuit Court held a calendar conference, set preliminary dates and heard a motion for reduction of bond. The Circuit Court denied that motion, referring the matter to pre-trial services. On May 6, 2024, Kvasnicka filed two motions: namely, a motion to dismiss on grounds that M.C.L. §750.543m violates the First Amendment as interpreted by *Counterman*, 600 U.S. 66; 143 S.Ct. 2106; 216 L.Ed.2d 775 (2023); and a motion to suppress Defendant's statement. The Circuit Court originally set these matters for hearing on May 13, 2024, but the parties agreed to have them heard on May 24, 2024. On May 24, 2024, the parties appeared, but the Government had not yet filed answers to the motions. The Court adjourned the hearings and permitted Kvasnicka to make a renewed motion for reduction of bond. The Court granted Kvasnicka's motion and reduced his bond at that time. The Court ordered the parties to return on June 14, 2024, for the motion hearings and for a Final Conference.

The Government untimely filed its responses to Defendant's motions on June 13, 2024, after 5:00 PM. The parties appeared for motion hearings on June 14, 2024. The Court heard lengthy arguments and determined that it would deny Kvasnicka's motion to dismiss and grant in part Kvasnicka's motion to suppress the statements. Kvasnicka made an oral motion to stay the proceedings in the trial court, which was denied. The Court entered a written order denying Kvasnicka's motion to dismiss on June 14, 2024, and also entered a written order denying Kvasnicka's oral motion to stay the proceedings.

Kvasnicka timely filed an interlocutory application for leave to appeal. The People did not file a brief in opposition to the application. The Court of Appeals granted leave on October 10, 2024. Kvasnicka filed his Brief on November 11, 2024. On December 11, 2024, the Court of

Appeals entered an Order granting an extension of time pursuant to motion filed by Kvasnicka. The prosecution filed an untimely response brief on December 16, 2024. No extension of time for the Government's brief was requested, and the Government did not seek to have its right to oral argument reinstated. Oral argument was held on February 5, 2025. Kvasnicka's counsel was present and provided argument.

On February 13, 2025, the Court of Appeals issued a published opinion reversing the trial court, determining that M.C.L. §750.543m was unconstitutional on its face, and ordered the trial court to dismiss the case against Kvasnicka. The Government filed an application for leave to appeal with this Court on February 20, 2025, along with a motion to stay the proceedings and a motion for immediate consideration. On February 24, 2025, the Circuit Court entered an order dismissing the charges against Kvasnicka in compliance with the Opinion and Order from the Court of Appeals. The Attorney General's office filed an Amicus Curiae brief in support of the Government's brief on February 28, 2025. Kvasnicka timely filed a response to the Government's application. On March 28, 2025, the Michigan Supreme Court entered an order taking no position with regards to the ultimate issue of the statute's constitutionality, while also vacating this Court's opinion and order entered on February 13, 2025, and ordering the matter remanded for additional consideration. Both parties filed motions for supplemental briefing based upon the Michigan Supreme Court's March 28, 2025, which were granted by order on May 1, 2025. The Government filed their supplemental brief contemporaneously with their motion. This court's May 1, 2025, order required Appellant Kvasnicka to submit his brief within fourteen days of the entry of the order, or by May 15, 2025. Kvasnicka now timely submits his supplemental brief.

#### **STANDARD OF REVIEW**

This Court reviews *de novo* a trial court's determinations regarding a challenge to the

constitutionality of a statute. *In re Tem*, 343 Mich. App. 171; 996 N.W.2d 850 (2022); citing *Dorman v. Clinton Township*, 269 Mich. App. 638, 644; 714 N.W.2d 350 (2006). Statutes enjoy the presumption of constitutionality. *Johnson v. Harnischfeger*, 414 Mich. 102, 112; 323 N.W.2d 912 (1982); *Builders Square v. Dep't of Agriculture*, 176 Mich. App. 494, 496; 440 N.W.2d 639 (1989). Courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent. *Rohan v. Detroit Racing Ass'n*, 314 Mich. 326, 342; 22 N.W.2d 433 (1946). The party challenging a statute's constitutionality cannot merely claim unconstitutionality but has the burden of proving its invalidity. *People v. Abraham*, 256 Mich. App. 265, 280; 662 N.W.2d 836 (2003), and must establish that no circumstances exist under which it would be valid. *Council of Orgs v. Governor*, 455 Mich. 557, 568; 566 N.W.2d 208.

#### **LAW AND ARGUMENT**

In reviewing the Government's brief on remand, it is the inimitable Yogi Berra who sums up Appellant's reaction best: "It's DeJa'Vu all over again." While the Michigan Supreme Court has remanded this matter for this court to reconsider its prior opinion through several additional lenses, the Government has trotted out the same weary draft horse that previously failed to summit the proverbial hill. Just as then, the Government's arguments, even in light of the Michigan Supreme Court's additional consideration, simply don't hold weight. M.C.L. §750.543m is facially unconstitutional, and no matter what lipstick is applied, subsection "m" is a hog whose only destiny is a trip down the conveyor belt of constitutional obsolescence.

The Michigan Supreme Court remanded and directed that this court: "address the proper interpretation of M.C.L. §750.543m in light of" five specific considerations. Those are:

1. M.C.L. §750.543z which provides that a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution in a manner that violates any constitutional provision; and

2. The constitutional-doubt canon; but also,
3. Whether it is appropriate to adopt a limiting construction of M.C.L. §750.543m to remedy any remaining constitutional deficiency;
4. If so, what should that limiting construction be;
5. Did the Wayne County Circuit Court abuse its discretion by dismissing the case without prejudice on February 24, 2025, while an application for leave to appeal remained pending before the Michigan Supreme Court.

*People v. Kvasnicka*, MSC Docket Number 168181, Order of the Michigan Supreme Court, 3.28.2025. First, Appellant notes that in reviewing this Court’s prior opinion, these issues appear to have been addressed, though perhaps indirectly. Further, many of these issues were raised by the Government in its responsive pleadings submitted previously to this Court prior to issuance of the February 13, 2025, Opinion and Order<sup>1</sup>. Yet, even in light of the Michigan Supreme Court’s considerations, Appellant argues the outcome of this matter remains inevitable: M.C.L. §750.543m is unconstitutional on its face, and there is no reasonable construction that would render the statute constitutional given the controlling precedent in *Counterman v. Colorado*, 600 U.S. 66 (2023).

**A. M.C.L. §750.543m in Light of M.C.L. §750.543z and the Constitutional Doubt Canon**

*I. M.C.L. §750.543z*

Here, Appellant remains thoroughly perplexed, much as it did when the prosecution first raised this argument in its brief. Beginning with the language of the specific statutory sections, is both appropriate and also, Appellant believes, enlightening as to the nature of the continuing perplexion. M.C.L. §750.543m provides:

---

<sup>1</sup> Perhaps if the Government had not filed its response late and had failed to make any effort to reinstate the People’s right to oral argument, these matters could have been more deeply addressed by questions from this Court. Alas, that did not happen, resulting in our having to reappear before this Court, to once again explain why, regardless of how the Government desires to try and toss sand into the gears, the Government cannot change the fact that water is wet.

**750.543m Making terrorist threat or false report of terrorism; intent or capability as defense prohibited; violation as felony; penalty.**

Sec. 543m.

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) Threatens to commit an act of terrorism and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

(3) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than \$20,000.00, or both.

M.C.L. §750.543m. The Michigan Supreme Court has instructed this Court to review M.C.L. §750.543m in light of M.C.L. §750.543z, which provides as follows:

**750.543z Constitutionally protected conduct; prosecution prohibited.**

Sec. 543z.

Notwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.

M.C.L. §750.543z.

Appellant, frankly, fails to understand the connection. The argument proffered by Appellant is that section “m” of the statute is unconstitutional based upon the requirements set forth in *Counterman, supra*. If Appellant is correct, all section “z” states is that the Government cannot prosecute any person under the statute if doing so would violate the First Amendment. In its order of February 13, 2025, this Court did not strike down the entirety of M.C.L. §750.543. Rather, it only struck down M.C.L. §750.543m as being facially unconstitutional. As such, the only way that M.C.L. §750.543z would apply, would be if the Government tried to prosecute a

person under section “m” AFTER it was found to be unconstitutional. Otherwise, subsection “z” does nothing to assist in the clarification of subsection “m” and its constitutionality or lack thereof.

However, the Supreme Court asked that M.C.L. §750.543m be reviewed in light of M.C.L. §750.543z **and** the constitutional doubt canon. Standing alone, section “z” of the statute and section “m” of the statute simply seem to work in harmony with each other under this court’s February 13, 2025, order finding section “m” unconstitutional. Appellant asserts, as discussed below, assessing section “m” in light of section “z” and the constitutional doubt canon, does not change the appropriateness of this court’s determination to find subsection “m” unconstitutional under the First Amendment under *Counterman*.

## 2. Constitutional Doubt Canon

In their order, the Michigan Supreme Court referenced the decision of *Sole v. Mich. Econ. Dev. Corp.* 509 Mich. 406 (2022) with regard to the constitutional doubt canon, however, the jurisprudence in this area is of significantly older vintage. As the Court noted, the constitutional doubt canon is implicated “when the validity of an act ... is drawn in question and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Sole, supra.* at 419 (2022)(citing *Workman v. Detroit Auto Inter-Ins. Exchange*, 404 Mich. 477, 508; 274 N.W.2d 373 (1979); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348; 56 S.Ct. 466; 80 L.Ed 688 (1936)). Further, under the canon’s jurisprudence courts are also required to operate with the presumption that the Legislature did not intend to enact a statute that “raises serious constitutional doubts.” *Sole, supra.* at 419 (2022)(citing *Clark v. Martinez* 543 U.S. 371, 381; 125 S.Ct. 716; 160 L.Ed.2d 734 (2005)).

The United States Supreme Court has provided clarity on the purpose and intent of the

doctrine, and how Courts should apply the canon (or not) where constitutional questions arise. “The canon is not a method of adjudicating constitutional questions by other means (citation omitted). Indeed, one of the canon’s chief justifications is that it allows courts to *avoid* the decision on constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez, supra.* at 381 (2005). Put more plainly, courts must presume that the legislative body did not intend to pass a law that violated the Constitution, and the Court, in determining the constitutionality of a statute, must try and determine if there is a construction of the statute that may be reasonably applied so as to avoid the ultimate question of constitutionality in the first place.

*a. Legislative Intent*

Here, Appellant asserts the legislature did not *intend* to enact a law that violated the First Amendment. Without wasting time on rhetorical arguments, the reason for this is seemingly straightforward. As appellant noted in its original brief to the Court, the State statute at issue here was passed in 2002, as part of a nationwide series of laws enacted by both the State and Federal governments to allow better detection, prevention, and prosecution of terrorism and threats of terrorism. However, as this court is aware, the law is a fluid thing, and as the wide river of First Amendment decisions continues to carve its course through our jurisprudence, statues that were passed with the best of intentions and constitutional fortitude, find themselves swept away in an unexpected flood. The *Counterman* decision was not issued until June of 2023, and it was only then that the cracks in the constitutional foundations of M.C.L. §750.543m were revealed. As such, there is no reason to presume that the legislature intended to enact an unconstitutional statute, but rather, what had presumptively been constitutional at the time it was passed, fell into

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unconstitutionality based upon a ruling from the United States Supreme Court over which the legislature had no control, and no ability to anticipate at the time of the act's passage. As such, there is sufficient legal basis for the Court to move on to the second prong of the canon: namely, is there a construction of the statute that can be reasonably had, which would permit the constitutional question to be avoided, while rendering an appropriate result.

*b. Statutory Construction*

The constitutional doubt canon requires an appellate court to try and find any other reasonable construction for a statute that would allow its constitutionality to be preserved, thereby avoiding the constitutional question in the first place. Here, Appellant asserts this court did that when it issued its first opinion in this matter on February 13, 2025. Furthermore, the language in the holding in *Counterman v. Colorado* clearly establishes that the plain language of the statute is constitutionally deficient, in that, it fails to account for the *mens rea* of the Defendant with regard to the conveyance of a threat that would fall under the auspices of the Act. Appellant's entire argument rests upon the fact that it isn't the words in the statute, or their interpretation that are the problem. Rather, just as with the Colorado statute at issue in *Counterman*, it is the language that is not contained in the statute, which cannot be reasonably interpreted or inferred, that creates the constitutional problem.

Looking to the actual language of the statute, it is devoid of any reference to a Defendant's subjective intent when the threat was communicated. While the statute uses the term "threat" that term is not included in the definitional section of the act, found in M.C.L. §750.543b. In *Counterman*, the United States Supreme Court addressed the Government's purported fix, to simply apply the dictionary definition of the term, which carries an implied subjective intent, and dismissed it out of hand.

If courts were at liberty to redefine what counts as a “threat” or “defamation” at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing inadvertent threats as “true threats.” This Court’s prior definition of the word “threat” in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U.S., at 733, 135 S. Ct. 2001, 192 L. Ed. 2d 1, does not tell us the scope of “true threats” for First Amendment purposes. *Elonis* itself made clear that it did “not . . . consider any First Amendment issues.” *Id.*, at 740, 135 S. Ct. 2001, 192 L. Ed. 2d 1. Instead, a careful examination of this Court’s true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

*Counterman*, *supra*. at 90 (2023)(citing *Elonis v. United States*, 575 U.S. 723; 135 S.Ct. 2001; 192 L.Ed.2d 1 (2015)). The Court’s position was very clear. Dictionary definitions of the word “threat” simply do not apply to the scope of “true threats” for First Amendment purposes, and do not fully encompass the legal standard for what constitutes a “true threat”. The Court, therefore, dismissed any such argument, essentially, out of hand.

Further, by determining the Colorado statute was unconstitutional, despite using the word “threat” seven times, because it did not contain the necessary subjective intent requirement, the Supreme Court, for all intents and purposes, dismissed the notion that the simple definition of the word “threat” as found in the dictionary, could provide an interpretation of the statute that saved it from constitutional failure under the First Amendment. For reference, the Colorado statute provided:

Section 18-3-602 - Stalking - penalty - definitions - Vonnie's law:

**(1)** A person commits stalking if directly, or indirectly through another person, the person knowingly:

**(a)** Makes a credible threat to another person and, in connection with the threat, repeatedly follows, approaches, contacts, or places under surveillance that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship; or

(b) Makes a credible threat to another person and, in connection with the threat, repeatedly makes any form of communication with that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship, regardless of whether a conversation ensues; or

(c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress. For purposes of this paragraph (c), a victim need not show that he or she received professional treatment or counseling to show that he or she suffered serious emotional distress.

(2) For the purposes of this part 6:

(a) Conduct "in connection with" a credible threat means acts that further, advance, promote, or have a continuity of purpose, and may occur before, during, or after the credible threat.

(b) "Credible threat" means a threat, physical action, or repeated conduct that would cause a reasonable person to be in fear for the person's safety or the safety of his or her immediate family or of someone with whom the person has or has had a continuing relationship. The threat need not be directly expressed if the totality of the conduct would cause a reasonable person such fear.

(c) "Immediate family" includes the person's spouse and the person's parent, grandparent, sibling, or child.

(d) "Repeated" or "repeatedly" means on more than one occasion.

(3) A person who commits stalking:

(a) Commits a class 5 felony for a first offense except as otherwise provided in subsection (5) of this section; or

(b) Commits a class 4 felony for a second or subsequent offense, if the offense occurs within seven years after the date of a prior offense for which the person was convicted.

(4) Stalking is an extraordinary risk crime that is subject to the modified presumptive sentencing range specified in section 18-1.3-401(10).

CO Code §18-3-602 (2022). Surely, the Justices of the United States Supreme Court could have

opened the dictionary, as the Government suggests, found the meaning of the word “threat,” and saved the Colorado statute. Such is not the way of things, unfortunately for the Government, which still purports this dictionary application is a “reasonable interpretation” of the statutory language, which avoids the constitutional problem as required by the constitutional doubt canon. However, upon closer review, this is simply a regurgitation of the Government’s prior position to this Court, and the answer from this panel should remain the same.

The proposed interpretation by the Government is not reasonable, and the only body with appropriate authority to fix the statute’s constitutional defect(s) is the legislature. The Government continues to seek the short cut, easy way out approach, asking this Court to simply look at the dictionary definition of the word “threat” and from that, imply or extrapolate that the necessary subjective intent requirement is plainly understood. While Appellant appreciates the semantics of the Government’s position, it fails to appreciate that the Court in *Counterman* was posed with the same argument and found it wholly deficient. Further, it fails to account for the actual First Amendment problem that is faced here. This court’s prior decision clearly demonstrates the issues raised by the Michigan Supreme Court were already in the scope of this court’s decision-making.

**On appeal, the prosecution turns to the dictionary definition of “threat,” noting that multiple dictionaries indicate that a threat is an expression of intent to inflict harm.** It then directs this Court to M Crim JI 38.4(3), arguing that it requires the jury to find that the defendant made a true threat and that a subjective-intent element is included in the definition of such a threat. M Crim JI 38.4(3) provides that the defendant’s threat of an act of terrorism does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. *It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.* [M Crim JI 38.43(3) (emphasis added).]

The prosecution contends that this instruction requires more than a reckless state of mind because it requires the jury to find the defendant understood that the language he used would reasonably cause others to believe that he was expressing an intent

to inflict harm or damage. The prosecution is incorrect. Although the last sentence asks the jury to consider how the threat is perceived by “others,” its reference to a reasonable person makes clear that the jury is tasked with deciding what a reasonable person in the defendant’s shoes would have thought, not necessarily what the defendant would have thought himself. This language is not aligned with the *Counterman* standard, which requires the prosecution to show a defendant’s subjective intent, by at least a standard of recklessness. *Counterman*, 600 US at 72-79.

...

MCL 750.543m provides that “[a] person is guilty of making a terrorist threat . . . if the person . . . [t]hreatens to commit an act of terrorism and communicates the threat to any other person.” Notably, the statute does not provide that the defendant has to purposefully, knowingly, or recklessly threaten to communicate an act of terrorism to another person. Rather, it is silent as to what state-of-mind the defendant must have when he “threatens to commit an act of terrorism.” Instead, it is the “act of terrorism” definition that includes a specific intent requirement. MCL 750.543b provides that the phrase “act of terrorism” requires that *the act* be one that “the person knows or has reason to know is dangerous to human life” and that *the act* be one that “is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.” Although consideration of MCL 750.543m and the definition of “act of terrorism” shows the Legislature’s intent to only prohibit true threats, *Osantowski*, 274 Mich App at 602-603, the statute does not require the prosecution to prove that the defendant made the threat recklessly, i.e., that he “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman*, 600 US at 69.

In summary, because there is no statutory language suggesting that the prosecutor must prove that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence, we conclude that MCL 750.543m(1)(a)(i) is facially unconstitutional. Accordingly, we reverse the court’s order denying the motion to dismiss the charges against Kvasnicka and remand for entry of an order dismissing the charges.

*People v. Kvasnicka*, \_\_\_ Mich. App. \_\_\_; \_\_\_ N.W.2d \_\_\_ (Slip. Op. at 4-5, 2.13.2025)(emphasis added). Appellant sees no reason why, even looking at the Supreme Court’s requests to look at the statute with the lens of M.C.L. §750.543z and the constitutional doubt canon in mind, this Court’s reasoning from the prior opinion would change. Of import, assuming that the Government argued that the subjective intent element found in the definition of the term “act of terrorism” found in

M.C.L. §750.543b could be bootstrapped to apply to the term “threat” found in M.C.L. §750.543m, that argument would also fail, because it would create a self-contradiction within the statute. M.C.L. §750.543m(2) states: “(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.” Defendant’s intent or capability of committing the act of terrorism cannot be precluded by the statute and also bootstrapped into the statute as a constitutional savings clause.

Even looking at an application of M.C.L. §750.543z and the constitutional doubt canon together, and assuming arguendo an application where this court could simply apply M.C.L. §750.543z’s prohibition to this case only, dismiss the underlying complaint, and not address the constitutionality of the statute, the *Counterman* problem would still remain. Every prosecution brought under M.C.L. §750.543m hereafter would be subject to constitutional challenge, and M.C.L. §750.543m would continue to remain constitutionally unsound. Respectfully, how long would the constitutional doubt canon allow courts to bury their collective heads in the sand and refuse to address the inherent constitutional failings of the statute? How many appeals would have to be taken and placed on the dockets before the growing inefficiency of such an approach was incapable of being ignored? Much like most other things in life, simply ignoring the problem does not lead to positive resolution.

Such an argument and application simply result in a reductio ad absurdum. Application of the doctrine in this fashion might rid the system of the proverbial meddling priest, but then it sows the seeds for a whole crop of initiates in need of threshing. Simply put, application of the constitutional doubt canon (or as the U.S. Supreme Court has called it the constitutional avoidance canon), only multiplies the problem because there is no reasonable construction of the words as they exist within the present iteration of M.C.L. §750.543m that can provide constitutional grace.

The buck has to stop somewhere.

*c. Counterman Compared*

Counterman’s case, at the trial court level, is essentially a mirror image of the facts here. Note the similarities between M.C.L. §750.543m and CO Code §18-3-602. Both require a knowing communication. Both require that the communication put a reasonable person in fear of harm. Both are defined as extraordinary risk statutes punishable as serious felonies. Neither requires action on the part of a defendant beyond communication of words. Neither statute requires proof of a subjective intent on the part of the speaker.

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment’s protection. And a statement can count as such a threat based solely on its objective content. The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications. Colorado argues that there is no such requirement. Counterman contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. Counterman’s view, we decide today, is the more consistent with our precedent. **To combat the kind of chill he references, our decisions have often insisted on protecting even some historically unprotected speech through the adoption of a subjective mental-state element. We follow the same path today, holding that the State must prove in true-threats cases that the Defendant had some understanding of his statement’s threatening character. The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent we hold that a recklessness standard is enough.** Given that a subjective standard here shields speech not independently entitled to protection – and indeed posing real dangers – we do not require that the State prove the Defendant had any more specific intent to threaten the victim.”

*Counterman, supra.* 143 S.Ct. at 2113 (2023)(emphasis added). *Counterman* establishes a two-part analysis to “true threats” cases, previously applied in other First Amendment speech prosecutions: namely, the State must first prove that a Defendant understood the statement’s threatening character; and second, must prove that a defendant must have acted recklessly in making the communication.

M.C.L. §750.543m, fails this test on its face. To be convicted under the statute, a person need only “[t]hreaten to commit an act of terrorism and communicate the threat to any other person,” (M.C.L. §750.543m(1)(a)) OR “Knowingly make a false report of an act of terrorism and communicate the false report to any other person, knowing the report is false.” (M.C.L. §750.543m(1)(b)). The Government need prove only that Kvasnicka spoke certain words, and if the communication was a false report, that Kvasnicka knew the communication was false. There is no requirement that Kvasnicka understand the “statement’s threatening character.”

The Government is not required to prove “**that the Defendant had some understanding of his statement’s threatening character**” or the precise *mens rea* with which the Defendant acted. *Counterman, supra*. Instead, the Government is required to show only that the objective “reasonable person” would think that others may take the threat seriously, but not that the subjective, individual Defendant knew, or should have known. At the feet of that most infamous of objective standards, “the reasonable person,” is where this statute meets its demise when tested by the strictures of the First Amendment.

To address the argument made by the Government regarding the jury instructions, Kvasnicka notes that in their presently approved form, they simply provide additional, ancillary, evidence that the statute does not require a subjective intent, but rather is objective in nature.

#### **M Crim JI 38.4 Making a Terrorist Threat**

(1) The defendant is charged with the crime of making a threat to commit an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First that the defendant communicated with [identify recipient(s) of communication] by speech, writing, gestures, or conduct.

(3) Second, that during the course of the communication, the defendant threatened to commit an act of terrorism. A threat does not have to be stated in any particular terms but must express a warning of danger or harm. [Footnote Omitted]. Further,

it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.

M Crim JI 38.4 (Emphasis Added). The elements of the offense, as read to the jury, show no subjective intent *on the part of the Defendant* as a requirement for conviction. In short, all the Government need prove under M.C.L. §750,543m as written is that the Defendant said threatening words and that a reasonable person would think others may take the threat seriously. The Government then proposes that simply changing the words “reasonable person” to “Defendant” in the jury instructions are enough to save the statute. First, as this court noted previously, Appellant is not sure how a jury instruction can save a statute that fails to contain language the is mandated by the United States Supreme Court and the First Amendment. “When considering whether a statute is or is not constitutional, it is the words of the statute that must be examined, not the model jury instructions.” *Kvasnicka, supra.* at 4 (SlipOp. 2.13.2025)(citing *People v. Osantowski*, 274 Mich. App. 593, 601; 736 N.W.2d 289 (2007)(overturned on other grounds). Second, assuming arguendo the jury instruction was a magic panacea for an otherwise facially unconstitutional statute, the change proposed by the government alone would not be sufficient. The word “may” does not properly convey a standard of recklessness on the part of a Defendant, which is the required minimum *mens rea* required for criminalization of speech relative to “true threats” prosecutions per *Counterman*. Of course, this Court has already made clear that, other than perhaps providing context with regard to the intent of the legislature as to the meaning of the words in the statute, the jury instructions have no impact on this Court’s constitutional evaluation.

### **B. Policy Consequences Considered**

Kvasnicka recognizes that formally invalidating constitutionally unsound statutes like M.C.L. §750.543m may have certain unsavory consequences. The U.S. Supreme Court recognized

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this concern in *Counterman*, noting: “for a similar reason, the First Amendment demands proof of a defendant’s mindset to make out an obscenity case. Obscenity is obscenity whatever the purveyor’s mental state. But we have repeatedly recognized that punishment depends on a ‘vital element of scienter’ – often described as the defendant’s awareness of “the character and nature” of the materials he distributed.” *Counterman, supra.* at 143 S.Ct. 2115-2116 (2023); citing *Hamling v. United States*, 418 U.S. 886, 927-929; 102 S.Ct. 3409; 73 L.Ed.2d 1215 (1982). Similarly, a “true threat” is a form of “unprotected speech.” However, in order to properly punish such conduct as criminal, the Government must prove the element of scienter and cannot be provided a free pass to avoid that proof. “Yes, ‘obscene speech and writings are not protected.’ [Citation Omitted]. But punishing their distribution without regard to scienter would ‘have the collateral effect of inhibiting’ protected expression.” *Counterman, supra.* 143 U.S. at 2116 (2023); citing *Smith v. California*, 361 U.S. 147, 152; 80 S.Ct. 215; 4 L.Ed.2d 205 (1959).

Application of this principle here is straightforward. A Defendant cannot be convicted without proof of criminal scienter. The Courts have long established that in unprotected speech prosecutions, the Government must prove, *at a minimum*, reckless disregard on the part of a Defendant as it relates to the conduct complained of in the Government’s case. Defamation cases, obscenity cases and incitement to riot cases require proof of recklessness regarding a Defendant’s scienter. True threat statutes and prosecutions taken thereunder, must be subject to the same requirements and must contain express language of a subjective intent on the part of Defendant.

The same reasoning counsels in favor of requiring a subjective element in a true-threats case. This Court again must consider the prospect of chilling non-threatening expression, given the ordinary citizens predictable tendency to steer ‘wide of the unlawful zone.’ [Citation Omitted]. 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 legal costs – all those may lead him to swallow words that are in fact not true threats. Some 50 years ago, Justice Marshall made the point when reviewing a true-threats prosecution arguably involving only

political hyperbole. [Citation Omitted]. The Court in *Rogers* reversed the conviction on other grounds, but Justice Marshall focused on the danger of deterring non-threatening speech. An objective standard, turning only on how reasonable observers would construe a statement in context, would make people give threats ‘a wide berth.’ [Citation Omitted]. And so use of that standard would discourage the ‘uninhibited, robust, and wide-open debate that the First Amendment is intended to protect.’”

*Counterman, supra.* 143 S.Ct. at 2116 (2023); citing *Speiser v. Randall*, 357 U.S. 513, 527; 78 S.Ct. 1332; 2 L.Ed.2d 1460 (1958); *Rogers v. United States*, 422 U.S. 35; 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J. Concurring Opinion). Justice Marshall’s fears expressed so eloquently in his concurring opinion in *Rogers*, and the holdings of other non-protected speech cases, led the Court in *Counterman* to invalidate a defendant’s conviction under a true-threat statute where the Government obtained a conviction without having to prove any subjective intent or knowledge on the part of the defendant. Such an outcome was constitutionally abhorrent, and the Court applied the logic of those prior cases in explaining why it had no choice but to overturn the conviction.

The reasoning – and indeed some of the words – came straight from this Court’s decisions insisting on a subjective element in other unprotected-speech cases, whether involving defamation, incitement, or obscenity. No doubt, the approach in all of those cases has a cost: Even as it lessens chill of protected speech, it makes prosecution of otherwise proscribable, and often dangerous, communications harder. And the balance between those two effects may play out differently in different contexts, as the next part of this opinion discusses. But the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression.

*Counterman, supra.* 143 S.Ct. at 2117 (2023). Here, the Court need go no further in the *Counterman* decision to know and understand Michigan’s statute, as written, is unconstitutional, and this court acted properly when it previously struck down this statute in February. By invalidating the Colorado statute, the U.S. Supreme Court made clear that “true-threats” statutes and prosecutions cannot proceed on an objective “reasonable person” standard.

Further, M.C.L. §750.543m cannot withstand a constitutional challenge on First Amendment grounds, simply by use of a dictionary definition of the word “threat.” The fact that such a definition contains a dubious suggestion of a subjective intent on the part of the speaker falls far short of what the First Amendment requires. *Counterman* demands that the statute (and not its jury instruction) must clearly proscribe the conduct ***and*** that the Defendant’s subjective intent in making the communication, by a standard of at least recklessness, was for the words to cause the listener to be placed in fear. M.C.L. §750.543m contains no reference to the Defendant’s intent with regard to the communication itself.

**C. Did the trial court abuse its discretion in dismissing the case**

Finally, and as a separate matter, the Michigan Supreme Court requested a review on remand of whether the trial court abused its discretion by dismissing the case in the trial court while there was an appeal pending. The March 28, 2025, order from the Supreme Court specifically references M.C.R. 7.215(F)(1)(a) and M.C.R. 7.305(C)(6)(a). M.C.R. 7.215(F)(1)(a) provides:

(a) the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal in the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court.

Here, the trial court did not wait until after the time for filing an application for leave to appeal to the Supreme Court had passed, before it entered the order of dismissal. The Government has submitted copies of electronic mail communications that show the parties attempts to set up a review hearing with the Court after the February 13, 2025, opinion and order of this court was issued. The trial court issued an order of dismissal on February 28, 2025, based upon the opinion and order of this court. The time to file an application for leave to appeal in the Michigan Supreme Court after the issuance of an opinion and order from this Court is fifty-six (56) days pursuant to M.C.R. 7.305(C)(2). While Appellant cannot say whether the trial court received notice of the

filing of an application for leave to appeal by the Government, Appellant can say that the time frame under the Court Rules for this court's order to become effective had not passed, and the time for filing an application for leave to appeal had not been elapsed.

As to whether the trial court's dismissal under those circumstances constituted an abuse of discretion, Appellant can only say that the time had not elapsed and the Government had filed its application within the fifty-six days established by Court Rule. As such, the trial court's order of dismissal appears to have been issued in contravention to the Court Rules noted above. Under the circumstances, Appellant leaves the determination to this Court's good discretion and can only indicate that if a trial court issues an order in contravention of the Court Rules, there is at worst an argument that such an action is an abuse of discretion.

### CONCLUSION

Appellant comprehends no interpretation by which subsection "m" can be saved in light of *Counterman*. No reasonable or alternative meaning can be given to the words of M.C.L. §750.543m, in its present form, that would provide a constitutional safe harbor. While the constitutional doubt canon may instruct that Courts seek any reasonable means by which to avoid finding a statute facially unconstitutional, the doctrine is a presumption, not a mandate. Nor does the doctrine permit the judicial branch to take up the mantle of the legislative branch, and unilaterally add language to a statute, remove language from a statute, or modify the language of a statute. Such authority is solely the province of the Michigan legislature, and while this court and the Michigan Supreme Court have immense plenary powers to interpret statutes and the language therein, those austere bodies do not, respectfully, have the ability to exercise powers exclusively granted to the legislative branch of our government.

Further, the Government cannot provide any reasonable alternative reading of the

language of the statute that would render it constitutional. The Government attempts to raise the use of the common definition of the term “threat” found in the Random House dictionary and conflate into the statute a subjective intent requirement. The United States Supreme Court, however, has already said that such an argument fails to properly understand the complexity of the problem. The common definition of threat wasn’t sufficient to save the Colorado statute in *Counterman* and it isn’t sufficient to convert M.C.L. §750.543m to constitutional acceptability. The Government’s other positions either ask the Court to unilaterally change the words in the statute, thereby exceeding the plenary powers of the judicial branch, or to change the words of the jury instruction, which will then save the statute through modified practical application. Such a position, as this Court noted in its prior opinion has no basis in law and violates the tenets of statutory construction. Second, even assuming such an act could be engaged upon, the proposed change to the jury instruction the Government proposes, would not address the totality of the First Amendment problem. As such, the only possible outcome, based upon the language of subsection “m” is a determination of unconstitutionality and a finding that prosecutions under the subsection are henceforth barred. This court’s prior decision was correct at the time, and even in light of the additional considerations mandated by the Michigan Supreme Court’s order, is correct now. Appellant again asks this court to reverse the determination of the trial court, reaffirm its decision issued on February 13, 2025, and hold that M.C.L. §750.543m is unconstitutional based upon *Counterman* and the First Amendment’s protections, and order the case against Appellant be dismissed.

Respectfully Submitted,

DODSON FOWLER WILLIAMS & NESI

/s/ Daniel J. Williams, Esq.  
Daniel J. Williams, P72085

Aimee M. Fowler, P72736  
Attorneys for Defendant-Appellant  
18538 Mack Ave.  
Grosse Pointe Farms, MI 48236  
(313) 458-8276 / (313) 469-7085 (FAX)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfw@gmail.com](mailto:aimeenfw@gmail.com)  
[aspratt@dfwnlaw.com](mailto:aspratt@dfwnlaw.com) (Legal Asst.)

May 15, 2025

\*\*\* Word Count: 7,609



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 14

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 168181  
Plaintiff-Appellee, Court of Appeals No. 371542  
v Wayne Circuit Court  
No. 24-001354-FH

MICHAEL JOSEPH KVASNICKA,  
Defendant-Appellant.

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**MOTION OF MICHIGAN ATTORNEY GENERAL DANA NESSEL TO FILE  
AN AMICUS BRIEF IN SUPPORT OF THE WAYNE COUNTY  
PROSECUTOR ON OR BEFORE MAY 22, 2025**

The Michigan Attorney General Dana Nessel by and through her attorneys B. Eric Restuccia, Deputy Solicitor General, and John S. Pallas, Division Chief, consistent with MCL 7.212(H) asks this Court to allow the Michigan Attorney General to file an amicus brief in support of Wayne County and the constitutionality of Michigan’s law, MCL 750.543m, **on or before May 22, 2025**, and she states the following in support of her amicus:

1. On February 13, 2025, this Court issued a published decision in which it ruled that MCL 750.543m(1)(a) was “facially unconstitutional.” See slip op, pp 1, 5.
2. On February 20, 2025, the Wayne County Prosecutor filed an emergency application, asking the Michigan Supreme Court to grant her application, affirm the constitutionality of Michigan law, and to stay the precedential effect of the decision below.

3. On February 28, 2025, the Michigan Attorney General filed an amicus brief in support of Wayne County's application.

4. On March 28, 2025, the Michigan Supreme Court vacated this Court's judgment, and it remanded the case for further review, identifying five different legal points for this Court's consideration.

5. On April 2, 2025, the Wayne County Prosecutor moved to file a brief in support of its position and asked this Court to accept additional briefing.

6. On May 1, 2025, this Court granted the motion, accepted the brief for filing, and it provided 14 days in which Michael Kvasnicka could file his response.

7. On May 15, 2025, Kvasnicka filed his supplement.

8. As the chief law enforcement officer for the State of Michigan, see MCL 14.30; *Fieger v Cox*, 274 Mich App 449, 451 (2007), the Michigan Attorney General wishes to advance her arguments in support of Wayne's supplemental filing.

9. By court rule, the Michigan Attorney General may ordinarily file an amicus brief without motion, see MCR 7.212(H)(2)(a), but given the posture of this case – supplemental briefing on remand – where the court rules do not expressly identify this situation, the Michigan Attorney General thought it prudent to file a motion to file an amicus, and to file the brief within 21 days of this Court's order accepting Wayne County's brief, i.e., on or before May 22, 2025.

Wherefore, the Michigan Attorney General asks this Court to grant leave to allow her to file an amicus brief on or before May 22, 2025, in support of the Wayne County Prosecutor.

**CONCLUSION AND RELIEF REQUESTED**

This Court should grant the Michigan Attorney General’s motion to allow her to file an amicus brief in support of the Wayne County Prosecutor and in support of the constitutionality of Michigan law on or before May 22, 2025.

Respectfully submitted,

Dana Nessel  
Attorney General

Ann M. Sherman  
Solicitor General

/s B. Eric Restuccia

B. Eric Restuccia (P49550)  
Deputy Solicitor General

John S. Pallas  
Division Chief

Department of Attorney General  
P.O. Box 30212  
Lansing, MI 48909  
(517) 335-7628

Dated: May 16, 2025

**STATE OF MICHIGAN**

MI Court of Appeals

**Proof of Service**

<b>Case Title:</b> PEOPLE OF MI V MICHAEL JOSEPH KVASNICKA	<b>Case Number:</b> 371542
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1. Title(s) of the document(s) served:

<b>Filing Type</b>	<b>Document Title</b>
Motion - Amicus Brief	People v Kvasnicka -- COA Amicus Motion (Final)

2. On 05-16-2025, I served the document(s) described above on:

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Karishma Huber Wayne County Prosecutor's Office P82419	kgoel@waynecounty.com	e-Serve
Matthew Stoloff Wayne County Prosecutor's Office 83358	mstoloff@waynecounty.com	e-Serve
Baughman Timothy Wayne County Prosecutor's Office 24381	tbaughma@waynecounty.com	e-Serve
Daniel Williams Dodson Fowler Williams & Nesi P72085	danielnfw@gmail.com	e-Serve
Holly Gustafson Michigan Department of Attorney General	Gustafsonh@michigan.gov	e-Serve
Sharon McCarthy Dodson Fowler Williams & Nesi, PLC	smccarthy@dfwnlaw.com	e-Serve
Wayne County Prosecutors Office Appeals Division Wayne County Prosecutors Office	wcpaappeals@waynecounty.com	e-Serve
B. Eric Restuccia Michigan Department of Attorney General 49550	restucciae@michigan.gov	e-Serve

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05-16-2025  
Date

/s/ B. Eric Restuccia  
Signature

Michigan Department of Attorney General



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

[dfwnplc.com](http://dfwnplc.com)

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 15

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 168181  
Plaintiff-Appellee, Court of Appeals No. 371542  
Wayne Circuit Court  
v No. 24-001354-FH  
MICHAEL JOSEPH KVASNICKA,  
Defendant-Appellant.

---

**BRIEF OF AMICUS ATTORNEY GENERAL IN SUPPORT OF  
THE WAYNE COUNTY PROSECUTOR**

**ORAL ARGUMENT REQUESTED IF HELD BY COURT**

Dana Nessel  
Attorney General

Ann M. Sherman  
Solicitor General

B. Eric Restuccia (P49550)  
Deputy Solicitor General

John S. Pallas  
Division Chief

Attorneys for the Attorney General  
P.O. Box 30212  
Lansing, Michigan 48909  
(517) 335-7628

Dated: May 22, 2025

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## STATEMENT OF QUESTIONS PRESENTED

In its March 28, 2025 order, the Michigan Supreme Court remanded this matter to this Court asking it to address “the proper interpretation of MCL 750.543m in light of” five considerations:

- (1) MCL 750.543z, which provides that “a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”; and
- (2) the constitutional-doubt canon, see *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419–420 (2022).

The Court of Appeals shall also address:

- (3) whether it is appropriate to adopt a limiting construction of MCL 750.543m to remedy any remaining constitutional deficiency, see *People v Burkman*, 513 Mich 300, 340 (2024); see also *Osborne v Ohio*, 495 US 103, 115 (1990);
- (4) if so, what that limiting construction should be; and
- (5) whether the Wayne Circuit Court abused its discretion by dismissing the case without prejudice on February 24, 2025, where doing so necessarily implicated “aspects of the case involved in the interlocutory appeal” while an application for leave to appeal remained pending with this Court. *People v Scott*, 513 Mich 180, 200 (2024).

The Attorney General contends that the answer to the proper interpretation may be resolved based on the first two considerations, i.e., that the proper construction of Michigan’s anti-terrorism threat provision, MCL 750.543m(1)(a), requires proof of an intent to either “intimidate” or “influence” “through intimidation” in making a threat of a violent felony that the person “knows or has reason to know” would be dangerous to human life to be guilty of making a terrorist threat.

## STATUTES INVOLVED

### MCL 750.543m provides as follows:

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) *Threatens to commit an **act of terrorism*** and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.

[Emphasis added.]

### MCL 750.543b(a) further provides a definition of “act of terrorism,” which requires proof of a specific blameworthy state of mind:

(a) “Act of terrorism” means a *willful and deliberate* act that is ***all of the following***:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that *the person **knows or has reason to know*** is dangerous to human life.

(iii) An act that ***is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.***

[Emphasis added.]

### MCL 750.543z provides in full:

Notwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.

## STATEMENT OF INTEREST OF AMICUS CURIAE ATTORNEY GENERAL

The Michigan Attorney General is the chief law enforcement officer for the State of Michigan. *Fieger v Cox*, 274 Mich App 449, 451 (2007). She also provides supervisory authority for the prosecutors throughout the State of Michigan. See MCL 14.30. See also *People v Monaco*, 475 Mich 1222 (2006) (describing role of the Attorney General in the appellate courts, citing MCL 14.28); *People v Foster*, 377 Mich 233, 235 n1 (1966) (same).

The Michigan Attorney General also is invested in the role of defending the constitutionality of Michigan law. For this reason, in the federal courts she is informed when the constitutionality of law is drawn into question so that she may intervene to defend the law. See 28 USC 2403(B). See also FR App P 44(B) (“The clerk must then certify that fact to the attorney general of the State.”); FR Civ P 5.1(a)(2) (notice to the Attorney General if “a state statute is questioned”). The state court appellate rules provide for the same point. See MCR 7.204(D)(3)(c) (notification to the Attorney General).

The decision of this Court before remand found Michigan’s anti-terrorism threat provision, MCL 750.543m(1)(a), to be “facially unconstitutional.” *People v Kvasnicka*, \_\_\_ Mich App \_\_\_ (2025), slip op, pp 1, 5. The Attorney General argues that this ruling was incorrect for two reasons: (1) the statute expressly requires proof of a wrongful intent in its definition of “act of terrorism,” requiring proof of either an “inten[t]” to “intimidate” or “influence” “through intimidation;” and (2) the canons of construction would require construing such an intent even in the absence of this express language. This Court’s prior opinion erred in holding otherwise.

## INTRODUCTION

This is the second round of briefing in this case for the Court. The key language is to “threaten[]” an “act of terrorism,” which is defined in MCL 750.543b(a) as a “willful and deliberate act” that “is *intended*” “to intimidate or coerce” or “influence” “through intimidation or coercion” for a threat to commit a “violent felony” that the person “knows or has reason to know is dangerous to human life.” (Emphasis added.) Thus, in order to prove that a person has made a terrorist threat under MCL 750.543m(1)(a), the People must prove that the criminal defendant had the intent to intimidate or influence through intimidation in a willful and deliberate manner in making the threat of violence that is dangerous to human life. This requirement of proof meets constitutional standards.

This Court’s prior opinion erred in two distinct ways in holding that “there is *no statutory language suggesting* that the prosecutor must prove that the defendant *consciously disregarded a substantial risk* that his communications would be viewed as threatening violence.” Slip op, p 5 (emphasis added).

**First**, contrary to this Court’s prior ruling, the definition of “act of terrorism” requires a *higher* showing, not just of recklessness, but the People must prove that the criminal defendant “intended” to intimidate in making the threat of violence, that is both “willful and deliberate,” knowing or having reason to know that the threatened act was a violent felony that would be dangerous to human life. The definition of “act of terrorism” is replete with express language requiring proof of a wrongful intent, which makes clear that the threat must include a “knowledge” requirement consistent with the U.S. Supreme Court’s decision in *Counterman v Colorado*, 600 US 66 (2023).

*Second*, even if somehow this Court could overlook this express language, where a statute is silent on the issue of scienter, canons of construction presume the Legislature requires the criminal defendant to possess a culpable mental state regarding each of the elements to avoid criminalizing otherwise innocent conduct. Strict liability laws are disfavored, and unless the Legislature’s clear design is to impose strict liability, the Michigan courts interpret the law to require proof of a *mens rea* even where the statute’s text includes no express criminal-intent provision. While here the definition of the act threatened does require proof of a *mens rea* – “willful,” “deliberate,” “is intended,” and “knowing or has reason to know” – even if these four different express requirements were not present, the proper course would be to interpret this law to require a culpable state of mind. The Legislature did not intend the crime of making a threat to be a strict liability offense. On remand, this Court should affirm its constitutionality.

### ARGUMENT

- I. **The plain text of Michigan’s anti-terrorism threat law, MCL 750.543m, requires proof of a wrongful intent to intimidate by a threat of a violent felony that the defendant knows or has reason to know would be dangerous to human life, through the definition of “act of terrorism” in MCL 750.543b(a).**

The statutory language at issue here is clear in requiring proof of a culpable state of mind, i.e., the wrongful intent to intimidate by making a threat about a violent felony that the person knew or had reason to know would be dangerous to human life. The *mens rea* requirement is express in the statutory definition of the “act of terrorism” that is threatened. Even if it were not, the canons of construction would otherwise require this Court to interpret the law as requiring it. The prior opinion erred in its earlier holding, and this Court should affirm the law on remand.

A. **The statutory language at issue here requires proof of a guilty state of mind consistent with constitutional standards as articulated by the U.S. Supreme Court in *Counterman*.**

As noted above, the crime charged here is making a terrorist threat, which is a 20-year felony:

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) *Threatens to commit an **act of terrorism*** and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

[Emphasis added.]

While the crime of false report of terrorism in § (1)(b) requires proof of “knowingly” making a false report, the definition section of this Act provides a definition of “act of terrorism,” which supplies the requirements of proof of the scienter requirements in “threaten[ing]” to commit an act of terrorism:

(a) “Act of terrorism” means a *willful* and *deliberate* act that is ***all of the following***:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that *the person **knows or has reason to know*** is dangerous to human life.

(iii) An act that ***is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.***

[Emphasis added.]

In other words, the People are required to prove all three elements in proving that a person “threaten[ed]” to commit an act of terrorism, as the definition includes the requirement for a “willful” and “deliberate” act that the person “intended” (1) “to intimidate or coerce a civilian population” or (2) “influence or affect the conduct of government or a unit of government through intimidation or coercion,” MCL 750.543b(a)(iii), through an act that would be a violent felony, which the person “knows or has reason to know” is dangerous to human life. § 543b(a)(ii). This Court has already explained that reading § 543m(1)(a) in “conjunction” with § 543b(a) demonstrates that “the statutes [including § 543m(1)(a)] require the existence of an intent to ‘intimidate or coerce,’” and thus they did not run afoul of the First Amendment. See *People v Osantowski*, 274 Mich App 593, 603 (2007), reversed in part on other grounds, 481 Mich 103 (2008). While the Court explained that this does not require proof of “an intent for direct intimidation of a specific victim,” it does require proof of a “general intent” to communicate a true threat, i.e., “communicating to any other person a *serious* expression of intent to commit an act of terrorism.” *Id.* at 605, 606 (emphasis added). See also *People v Byczek*, 337 Mich App 173, 186 (2021) (citing *Osantowski*, 274 Mich App at 603, 605); *People v Gerhard*, 337 Mich App 680, 687 (2021). This is a culpable intent standard that complies with the U.S. Supreme Court’s decision in *Counterman v Colorado*, 600 US 66 (2023).

In *Counterman*, the U.S. Supreme Court identified three possible subjective culpable criminal intents that would be sufficient to sustain the constitutionality of a law that punished a true threat, as Michigan law does here:

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices.

[1] **Purpose** is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he “consciously desires” a result—so here, when he wants his words to be received as threats.

[2] Next down, though not often distinguished from purpose, is **knowledge**. A person acts knowingly when “he is aware that [a] result is practically certain to follow”—so here, when *he knows to a practical certainty that others will take his words as threats*.

[3] A greater gap separates those two from recklessness. A person acts **recklessly**, in the most common formulation, when he “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.” That standard involves insufficient concern with risk, rather than awareness of impending harm. But still, recklessness is morally culpable conduct, involving a “deliberate decision to endanger another.” *In the threats context, it means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.”*

[*Counterman*, 600 US at 78–79 (numbered brackets and paragraph breaks added; emphasis added; citations omitted).]

In brief, the three subjective standards are “purpose,” “knowledge,” and “reckless[ness],” i.e., “aware that others could regard his statements” as a threat and the perpetrator delivers them nonetheless.

In applying the definitions of *Counterman* to Michigan law, it is clear that in order to prove that a person “threaten[ed] to commit an act of terrorism,” see MCL 750.543m(1)(a), the People must prove that the person threatened to commit an act that was “willful” and “deliberate,” and that through the threat of a violent act that the person “knows or has reason to know” would be dangerous to human life, the person “intended to intimidate” or “intended” to “influence” “through intimidation or coercion.” MCL 750.543b(a)(iii). See also *Osantowski*, 274 Mich App at 603 (“requir[ing] the existence of an intent to ‘intimidate or coerce’”).

These requirements that the person making the threat be “deliberate” with a blameworthy “intent” are traditional hallmarks of subjective criminal intent. Indeed, the Michigan Supreme Court explained that the “proof of an intent to injure in order to establish an assault and battery” is a *mens rea* requirement that is “subjective” because it was “an intent to do ‘wrong.’” *People v Datema*, 448 Mich 585, 599 (1995).

That principle applies equally here, which requires the People to prove a wrongful intent in threatening the act, i.e., the intent to intimidate or the intent to influence through the use of intimidation. And the People must prove that the act the person threatened to commit has to be a violent felony, which the person “knows or has reason to know” would be dangerous to human life. MCL 750.543b(a)(ii). This likewise is consistent with the standards from *Counterman*, which notes for proof of knowledge that the person “*knows* to a practical certainty that others will take his words as threats.” *Counterman*, 600 US at 79 (emphasis added).

Moreover, the use of “willful” seems to be the paradigm of the culpable state of mind for recklessness, which appears the definition of gross negligence for manslaughter. See, e.g., *People v Goecke*, 457 Mich 442, 464 (1998) (“the intent to do an act in wanton and *wilful* disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm”) (emphasis added); *Datema*, 448 Mich at 598–599 (“negligence [for involuntary manslaughter] is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while wantonness or *recklessness*, in effect *wilfulness*, is characterized, as the words imply, by *wilfulness*.”) (emphasis added), quoting *People v Orr*, 243 Mich 300, 308 (1928).

The contrast to *Counterman* is notable. There, the U.S. Supreme Court explained that the prosecution would have to show that “a reasonable person would have viewed” the communication as “threatening.” *Counterman*, 600 US at 71. But the prosecution “had no need to prove that Counterman had any kind of ‘subjective intent to threaten.’” *Id.* (cleaned up). But that is exactly what the People need to prove here. Given the importance of this central point, it is worth reiterating that this Court has already ruled that the prosecution is required to prove “an intent to intimidate” in making a threat of violence under MCL 750.543m(1)(a). See *Byczek*, 337 Mich App at 190 (“the prosecution also was required to demonstrate that *defendant’s statement was a true threat, meaning that it was the ‘communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals’ made with ‘an intent to ‘intimidate or coerce.’*””) (Emphasis added, footnote omitted), citing *Osantowski*, 274 Mich App at 603, 605. And that is because this Court in *Osantowski* concluded that the crime of threatening terrorism criminalized the communication of an act that “encompassed” the requirements of an act of terrorism. See *id.* at 604.

In short, the correct reading, as the Wayne County Prosecutor argues, is that Michigan’s terrorism law requires proof that “the defendant was aware that others could regard the statement[s] as threatening harm or injury and delivered them/it anyway.” See Wayne Supp, p 17. Consistent with *Counterman*, this Court should adopt this understanding of Michigan law in MCL 750.543m(1)(a).

**B. The canons of construction further support this understanding, and they would require this interpretation of the law even in the absence of express language that requires proof of a *mens rea* (a guilty state of mind).**

In the remand order, the Michigan Supreme Court has asked this Court to consider the canon of “constitutional doubt,” in which the appellate courts “will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided” once the validity of an act is drawn into question. See *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419–420 (2022) (“courts reasonably presume that the Legislature did not intend to enact a statute that ‘raises serious constitutional doubts’”). This canon is applicable here as the criminal defendant challenges the constitutional validity of Michigan’s anti-terrorism threat law.

This canon operates in tandem with the well-established case law that disfavors strict liability statutes, and instead asks the reviewing court to interpret the criminal law as requiring proof of a guilty state of mind in order to commit a crime. Indeed, it is the “longstanding presumption, traceable to the common law,” “that unless otherwise stated in a statute, a Legislature intends to require a defendant to possess *a culpable mental state regarding each of the statutory elements.*” *People v Magnant*, 508 Mich 151, 182 (2021) (emphasis added; cleaned up). Thus, even where “the text of the statute provides no express criminal-intent provision,” the courts will interpret the law as to require a “wrongful state of mind” to commit the crime unless the Legislature clearly directed to the contrary. See *id.* See also *People v Tombs*, 472 Mich 446, 456–457 (2005) (Kelly, Marilyn, J., plurality opinion) (“some form of scienter is to be implied in a criminal statute even if not expressed”); *id.*

“Absent some clear indication that the Legislature intended to dispense with the requirement, we presume that silence [of a *mens rea* requirement] suggests the Legislature’s intent not to eliminate *mens rea*.[.]” (cleaned up).

In applying these principles here, even in the absence of this definition of “act of terrorism,” which identifies expressly elements that require proof of a guilty state of mind, e.g., “is intended” to “intimidate,” the mere use of “threaten” by the Legislature would provide an implied basis for a scienter, as argued by the Wayne County prosecutor. See Wayne’s Supp, p 16 (“A threat requires intent”). And this Court need not resort to a dictionary definition to support this point, as this Court in *Osantowski* provided a definition of “threat,” by which this Court explained that “[i]t is absolutely clear from the context in which the term ‘threat’ appears that the Legislature sought to prevent the communication of an intent to engage in behavior that constituted or encompassed an ‘act of terrorism’ as defined by MCL 750.543b.” *Osantowski*, 274 Mich App at 604.

Significantly, this Court previously did something similar in *People v Johnson*, 340 Mich App 531 (2022). There, this Court noted the preference for a law to require a criminal intent, rather than one that imposes strict liability. *Id.* at 546 (“we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, ***even if it was left unstated***”) (emphasis added), quoting *Tombs*, 472 Mich at 459 (Kelly, Marilyn, J., plurality opinion). This Court then went on to “read[] a ‘criminal intent’ element into the offense of witness retaliation” and modify the standard jury instruction, similar to the remedy Wayne County has proposed here:

“To satisfy the ‘true threat’ exception to the Free Speech Clause, the jury needed to be instructed that the prosecution was required to prove beyond a reasonable doubt that *defendant meant to express a serious intent to kill or injure BP*, although the prosecutor did not have to prove that defendant actually intended to kill or injure BP. . . . In any new trial held on remand, the court shall instruct the jury on witness retaliation consistently with this opinion.” *Johnson*, 340 Mich App at 547 (emphasis added).

Therefore, even apart from the express language in the definition of “act of terrorism” in MCL 750.543b(a), the canons of construction make it unmistakable that the People must prove a *mens rea* consistent with *Counterman* in order to convict a criminal defendant of terrorism under MCL 750.543m.<sup>1</sup>

**C. This Court’s prior opinion from February 13, 2025 – now vacated – erred in holding to the contrary.**

Before the Michigan Supreme Court vacated this Court’s opinion, this Court addressed the definition of “act of terrorism” in its central analysis, when the Court “turn[ed] . . . to the statutory language,” as follows:

MCL 750.543m provides that “[a] person is guilty of making a terrorist threat . . . if the person . . . [t]hreatens to commit an act of terrorism and communicates the threat to any other person.” Notably, the statute does not provide that the defendant has to purposefully, knowingly, or recklessly threaten to communicate an act of terrorism to another person. Rather, it is silent as to what state-of-mind the defendant must have when he “threatens to commit an act of terrorism.”

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<sup>1</sup> This point is further buttressed by the Michigan Supreme Court’s remand order and reference to *People v Burkman*, 513 Mich 300, 340 (2024), which underscores the role of the appellate courts in ensuring a constitutional interpretation and application of Michigan’s criminal provisions.

*Instead, it is the “act of terrorism” definition that includes a specific intent requirement.* MCL 750.543b provides that the phrase “act of terrorism” requires that the act be one that “the person knows or has reason to know is dangerous to human life” and that the act be one that “is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.” Although consideration of MCL 750.543m and the definition of “act of terrorism” shows the Legislature’s intent to only prohibit true threats, [*People v Osantowski*, 274 Mich App [593] at 602–603 [2007], the statute does not require the prosecution to prove that the defendant made the threat recklessly, i.e., that he “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman*, 600 US at 69.

[Slip op, p 5 (paragraph break, emphasis added; ellipses in original).]

This analysis appears to reflect three legal mistakes in reviewing the statutory requirements of guilty knowledge.

**First**, the prior opinion failed to consider that in the face of “silence” regarding a *mens rea* the Court was duty bound to interpret the law to require a *mens rea* unless there was a “clear” legislative direction to the contrary, see *Tombs*, 472 Mich at 456–457 (Kelly, Marilyn, J.). Even if the prior opinion’s analysis was correct, the Court would construe the statutory language as requiring a *mens rea* requirement anyway. Cf. *Johnson*, 340 Mich App at 546–547. In fact, that is exactly what occurred in the *Counterman* case on remand. That is, on remand the Colorado Court of Appeals ordered retrial, noting that the trial court “should instruct the jury on the elements of true threats and recklessness consistent with *Counterman*.” *People v Counterman*, 2024 WL 3783589, at \*3, n 4 (Colo App, June 13, 2024) (“[Y]ou must find that the defendant consciously disregarded a substantial risk that [his] [her] communications would be viewed as threatening violence.”).

*Second*, in reference to the definition of “act of terrorism,” this Court stated that it “includes a specific intent requirement.” Slip op, p 5. That statement should have been the end of the analysis. The requirement to prove a culpable “intent” is the gold standard of requirements to prove a *mens rea*. It requires a *higher* showing than recklessness. See *Counterman*, 600 US at 79 (for proof of knowledge: “he knows to a practical certainty that others will take his words as threats”); *id.* (for proof of recklessness: “a speaker is aware that others could regard his statements as threatening violence and delivers them anyway.”) (cleaned up).

Despite apparently identifying the fact that the statute required a wrongful intent, the prior opinion seemed to apply it in the opposite manner, after noting that *Osantowski* and *Byczek* were “silent” “as to whether the defendant’s general intent to communicate a true threat must be adjudged by an objective or by a subjective standard.” Slip op, p 4. It then concluded that MCL 750.543m and the interrelated definition of “act of terrorism” in MCL 750.543b “only prohibit true threats” in mistakenly finding that “the statute does not require the prosecution to prove that the defendant made the threat recklessly.” Slip op, p 5. Yet, as stated previously in *Osantowski* and *Byczek*, the express language of MCL 750.543b(a) requires proof of the *higher* standard, i.e., a culpable intent to intimidate, because § 543m requires proof that the defendant made the threat *with an intent* to either “intimidate” or “influence” “through intimidation” – which is a wrongful intent – as defined by §543b(a)(iii)’s use of the phrase, “an act that is intended.” See *Osantowski*, 274 Mich App at 603; *Byczek*, 337 Mich App at 190. An intent to intimidate *is* a culpable, subjective intent.

*Third*, perhaps the point of the prior opinion’s analysis was that the intent requirement in the definition of “act of terrorism” in MCL 750.543b(a) cannot be imported into the crime of threatening an act of terrorism in MCL 750.543m. But that is not consistent with the canons of construction, which require that a definition be given the same meaning throughout the whole statutory chapter. See *Peiffer v GM*, 177 Mich App 674, 677 (1989) (“words used in one place in a statute have the same meaning in every other place in the statute”). See also MCL 750.543b (“as used in this chapter”).

Moreover, any suggestion that the Legislature’s failure to add “purposefully, knowingly, or recklessly” before “threaten” in MCL 750.543m, see slip op, p 5, somehow nullifies the definition of “willful” and “deliberate” and the “intent” and “know[ledge]” requirements in §543b(a)’s definition of “act of terrorism” would be counterintuitive, as there is no indication that the Legislature was attempting to change the phrase’s definition. And it would contradict the canon that requires this Court to construe Michigan law in a constitutional manner unless “clearly inconsistent with the [statute’s] language.” See *People v Skinner*, 502 Mich 89, 111 (2018). See also MCL 750.543z (“a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”). The prior opinion failed to apply the statute’s express language, which required proof of an intent to intimidate in making a threat to commit a violent act that the person knows or has reason to know would be dangerous to human life. This Court should affirm the constitutionality of this law.

**D. The arguments of Kvasnicka in his supplement to the contrary are unavailing.**

In his supplemental brief, Kvasnicka raises a few arguments, three of which merit a response to ensure a full understanding of the issues.

*First*, Kvasnicka attempts to resolve the question regarding the canon of constitutional doubt by insisting that the language of the statute “is *devoid* of any reference to a Defendant’s subjective intent when the threat was communicated.” Kvasnicka Supp, p 9 (emphasis added). The prior opinion noted something similar when it referenced its conclusion that the statute was “silent” regarding the nature of the intent the People must prove. See slip op, p 5 (“it is *silent* as to what state-of-mind the defendant must have when he ‘threatens to commit an act of terrorism.’”) (Emphasis added). But the canons of construction require that this Court construe any such silence as permitting an interpretation of the law to include a *mens rea* unless there is a clear indication to the contrary. See, e.g., *Tombs*, 472 Mich at 457 (2005) (Kelly, Marilyn, J., plurality opinion) (“we presume that silence suggests the Legislature’s intent not to eliminate *mens rea*[.]”) (cleaned up). In fact, this Court has already apparently eschewed the argument in *Osantowski* that MCL 750.543m(1)(a) imposes strict liability, when it determined that it requires proof of an intent to intimidate. Cf. *Osantowski*, 274 Mich App at 603, 606–607 (“Defendant argues that the Legislature made threatening to commit an act of terrorism into a strict liability crime”). Thus, any silence here does not answer the canon, which requires this Court to find a scienter requirement unless the Legislature clearly indicated it was creating a strict liability offense, which it did not do here.

*Second*, related to this first point, Kvasnicka leans heavily on the decision in *Counterman* to support his argument that the statute is facially invalid. See Kvasnicka Supp, pp 9–17; 10 (“by determining the Colorado statute was unconstitutional, despite using the word ‘threat’ seven times, because it did not contain the necessary subjective intent requirement, the Supreme Court, for all intents and purposes, dismissed the notion that the simple definition of the word ‘threat’ as found in the dictionary, could provide an interpretation of the statute that saved it from constitutional failure under the First Amendment.”); 19 (“By invalidating the Colorado statute”). But this argument is predicated on a critical misunderstanding of the ruling in *Counterman*.

The U.S. Supreme Court did *not* invalidate the Colorado statute, but it ruled that the jury instructions that allowed a conviction without a finding of a *mens rea* violated the First Amendment, and it merely vacated the judgment of the Colorado Court of Appeals. *Counterman*, 600 US at 82–83. Then, as noted, on remand the Colorado appellate court vacated the conviction, and further “remand[ed] the case for a new trial,” with a specific direction about how the instructions should be given to the jury, quoted here in full:

In the wake of *Counterman II*, the Model Criminal Jury Instructions Committee promulgated the following “special instruction” for the charge of stalking (serious emotional distress) when the charged conduct involves repeated communications, as it did here:

For purposes of the crime of stalking (serious emotional distress), in order to find that the defendant made any form of communication with another person that would cause a reasonable person to suffer serious emotional distress, *you must find that the defendant consciously disregarded a substantial risk that [his] [her] communications would be viewed as threatening violence.*

COLJI-Crim. 3-6:04.5.SP (2023).

[*Counterman*, 2024 WL 3783589, at \*3 n4 (Colo App, June 13, 2024) (emphasis added)]

Thus, Kvasnicka's reliance on *Counterman* cuts exactly the other way. It only *confirms* the constitutional validity of the law at issue here. The Wayne County Prosecutor is asking for the same basic relief that the intermediate appellate court in Colorado provided based on its statute, which Kvasnicka quotes in full. See Kvasnicka Supp, pp 10–11.

**Third**, with respect to the express language of a wrongful intent that is provided in the definition of “act of terrorism,” Kvasnicka anticipates the argument of amicus and argues that the wrongful intent expressly provided in MCL 750.543b(a) cannot be imported into the definition of the crime of making a terrorist threat in MCL 750.543m given the provision in § 543m(2): “It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism.” In particular, Kvasnicka argues that “Defendant’s intent or capability of committing the act of terrorism cannot be precluded by the statute and also bootstrapped into the statute as a constitutional savings clause.” Kvasnicka Supp, p 14, citing MCL 750.543m(2). But this argument misunderstands the point of the law, which criminalizes the making of a threat in § 543m(1)(a) as well as the carrying out of an act of terrorism in § 543f(1) (“A person is guilty of terrorism when that person knowingly and with premeditation commits an act of terrorism.”). The threat of committing an act of terrorism and committing an act of terrorism are punished separately, see *People v Osantowski*, 481 Mich 103, 110 (2008) (“an offender may threaten to commit an act of terrorism . . . without committing an act of terrorism”), and each requires a wrongful intent.

As this Court explained in *Osantowski*, the requirement of proving a criminal intent to make a threat requires proof of “an intent to ‘intimidate or coerce.’” 274 Mich App at 603. To be clear, this culpable intent to intimidate applies to both the threat and the commission of the act. For the crime of making the threat, the law in MCL 750.543m(1)(a) criminalizes the terror that the person making the threat seeks to create irrespective whether the person actually intends to carry out the threat. Thus, it is not the intent to actually commit a violent felony that this law criminalizes, but the wrongful intent to purposefully place others in fear, i.e., *to intend to intimidate or influence through intimidation*. See *Byczek*, 337 Mich App at 190. As this Court explained in *Osantowski*, “[t]he speaker need not actually intend to carry out the threat.” *Osantowski*, 274 Mich App at 605, quoting *Virginia v Black*, 538 US 343, 359 (2003). Kvasnicka’s analysis fails to distinguish between the crime of making a threat of an act of terrorism and the crime of actually committing an act of terrorism, as § 543m(1)(a) criminalizes only the former.

Based on this misapprehension, Kvasnicka then asserts that the People are “not required to prove ‘that the Defendant had some understanding of his statement’s threatening character.’” Kvasnicka Supp, p 16. But that is wrong. It is exactly what the People are required to prove in bringing a charge of threatening an act of terrorism as provided by Michigan law. This Court should affirm the constitutionality of Michigan law.

## CONCLUSION AND RELIEF REQUESTED

This Court should affirm the constitutionality of Michigan's anti-terrorism threat provision, MCL 750.543m(1)(a).

Respectfully submitted,

Dana Nessel  
Attorney General

Ann M. Sherman  
Solicitor General

/s B. Eric Restuccia

B. Eric Restuccia (P49550)  
Deputy Solicitor General

John S. Pallas  
Division Chief

Department of Attorney General  
P.O. Box 30212  
Lansing, MI 48909  
(517) 335-7628

Dated: May 22, 2025

## WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.212(B)(1), (3) because, excluding the part of the document exempted, this **merits brief** contains no more than 16,000 words. This document contains 5,320 words.

/s B. Eric Restuccia

B. Eric Restuccia (P49550)  
Deputy Solicitor General  
Attorneys for the People  
P.O. Box 30212  
Lansing, Michigan 48909  
(517) 335-7628



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 16

STATE OF MICHIGAN  
IN THE SUPREME COURT  
Appeal from the Michigan Court of Appeals

PEOPLE OF THE STATE OF MICHIGAN, Supreme Court No. 168181  
Plaintiff-Appellee/Cross-Appellant, Court of Appeals No. 371542  
v Wayne Circuit Court  
No. 24-001354-FH

MICHAEL JOSEPH KVASNICKA,  
Defendant-Appellant/Cross-Appellee.

**The appeal involves a ruling  
that a statute invalid.**  
**\* NEED RULING BY APRIL 1 \***

**AMICUS BRIEF OF ATTORNEY GENERAL DANA NESSEL IN SUPPORT  
OF THE PEOPLE’S APPLICATION ASKING THIS COURT TO EITHER  
PEREMPTORILY REVERSE OR GRANT CONTROLLING CONSTRUCTION**

The Michigan Attorney General Dana Nessel by and through her attorneys B. Eric Restuccia, Deputy Solicitor General, and John S. Pallas, Division Chief, consistent with MCL 7.311 asks this Court to grant the application of the Wayne County Prosecutor’s Office in support of the constitutionality of Michigan’s anti-terrorism law, MCL 750.543m, and requesting this Court to either peremptorily reverse or to provide a controlling constitutional application of the law during the pendency of the application, and she states the following in support of her amicus:

1. On February 13, 2025, the Court of Appeals issued a published decision in which it ruled that MCL 750.543m(1)(a) was “facially unconstitutional.” See slip op, pp 1, 5.

2. On February 20, 2025, the Wayne County Prosecutor filed an emergency application, asking this Court to grant her application, affirm the constitutionality of Michigan law, and to stay the precedential effect of the decision below.

3. As the chief law enforcement officer for the State of Michigan, see MCL 14.30; *Fieger v Cox*, 274 Mich App 449, 451 (2007), the Attorney General wishes to advance two arguments in support of Wayne's emergency application for leave.

4. **First**, as argued in Wayne's application, the decision of the Court of Appeals is clearly erroneous on an issue of major jurisprudential significance. See MCR 7.305(B)(1), (3), (5)(a). The statute at issue provides as follows:

(1) A person is guilty of making a terrorist threat or of making a false report of terrorism if the person does either of the following:

(a) *Threatens to commit an act of terrorism* and communicates the threat to any other person.

(b) Knowingly makes a false report of an act of terrorism and communicates the false report to any other person, knowing the report is false.

[MCL 750.543m (emphasis added).]

The statute further provides a definition of "act of terrorism," which requires proof of a specific blameworthy state of mind:

(a) "Act of terrorism" means a *willful* and *deliberate* act that is ***all of the following***:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that *is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.*

[MCL 750.543b(a) (emphasis added).]

In other words, the People are required to prove all three elements, which notably includes the requirement for a “willful” and “deliberate” act that the person (1) “intended to intimidate or coerce a civilian population” or (2) “influence or affect the conduct of government or a unit of government through intimidation or coercion.” MCL 750.543b(a)(iii). This is a subjective intent standard that complies with the U.S. Supreme Court’s decision in *Counterman v Colorado*, 600 US 66 (2023).

In *Counterman*, the U.S. Supreme Court identified three possible subjective culpable criminal intents that would be sufficient to sustain the constitutionality of a law that punished a true threat, as Michigan law does here:

The next question concerns the type of subjective standard the First Amendment requires. The law of *mens rea* offers three basic choices.

[1] Purpose is the most culpable level in the standard mental-state hierarchy, and the hardest to prove. A person acts purposefully when he “consciously desires” a result—so here, when he wants his words to be received as threats.

[2] Next down, though not often distinguished from purpose, is knowledge. A person acts knowingly when “he is aware that [a] result is practically certain to follow”—so here, when he knows to a practical certainty that others will take his words as threats.

[3] A greater gap separates those two from recklessness. A person acts recklessly, in the most common formulation, when he “consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.” That standard involves insufficient concern with risk, rather than awareness of impending harm. But still, recklessness is morally culpable conduct, involving a “deliberate decision to endanger another.” *In the threats context, it means that a speaker is aware “that others could regard his statements as” threatening violence and “delivers them anyway.”*

[*Counterman*, 600 US at 78–79 (numbered brackets and paragraph breaks added; emphasis added; citations omitted).]

In short, the three subjective standards are “purpose,” “knowledge,” and “recklessness,” i.e., “aware that others could regard his statements” as a threat and delivers them nonetheless.

In applying the definitions of *Counterman* to Michigan law, as noted it is clear that in order to prove that a person “threaten[ed] to commit an act of terrorism,” see MCL 750.543m(1)(a), the People must prove that the person’s act was “willful” and “deliberate,” and that through that act the person “intended to intimidate” or “intended to influence” “through intimidation or coercion.” MCL 750.543b(a)(iii). The requirements that the person’s act be “deliberate” with a blameworthy “intent” are traditional hallmarks of subjective criminal intent. For example, this Court explained that the “proof of an intent to injure in order to establish an assault and battery” is a *mens rea* requirement that is “subjective” because it was “an intent to do ‘wrong.’” *People v Datema*, 448 Mich 585, 599 (1995). Cf. *People v Langworthy*, 416 Mich 630, 650 (1982) (“It would be difficult, if not impossible, to premeditate and *deliberate* a killing without at the same time possessing the specific intent to kill.”) (emphasis added). That applies equally here, which requires the People to prove a wrongful intent, i.e., the intent to intimidate or the intent to influence through the use of intimidation.

Likewise, the use of “willful” seems to be the paradigm of the culpable state of mind for recklessness, which appears both in the definition of depraved heart murder as well as in the definition of gross negligence for manslaughter. See, e.g., *People v Goecke*, 457 Mich 442, 464 (1998) (“the intent to do an act in wanton and *wilful* disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm”) (emphasis added), citing *People v Aaron*, 409 Mich 672, 728

(1980); *Datema*, 448 Mich at 598–599 (“negligence [for involuntary manslaughter] is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while wantonness or *recklessness*, in effect wilfulness, is characterized, as the words imply, by *wilfulness*.”) (emphasis added), quoting *People v Orr*, 243 Mich 300, 308 (1928).

The contrast to *Counterman* is notable. There, the U.S. Supreme Court explained that the prosecution would have to show that “a reasonable person would have viewed” the communication as “threatening.” *Counterman*, 600 US at 71. But the prosecution “had no need to prove that Counterman had any kind of ‘subjective intent to threaten.’” *Id.* (cleaned up). But that is exactly what the People need to prove here. The correct reading, as the Wayne County Prosecutor argues, is that Michigan’s terrorism law requires proof that “the defendant was aware that others would regard the statement as threatening harm or injury and delivered [it] anyway.” See Wayne App, p 17.<sup>1</sup>

In fact, the analysis of the Court of Appeals below ironically confirms the proper construction of the law as requiring proof of a subjective state of mind. In its review of the statutory language, in particular the definition of “act of terrorism,” the Court of Appeals acknowledged that it “includes a specific intent requirement.” Slip op, p 5. But that should have been the insight that led the court to affirm and find a requirement to provide a culpable subjective mental state. As this Court has explained, proof of a specific intent requires more than proof of the intent to commit the act, it requires proof of the intent to desire the result or at least know the outcome and act anyway:

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<sup>1</sup> It is worth noting that even in *Counterman*, the U.S. Supreme Court merely remanded for further proceedings, but did not invalidate the statute. See *id.* at 83.

The distinction between *specific intent* and general intent crimes is that the former *involve a particular criminal intent beyond the act done*, while the latter involve merely the intent to do the physical act.

[*People v Kowalski*, 489 Mich 488, 500 n 15 (2011) (cleaned up; citations omitted; emphasis added).]<sup>2</sup>

Despite identifying the fact that the statute required a specific intent, the Court of Appeals then went on apparently to do just the opposite and read the statutory language to only require proof of an intent to commit the act. See slip op, p 5 (“MCL 750.543b provides that the phrase ‘act of terrorism’ requires . . . that *the act* be one that is ‘intended to intimidate . . . ’”) (emphasis in original). The Court of Appeals then concluded that MCL 750.543m and the interrelated definition of “act of terrorism” in MCL 750.543b “only prohibit true threats” and then ruled that “the statute does not require the prosecution to prove that the defendant made the threat recklessly.” (Slip op, p 5.) Yet, the express language of MCL 750.543b(a) would seem to provide to the contrary, because it is *the criminal defendant’s intent* to either “intimidate” or “influence” “through intimidation” that must be proven in the definition’s use of the phrase, “an act that is intended.” § 543b(a)(iii).

Perhaps the point of the analysis of the Court of Appeals is that the specific intent requirement in the definition of “act of terrorism” in MCL 750.543b(a) cannot be imported into the crime of threatening an act of terrorism in MCL 750.543m. But that is not consistent with the canons of construction, which require that a definition be given the same meaning throughout the whole statutory chapter. Cf.

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<sup>2</sup> See also *People v Gould*, 225 Mich App 79, 85 (1997), quoting Lafave’s Crim Law: “Thus, *in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur*[.]” (Emphasis added.)

*U.S. Fid & Guar v Mich Catastrophic Claims Ass'n*, 484 Mich 1, 14 (2009) (“If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word.”) See also *Peiffer v GM*, 177 Mich App 674, 677 (1989) (“words used in one place in a statute have the same meaning in every other place in the statute”).

Moreover, any suggestion that the Legislature’s failure to add “purposefully, knowingly, or recklessly” before “threaten” in MCL 750.543m, see slip op, p 5, somehow nullifies the definition of “willful” and “deliberate” and the “intent” requirements in §543b(a)’s definition of “act of terrorism” would be counterintuitive, as there is no indication that the Legislature was attempting to change the phrase’s definition. And it would contradict the canon that requires this Court to construe Michigan law in a constitutional manner unless “clearly inconsistent with the [statute’s] language.” See *People v Skinner*, 502 Mich 89, 111 (2018) (“In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject matter, is to be made in favor of the constitutionality of the act”). The Court of Appeals’ analysis was clearly erroneous. See MCR 7.305(B)(5)(a).

5. ***Second***, this Court needs to either (1) grant peremptory relief, see MCR 7.311 (motions generally), or (2) grant a stay of the precedential effect of the decision as the Wayne County Prosecutor has requested, and to ***provide a constitutional construction of the law as argued here and in Wayne County’s brief in the intervening time to allow the lower courts to continue to apply the law while this matter pends***. Cf. *People v Burkman*, 513 Mich 300, 340–341 (2024) (providing a controlling constitutional construction of MCL 168.932(a) for the bench and bar).

Significantly, the Court of Appeals previously did something similar in *People v Johnson* 340 Mich App 531 (2022). There, the Court of Appeals noted the preference for a law to require a criminal intent, rather than one that imposes strict liability. *Johnson*, 340 Mich App at 546–547 (“we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, ***even if it was left unstated***”) (emphasis added), quoting Justice Kelly’s opinion in *People v Tombs*, 472 Mich 446, 459 (2005). The court then went on to modify the standard jury instruction in a witness retaliation case, similar to the remedy the proposed here: “We hold that the jury was not properly instructed and that M Crim JI 37.6 lacks language necessary to avoid infringement of the First Amendment right to free speech. To satisfy the ‘true threat’ exception to the Free Speech Clause, the jury needed to be instructed that the prosecution was required to prove beyond a reasonable doubt that defendant meant to express a serious intent to kill or injure BP, although the prosecutor did not have to prove that defendant actually intended to kill or injure BP. . . . In any new trial held on remand, the court shall instruct the jury on witness retaliation consistently with this opinion.”) *Johnson*, 340 Mich App at 547.

Without a controlling construction, Michigan’s statute protecting against terrorism and other threats, see MCL 750.543m(1)(a), will continue to operate with a cloud of uncertainty while this appeal is pending. Given that the matter would not likely be heard until the Fall of 2025, it may be a year or longer that this statute would remain in limbo. A constitutional construction of the law during the pendency should instill confidence in the bench and bar to enable the pending cases to proceed while this Court reviews this case if it determines that peremptory reversal is not warranted.

The Attorney General hopes this Court will issue either a peremptory reversal or otherwise provide a constitutional construction of the law during the case's pendency of the case by **April 1, 2025**, to avoid the possibility that lower courts dismiss any of the current pending criminal cases. The Department of Attorney General alone has eight pending cases under this statute.

And it is worth pointing out the importance of this statute to Michigan law. The law is designed to stop threats that disrupt schools, places of business, and entire communities. The question of what to do with the defendant who engages in this kind of conduct is often complicated. Without a sound legal basis, the opinion of the Court of Appeals has removed the only statute that allows a significant criminal charge in response to such a threat of terrorism, as is at issue here. Threats of terrorism are too serious to have an unsupported decision block law enforcement from responding appropriately while this application winds its way through the appellate process.

Wherefore, the Attorney General supports the Wayne County Prosecutor's application for leave and asking for a stay of the precedential effect of the decision, hoping that this Court will either peremptory reverse the decision of the Court of Appeal or otherwise provide an interim controlling construction of this statute while this important matter pends.

**CONCLUSION AND RELIEF REQUESTED**

This Court should grant the Wayne County Prosecutor’s application for leave and either stay the precedential effect of the decision and provide a controlling constitutional construction of the law, or otherwise should peremptorily reverse the decision of the Court of Appeals.

Respectfully submitted,

Dana Nessel  
Attorney General

Ann M. Sherman  
Solicitor General

/s B. Eric Restuccia

B. Eric Restuccia (P49550)  
Deputy Solicitor General

John S. Pallas  
Division Chief

Department of Attorney General  
P.O. Box 30212  
Lansing, MI 48909  
(517) 335-7628

Dated: February 28, 2025

**STATE OF MICHIGAN**

MI Supreme Court

**Proof of Service**

<b>Case Title:</b> PEOPLE OF MI V MICHAEL JOSEPH KVASNICKA	<b>Case Number:</b> 168181
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Daniel Williams Dodson Fowler Williams & Nesi P72085	danielnfw@gmail.com	e-Serve
Joycelyn Frederick Wayne County Prosecutor's Office	jsharp@waynecounty.com	e-Serve
Sharon McCarthy Dodson Fowler Williams & Nesi, PLC	smccarthy@dfwnlaw.com	e-Serve
Baughman Timothy Wayne County Prosecutor's Office 24381	tbaughma@waynecounty.com	e-Serve
B. Eric Restuccia Michigan Department of Attorney General 49550	restucciae@michigan.gov	e-Serve
Holly Gustafson Michigan Department of Attorney General	Gustafsonh@michigan.gov	e-Serve

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Michigan Department of Attorney General



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Personal Injury &  
Professional Licensing*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Family Law  
Probate Law &  
Trust Litigation*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

[dfwnplc.com](http://dfwnplc.com)

---

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 17

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee,*

COA Docket No. 371542  
MSC Docket No. 168181  
Lower Ct.: Wayne County Circuit Court  
Lower Ct. Case No: 24-001354-01-FH

vs.

MICHAEL JOSEPH KVASNICKA,

*Defendant-Appellant.*



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18050 Mack Ave.  
Grosse Pointe, MI  
48230

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

ffwplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROSECUTOR'S OFC.  
Timothy E. Baughman (P24381)  
Special Assistant Prosecuting Attorney  
Frank Murphy Hall of Justice  
1441 St. Antoine  
Detroit, MI 48226  
(313) 224-5777  
[khuber@waynecounty.com](mailto:khuber@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant/Appellant*  
18050 Mack Avenue  
Grosse Pointe, MI 48230  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)  
[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

**DEFENDANT-APPELLANT'S MOTION FOR LEAVE TO FILE RESPONSE TO  
AMICUS CURIAE BRIEF OF THE MICHIGAN ATTORNEY GENERAL  
IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR**

Defendant-Appellant, MICHAEL JOSEPH KVASNICKA, by and through his attorneys, DODSON, FOWLER, WILLIAMS AND NESI, PLC, and Daniel J. Williams, respectfully requests this Court to allow him to file a Response to the Amicus Curiae brief filed by the Michigan Attorney General in Support of the Wayne County Prosecutor, filed on remand from the Michigan Supreme Court, pursuant to M.C.R. 7.212(H), on or before July 1, 2025, and he states the following in support of his motion:

1. On February 13, 2025, this Honorable Court issued a published decision in which it ruled that MCL 750.543(m)(1)(a) was “facially unconstitutional.” See slip op, pp 1, 5.
2. On February 20, 2025, the Wayne County Prosecutor filed a Motion to Expedite Application, and/or Stay Precedential Effect of the Decision of the Court of Appeals, along with a Motion for Immediate Consideration of Motion to Expedite Application, and an Application for Leave to Appeal, with the Michigan Supreme Court, requesting the Court to grant the application, affirm the constitutionality of the statute, and to stay the precedential effect of the decision of this Court.
3. On February 28, 2025, the Michigan Attorney General filed an amicus brief in support of the Wayne County Prosecutor’s application.
4. On March 28, 2025, the Michigan Supreme Court granted the Prosecution’s motion for immediate consideration, vacated the judgment of this Court, and remanded the case to this Court for further consideration, directing it to address the proper interpretation of MCL 750.543m in light of five (5) separate legal factors. It expressed no opinion on whether MCL 750.543m violates constitutional free-speech protections by imposing criminal liability on a defendant without proof “that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman vs. Colorado*, 600 US 66, 69 (2023).
5. On April 2, 2025, the Wayne County Prosecutor moved to file a Supplemental Brief in support of its position and requested this Honorable Court to accept additional briefs.
6. On April 21, 2025, Defendant-Appellant also moved to file a Supplemental Brief in support of its position and requested this Honorable Court to accept additional briefs.
7. On May 1, 2025, this Court granted the separate motions to file supplemental briefs,

accepted the Prosecutor's Supplemental Brief for filing, and granted Defendant 14 days to file his Supplemental Brief.

8. On May 15, 2025, Defendant-Appellant filed his Supplemental Brief on Remand From the Michigan Supreme Court.

9. On May 16, 2025, the Michigan Attorney General filed her Motion to File an Amicus Brief in Support of the Wayne County Prosecutor on or Before May 22, 2025.

10. On May 20, 2025, this Court granted the Motion of Michigan Attorney General to File an Amicus Brief in Support of the Wayne County Prosecutor.

11. On May 22, 2025, the Michigan Attorney General filed her Brief of Amicus Attorney General in Support of the Wayne County Prosecutor.

12. On June 12, 2025, Appellant filed a Reply to the Michigan Attorney General's Amicus brief.

13. On June 13, 2025, Appellant's filing was rejected by the Court, noting that a motion would need to be filed requesting leave to file a response or reply to an amicus curiae brief.

14. Defendant-Appellant has a vested interest in refuting certain circular and/or false statements and arguments contained in the Michigan Attorney General's Amicus Brief and furthering his arguments in opposition to the Michigan Attorney General's position.

15. While MCR 7.212(H)(1) grants individuals and/or entities authority to file amicus curiae briefs in response to the principal parties' briefs, the rule does not expressly permit a time for the filing of a response to such an amicus curiae brief.

16. Further, there is nothing in M.C.R. 7.212(H) forbidding either party to the litigation from responding to an amicus curiae brief, nor is there any other Court Rule forbidding such a response.

17. As such, Defendant-Appellant seeks relief from this Court via motion, as directed by the rejection of the previously filed and rejected Appellant's Reply to Amicus Curiae of Michigan Attorney General.

Therefore, Defendant-Appelleant, MICHAEL JOSEPH KVASNICKA, respectfully requests this Honorable court grant permission to file a Response to the Amicus Curiae brief filed by the Michigan Attorney General in Support of the Wayne County Prosecutor.

Respectfully Submitted,

DODSON FOWLER WILLIAMS & NESI, PLC

/s/ Daniel J. Williams

Daniel J. Williams (P72085)  
Aimee M. Fowler (P72736)  
*Attorneys for Defendant-Appellant*  
18050 Mack Avenue  
Grosse Pointe, MI 48230  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfowler@gmail.com](mailto:aimeenfowler@gmail.com)  
[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

Dated: June 18, 2025

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record for all parties to the above cause at their respective addresses as disclosed by the pleadings of record herein on this 18<sup>th</sup> day of June, 2025

By: Electronically

I declare under the penalty of perjury that the statement above is true to the best of my information, knowledge and belief.

/s/ Sharon M. McCarthy  
SHARON M. McCARTHY,  
Sr. Litigation Paralegal



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 18

**Court of Appeals, State of Michigan**

**ORDER**

PEOPLE OF MI V MICHAEL JOSEPH KVASNICKA

Docket No. 371542

LC No. 24-001354-01-FH

Mark T. Boonstra  
Presiding Judge

Michael J. Kelly

Allie Greenleaf Maldonado  
Judges

---

Appellant's motion to file response to amicus curiae brief is GRANTED. The brief shall be filed on or before July 1, 2025.



Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

June 23, 2025

Date



Chief Clerk



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

[dfwnplc.com](http://dfwnplc.com)

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

# APPENDIX 19

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

*Plaintiff-Appellee,*

vs.

MICHAEL JOSEPH KVASNICKA,

*Defendant-Appellant.*

COA Docket No. 371542  
MSC Docket No. 168181  
Lower Ct.: Wayne County Circuit Court  
Lower Ct. Case No: 24-001354-01-FH



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18050 Mack Ave.  
Grosse Pointe, MI  
48230

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

ffwplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

WAYNE COUNTY PROSECUTOR'S OFC.  
Karishma Madhu Huber, P82419  
*Assistant Prosecuting Attorney*  
Frank Murphy Hall of Justice  
1441 St. Antoine  
Detroit, MI 48226  
(313) 224-5777  
[khuber@waynecounty.com](mailto:khuber@waynecounty.com)

DODSON FOWLER WILLIAMS & NESI  
Daniel J. Williams, P72085  
Aimee M. Fowler, P72736  
*Attorneys for Defendant/Appellant*  
18050 Mack Avenue  
Grosse Pointe, MI 48230  
(313) 458-8276 / (313) 469-7085 (Fax)  
[danielnfw@gmail.com](mailto:danielnfw@gmail.com)  
[aimeenfww@gmail.com](mailto:aimeenfww@gmail.com)  
[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

**DEFENDANT-APPELLANT'S RESPONSE TO AMICUS CURIAE  
OF THE MICHIGAN ATTORNEY GENERAL IN SUPPORT OF  
THE WAYNE COUNTY PROSECUTOR**

***ORAL ARGUMENT REQUESTED***

***\*\*\* This appeal involves a ruling that a state statute  
is facially unconstitutional.***

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**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18050 Mack Ave.  
Grosse Pointe, MI,  
48230

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

[dfwnplc.com](http://dfwnplc.com)

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman Esq.

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**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18050 Mack Ave.  
Grosse Pointe, MI,  
48230

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

**STATEMENT OF JURISDICTION**

This Court has jurisdiction over this action originally as an appeal by leave under M.C.R. 7.203(B)(2), as the appeal regarded an order of the circuit court that is not a final judgment otherwise appealable by right. This Court granted leave to appeal by Order issued on October 10, 2024, thereby asserting its jurisdiction.

This Court again has jurisdiction by remand from the Michigan Supreme Court for further consideration.

**STATEMENT OF QUESTIONS PRESENTED**

**I. Does M.C.L. §750.543m’s lack of a subjective intent requirement violate the First Amendment of the *United States Constitution* as interpreted by the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66; 143 S.Ct. 2106; 216 L.Ed.2d 775 (2023)?**

Defendant-Appellee Answers: **Yes.**

Plaintiff-Appellant Answers: **No.**

The Circuit Court Answers: **No.**

**RESPONSE TO STATEMENT OF INTEREST  
OF AMICUS CURIAE ATTORNEY GENERAL**

While Defendant-Appellee does not object to the filing of the Brief of Amicus Curiae filed by the Attorney General in Support of the Wayne County Prosecutor, Defendant-Appellee takes no position as to the Statement of Interest of Amicus Curiae Attorney General.

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LAW AND ARGUMENT

The amicus curiae filed by the Attorney General asserts two arguments: “(1) the statute (M.C.L. §750.543) expressly requires proof of a wrongful intent in its definition of “act of terrorism,” requiring proof of either an ‘intent[t]’ to ‘intimidate’ or ‘influence’ ‘through intimidation;’ and (2) the canons of construction would require construing such an intent even in the absence of the express language.” *Amicus Curiae Brief*, pg. 1. The position of the Attorney General is errant and fails to account for either the plain language of the statute which contradicts their first argument, or for the decision of the United States Supreme Court in *Counterman v. Colorado*, 600 U.S. 66; 143 S.Ct. 2106; 216 L.Ed.2d 775 (2023).

***i. M.C.L. §750.543’s definition of an “act of terrorism” is not applicable to the intent requirement in question and the statute specifically bars intent and capacity as a defense.***

The first erroneous position taken by the Attorney General in her amicus curiae brief states that the Court may simply adopt the intent set forth in the statutory definition of the words “act of terrorism” and apply that same intent to the word “threat.” First, this extrapolation is contrary to the principles of statutory interpretation. The statutory definition section is silent with regard to the definition of the term “threat.” M.C.L. §750.543b. The Government may not simply extrapolate an intent requirement from another term that is defined in the statute and apply it, as if one could simply “copy and paste” as the colloquial goes.

More significantly, the argument presented by the Attorney General creates a significant statutory problem. The Attorney General effectively argues that the definition of the word “act of terrorism” contains the necessary subjective intent element necessary to allow for prosecutions under the statute. Specifically, M.C.L. §750.543b defines the term “act of terrorism” as:

- (a) "Act of terrorism" means a willful and deliberate act that is all of the following:
  - (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18050 Mack Ave.  
Grosse Pointe, MI  
48230

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

ffwplc.com

***Attorneys***

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
Christopher J. Nesi, Esq.  
Michael Wightman, Esq.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

M.C.L. §750.543b(a). On the surface, one might agree that this appears to dissolve the issue, but much like arsenic in water, even though it appears to have dissolved, the poison is still present and drinking it would have fatal consequences. Two primary arguments against the Attorney General's position demonstrate the flaws in the argument.

First, this Court already addressed this argument directly in its prior opinion in this matter, and nothing about the Supreme Court's requests or order for remand negate the logical position this Court has already taken in dismissing the Attorney General's position here. This Court stated:

Again, MCL 750.543m provides that “[a] person is guilty of making a terrorist threat . . . if the person . . . [t]hreatens to commit an act of terrorism and communicates the threat to any other person.” Notably, the statute does not provide that the defendant has to purposefully, knowingly, or recklessly threaten to communicate an act of terrorism to another person. Rather, it is silent as to what state-of-mind the defendant must have when he “threatens to commit an act of terrorism.” Instead, it is the “act of terrorism” definition that includes a specific intent requirement. MCL 750.543b provides that the phrase “act of terrorism” requires that *the act* be one that “the person knows or has reason to know is dangerous to human life” and that *the act* be one that “is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.” Although consideration of MCL 750.543m and the definition of “act of terrorism” shows the Legislature’s intent to only prohibit true threats, *Osantowski*, 274 Mich App at 602-603, the statute does not require the prosecution to prove that the defendant made the threat recklessly, i.e., that he “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Counterman*, 600 US at 69.

*People v. Kvasnicka*, \_\_\_ Mich App. \_\_\_; \_\_\_ N.W.2d \_\_\_ (Slip. Op., Feb. 13, 2025). The Court’s position remains true and correct. The statute does not state the necessary intent applicable to the Defendant’s making of the threat; i.e., that he “consciously disregarded a substantial risk that his communications would be viewed as threatening violence.” *Kvasnicka, supra*. (Slip Op., February

13, 2025)(citing *Counterman, supra.* (2023)). The language of the statute, and the definitions in the statute, have not changed since the parties were last before this Court. The veracity of this Court's opinion and reading of the statute have in no way been diminished. While the Attorney General and the Appellee appear to indirectly take the position that the remand from the Michigan Supreme Court means that this Court's opinion was "wrong," that is simply not accurate! In fact, the Supreme Court's order specifically stated that it took no position on the constitutionality of the statute or the positions taken by this Court, but that it was vacating and remanding for additional consideration of five specific issues. The Appellant argues that this Court was correct when it issued its opinion, and is still correct today.

However, there is an additional consideration that the Attorney General fails to address in its argument. While they desire this Court to take the primrose path, adopt the position that the express intent set forth in the definition of the terms "act of terrorism" and call it a day, such a decision would directly contradict and invalidate the language in M.C.L. §750.543m. Specifically, M.C.L. §750.543m *expressly prohibits* the intent or capacity of the defendant to carry out the threatened act of terrorism from consideration by the Court or a jury. "(2) It is not a defense to a prosecution under this section that the defendant did not have the intent or capability of committing the act of terrorism." M.C.L. §750.543m. In light of subsection "m", the Attorney General's position is inapposite, illogical, and legally unsupportable. The Attorney General asks this Court to adopt the intent standard set forth in the definition of the terms "act of terrorism" as the same as that which is required by the speaker of a threat to commit an act of terrorism. Yet, the statute expressly states that the intent of the speaker to commit the act is not a defense; i.e., is by statute irrelevant and cannot be considered. The intent that §750.543m specifically forbids is the exact intent which the United States Supreme Court mandated must be considered. The position of the

Attorney General, as it relates to their first argument, simply fails to solve any of the constitutional problems that exist with the statute, and in fact, potentially creates others. The end result, the argument fails to hold water and should be dismissed out of hand.

***ii. The Attorney General's position that "canons of construction would require construing such an intent even in the absence of the express language" is legally incorrect.***

Defendant-Appellant has previously argued regarding this position in both his original brief filed in this matter, but also in the supplemental brief filed on remand. Rather than reinvent the wheel, as the saying goes, Defendant-Appellant will adopt those former arguments here as if fully set forth herein. In addition, however, Defendant-Appellant recites specific portions of those previous arguments most pertinent to the Attorney General's position, most directly related to the specific legally unsupportable arguments contained in her Amicus Brief.

In its Order, the Michigan Supreme Court referenced the decision of *Sole v. Mich. Econ. Dev. Corp.* 509 Mich. 406; 983 N.W.2d (2022) with regard to the constitutional doubt canon; however, the jurisprudence in this area is of significantly older vintage. As the Court noted, the constitutional doubt canon is implicated "when the validity of an act ... is drawn in question and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Sole, supra.* at 419 (2022)(citing *Workman v. Detroit Auto Inter-Ins. Exchange*, 404 Mich. 477, 508; 274 N.W.2d 373 (1979); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348; 56 S.Ct. 466; 80 L.Ed 688 (1936)). Further, under the canon's jurisprudence courts are also required to operate with the presumption that the Legislature did not intend to enact a statute that "raises serious constitutional doubts." *Sole, supra.* at 419 (2022)(citing *Clark v. Martinez* 543 U.S. 371, 381; 125 S.Ct. 716; 160 L.Ed.2d 734 (2005)).

The United States Supreme Court has provided clarity on the purpose and intent of the

doctrine, and how Courts should apply the canon (or not) where constitutional questions arise. “The canon is not a method of adjudicating constitutional questions by other means (citation omitted). Indeed, one of the canon’s chief justifications is that it allows courts to *avoid* the decision on constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez, supra.* at 381 (2005). Put more plainly, courts must presume that the legislative body did not intend to pass a law that violated the Constitution, and the Court, in determining the constitutionality of a statute, must try and determine if there is a construction of the statute that may be reasonably applied so as to avoid the ultimate question of constitutionality in the first place.

*a. Legislative Intent*

Here, Appellant asserts the legislature did not *intend* to enact a law that violated the First Amendment. Without wasting time on rhetorical arguments, the reason for this is seemingly straightforward. As Appellant noted in its original brief to the Court, the State statute at issue here was passed in 2002, as part of a nationwide series of laws enacted by both the State and Federal governments to allow better detection, prevention, and prosecution of terrorism and threats of terrorism. However, as this court is aware, the law is a fluid thing, and as the wide river of First Amendment decisions continues to carve its course through our jurisprudence, statues that were passed with the best of intentions and constitutional fortitude, find themselves swept away in an unexpected flood. The *Counterman* decision was not issued until June of 2023, and it was only then that the cracks in the constitutional foundations of M.C.L.§750.543m were revealed. As such, there is no reason to presume that the legislature intended to enact an unconstitutional statute, but rather, what had presumptively been constitutional at the time it was passed, fell into

unconstitutionality based upon a ruling from the United States Supreme Court over which the legislature had no control, and no ability to anticipate at the time of the act's passage. As such, there is sufficient legal basis for the Court to move on to the second prong of the canon: namely, is there a construction of the statute that can be reasonably had, which would permit the constitutional question to be avoided, while rendering an appropriate result.

*b. Statutory Construction*

The constitutional doubt canon requires an appellate court to try and find any other reasonable construction for a statute that would allow for its constitutionality to be preserved, thereby avoiding the constitutional question in the first place. Here, Appellant asserts this court did that when it issued its first opinion in this matter on February 13, 2025. Furthermore, the language in the holding in *Counterman v. Colorado* clearly establishes that the plain language of the statute is constitutionally deficient, in that, it fails to account for the *mens rea* of the Defendant with regard to the conveyance of a threat that would fall under the auspices of the Act. Appellant's entire argument rests upon the fact that it isn't the words in the statute, or their interpretation that are the problem. Rather, just as with the Colorado statute at issue in *Counterman*, it is the language that is not contained in the statute, which cannot be reasonably interpreted or inferred, that creates the constitutional problem.

Looking to the actual language of the statute, it is devoid of any reference to a Defendant's subjective intent when the threat was communicated. While the statute uses the term "threat" that term is not included in the definitional section of the act, found in M.C.L. §750.543b. In *Counterman*, the United States Supreme Court addressed the Government's purported fix, to simply apply the dictionary definition of the term, which carries an implied subjective intent, and dismissed it out of hand.

If courts were at liberty to redefine what counts as a “threat” or “defamation” at will, this would achieve the same results as creating new categories of unprotected speech.

Thus, the Court must first ask whether there is a long-standing tradition of punishing inadvertent threats as “true threats.” This Court’s prior definition of the word “threat” in a federal statute, looking primarily to dictionaries, *Elonis*, 575 U.S., at 733, 135 S. Ct. 2001, 192 L. Ed. 2d 1, does not tell us the scope of “true threats” for First Amendment purposes. *Elonis* itself made clear that it did “not . . . consider any First Amendment issues.” *Id.*, at 740, 135 S. Ct. 2001, 192 L. Ed. 2d 1. Instead, a careful examination of this Court’s true-threats precedent and the history of threat crimes does not support a long-settled tradition of punishing inadvertently threatening speech.

*Counterman*, *supra*. at 90 (2023)(citing *Elonis v. United States*, 575 U.S. 723; 135 S.Ct. 2001; 192 L.Ed.2d 1 (2015)). The Court’s position was very clear. Dictionary definitions of the word “threat” simply do not apply to the scope of “true threats” for First Amendment purposes, and do not fully encompass the legal standard for what constitutes a “true threat”. Therefore, the Court dismissed any such argument, essentially, out of hand.

Here, the Attorney General proposes yet another “fix,” i.e., interposing the intent found in the definition of “act of terrorism” and indicating that such a definition must be imposed for threats to commit those acts as well. Damn the torpedoes that the provisions of the statute expressly rule out such a “fix” as argued previously. However, even if one averts their eyes from the obvious statutory trainwreck such a reading would create, the Attorney General’s position simply doesn’t comport with the express holdings of the United States Supreme Court in *Counterman*.

True threats of violence, everyone agrees, lie outside the bounds of the First Amendment’s protection. And a statement can count as such a threat based solely on its objective content. **The first dispute here is about whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.** Colorado argues that there is no such requirement. *Counterman* contends that there is one, based mainly on the likelihood that the absence of such a *mens rea* requirement will chill protected, non-threatening speech. *Counterman*’s view, we decide today, is the more consistent with our precedent. To combat the kind of chill he references, our decisions have often insisted on protecting even

some historically unprotected speech through the adoption of a subjective mental-state element. **We follow the same path today, holding that the State must prove in true-threats cases that the Defendant had some understanding of his statement's threatening character.** The second issue here concerns what precise *mens rea* standard suffices for the First Amendment purpose at issue. Again guided by our precedent we hold that a recklessness standard is enough. Given that a subjective standard here shields speech not independently entitled to protection – and indeed posing real dangers – we do not require that the State prove the Defendant had any more specific intent to threaten the victim.”

*Counterman, supra.* 143 S.Ct. at 2113 (2023)(emphasis added). The Attorney General's position asks this Court to disregard the clear language of the Supreme Court's holding. A true threat statute must contain a subjective intent element not for the act itself, but regarding the knowledge of the Defendant that the making of the threat was done at least recklessly. The intent to commit or not commit the act is a wholly separate and distinct crime. Further, the Attorney General's drag and drop approach ignores the fact that criminal statutes may contain *different mens reas* for *different elements of an individual offense*. Hence the requirement that the legislature must specify the intent necessary to prove a criminal act. Here, there was zero consideration when the statute was passed about the subjective intent that was necessary with regard to Defendant's *mens rea* about the communication of the threat itself, and one cannot simply be superimposed. Especially not where such a superimposition is barred by a clause in the same subsection of the statute. Nothing in the argument made by the Attorney General changes that fact in any way. In fact, if the Court adopted the position requested by the Attorney General, it would simply create an even more grave affront to the First Amendment and the Court's holding in *Counterman*. The argument simply cannot be sustained, and should be rejected out of hand.

### CONCLUSION

The Attorney General has decided it wishes to take up the yolk of the Government's arguments made by the Wayne County Prosecutor's Office, the Appellant. Their arguments should

be subject to the same fate as the Government's made previously. Like Sisyphus, the Government continues pushing the boulder that is M.C.L. §750.543m up the same hill, only to realize that it will never reach the top. The fact that the Attorney General has decided to give Sisyphus aid, will not change the fact that the hill's summit is unreachable, and no matter how many agencies determine they desire to assist, the unconstitutional nature of the statute ultimately prevents the outcome they desire. The Court was correct before, and it should again, put an end to the myth of constitutionality the Government attempts to suggest surrounds M.C.L. §750.543m. The clear eyes of the Court have seen through the fog previously, and nothing about the considerations posed by the Supreme Court changes the ultimate outcome. The statute must be struck down because it is incurably unconstitutional.

Respectfully Submitted,

DODSON FOWLER WILLIAMS & NESI, PLC

/s/ *Daniel J. Williams*

Daniel J. Williams (P72085)

Aimee M. Fowler (P72736)

*Attorneys for Defendant-Appellee*

18050 Mack Avenue

Grosse Pointe, MI 48230

(313) 458-8276 / (313) 469-7085 (Fax)

[danielnfw@gmail.com](mailto:danielnfw@gmail.com)

[aimeenfz@gmail.com](mailto:aimeenfz@gmail.com)

[smccarthy@dfwnlaw.com](mailto:smccarthy@dfwnlaw.com) (Paralegal)

Dated: June 12, 2025

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record for all parties to the above cause at their respective addresses as disclosed by the pleadings of record herein on this 12<sup>th</sup> day of June, 2025

By: Electronically

I declare under the penalty of perjury that the statement above  
is true to the best of my information, knowledge and belief.

/s/ Sharon M. McCarthy

SHARON M. McCARTHY,  
Sr. Litigation Paralegal



**DODSON  
FOWLER  
WILLIAMS  
& NESI, PLC**

*Main Office*

18538 Mack Ave.  
Grosse Pointe Farms,  
MI, 48236

(313) 458-8276  
(313) 469-7085 (Fax)

*Village Office*

722 Notre Dame  
Grosse Pointe, MI  
48230

(313) 886-5769  
(313) 886-5851 (Fax)

dfwnplc.com

*Attorneys*

Nathan A. Dodson, Esq.  
Aimee M. Fowler, Esq.  
Daniel J. Williams, Esq.  
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Michael Wightman, Esq.

# APPENDIX 20

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STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH KVASNICKA,

Defendant-Appellant.

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No. 371542

Wayne Circuit Court

LC No. 24-001354-01-FH

ON REMAND

Before: BOONSTRA, P.J., and M. J. KELLY and MALDONADO, JJ.

M. J. KELLY, J.

This case involving the constitutionality of MCL 750.543m, a statute that criminalizes making a terrorist threat or making a false report of terrorism, returns to us on remand from our Supreme Court. *People v Kvasnicka*, \_\_\_ Mich \_\_\_; 18 NW3d 308 (2025) (*Kvasnicka II*). In our prior opinion, we concluded that MCL 750.543m was facially unconstitutional because, contrary to the United States Supreme Court’s decision in *Counterman v Colorado*, 600 US 66; 143 S Ct 2106; 216 L Ed 2d 775 (2023), the statute’s plain language does not require the prosecution to prove that the defendant acted recklessly, i.e., that he or she “consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence.” *People v Kvasnicka*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW3d \_\_\_ (2025) (Docket No. 371542); slip op at 5, vacated and remanded 18 NW3d 308 (2025) (*Kvasnicka I*). In its order vacating *Kvasnicka I*, our Supreme Court did not express an opinion on the constitutionality of MCL 750.543m. *Kvasnicka II*, 18 NW3d at 308. Rather, the Court directed us to

address the proper interpretation of MCL 750.543m in light of: (1) MCL 750.543z, which provides that “a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision”; and (2) the constitutional-doubt canon, see *Sole v Mich Econ Dev Corp*, 509 Mich 406, 419-420; 983 NW2d 733 (2022). The Court of Appeals shall also address: (3) whether it is appropriate to adopt a limiting construction of MCL

750.543m to remedy any remaining constitutional deficiency, see *People v Burkman*, 513 Mich 300, 340; 15 NW3d 216 (2024); see also *Osborne v Ohio*, 495 US 103, 115; 110 S Ct 1691; 109 L Ed 2d 98 (1990); (4) if so, what that limiting construction should be; and (5) whether the Wayne Circuit Court abused its discretion by dismissing the case without prejudice on February 24, 2025, where doing so necessarily implicated “aspects of the case involved in the interlocutory appeal” while an application for leave to appeal remained pending with [the Michigan Supreme Court].” *People v Scott*, 513 Mich 180, 200; 15 NW3d 159 (2024); see MCR 7.215(F)(1)(a); MCR 7.305(C)(6)(a). [*Id.*]

Having considered these directives, we now conclude that MCL 750.543m(1)(a) is not facially unconstitutional. Accordingly, we affirm the trial court’s order denying defendant’s motion to dismiss the charges against him and remand for further proceedings consistent with this opinion.

### I. DISMISSAL BY THE TRIAL COURT

We first address whether the trial court abused its discretion by dismissing this case without prejudice while an application for leave was pending in our Supreme Court. We conclude that it did. MCR 7.215(F)(1)(a) provides that, unless otherwise ordered by this Court or our Supreme Court, “the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal in the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court[.]” Additionally, MCR 7.305(C), provides in relevant part:

(6) If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

In our prior opinion, issued on February 13, 2025, we reversed the trial court’s order denying Kvasnicka’s motion to dismiss and ordered the court to enter an order dismissing the charges. *Kvasnicka I*, \_\_\_ Mich App at \_\_\_; slip op at 5. The prosecution had 56 days to file an application for leave to appeal in the Supreme Court under MCR 7.305(C)(2), and it filed its application on February 20, 2025. At that point, the trial court remained divested of subject-matter jurisdiction. See *People v Winburn*, \_\_\_ Mich App \_\_\_, \_\_\_; \_\_\_ NW3d \_\_\_ (2025) (Docket No. 369323); slip op at 2-3 (holding that a trial court is divested of subject-matter jurisdiction upon the filing of a claim of appeal and, upon the filing of an application for leave to appeal to our Supreme Court, “jurisdiction remains with the appellate courts (and correspondingly, the circuit court remains divested of jurisdiction) until the Supreme Court’s ‘disposition of defendant’s application for leave to appeal the Court of Appeals’ judgment.” (quoting *People v Washington*, 508 Mich 107, 127; 972 NW2d 767 (2021))). Contrary to the court rules, and in the absence of subject-matter jurisdiction, the trial court dismissed the case without prejudice on February 28, 2025, which was 15 days after this Court issued the opinion, and 8 days after the prosecution filed its application for leave to appeal. In doing so, the court abused its discretion.

## II. CONSTITUTIONALITY OF MCL 750.543m

### A. STANDARD OF REVIEW

In its remand order, our Supreme Court has directed us to consider the proper interpretation of MCL 750.543m in light of MCL 750.543z and the constitutional-doubt canon of statutory interpretation. We review de novo questions related to the constitutionality of a statute. *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014). We also review de novo the proper application and interpretation of a statute. *Id.* at 414-415.

### B. ANALYSIS

#### 1. CONSTITUTIONAL PRINCIPLES

We first consider the underlying constitutional principles applicable in this case. Although the states and the federal government are prohibited from making laws that abridge the freedom of speech, US Const Am I and Const 1963, art 1, § 5, it is well-established that “[t]rue threats of violence are outside the bounds of First Amendment protection and [are] punishable as crimes.” *Counterman*, 600 US at 69. “‘True threats’ encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals.” *Virginia v Black*, 538 US 343, 359; 123 S Ct 1536; 155 L Ed 2d 535 (2003). “The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” *Id.* at 359-360 (quotation marks, alterations, and citation omitted). “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 (say, ‘I am going to kill you for showing up late’).” *Counterman*, 600 US at 74, citing *Watts v United States*, 394 US 705, 708; 89 S Ct 1399; 22 L Ed 2d 664 (1969). “Whether the speaker is aware of, and intends to convey, the threatening aspect of the message is not part of what makes a statement a threat[.]” *Counterman*, 600 US at 74, citing *Elonis v United States*, 575 US 723, 733; 135 S Ct 2001; 192 L Ed 2d 1 (2015). “The existence of a threat depends not on the mental state of the author but on what the statement conveys to the person on the other end.” *Id.* (quotation marks and citation omitted). In *Counterman*, recognizing that a statement can qualify as a true threat “solely on its objective content,” the *Counterman* Court considered “whether the First Amendment nonetheless demands that the State in a true-threats case prove that the defendant was aware in some way of the threatening nature of his communications.” *Counterman*, 600 US at 72.

The defendant in *Counterman* sent a woman, CW, hundreds of Facebook messages between 2014 and 2016. *Counterman*, 600 US at 70. CW did not know the defendant and never responded to his messages. *Id.* Some of the defendant’s messages were facially inoffensive, although they suggested that he and CW had a personal relationship. *Id.* Other messages indicated that the defendant had observed or followed CW without her knowledge, and still others were even more perplexing or menacing. *Id.* The prosecutor charged the defendant with violating Colorado’s stalking statute, Colo Rev Stat 18-3-602(1)(c) (2020), which stated in pertinent part:

(1) A person commits stalking if directly, or indirectly through another person, the person knowingly:

\* \* \*

(c) Repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, a member of that person's immediate family, or someone with whom that person has or has had a continuing relationship to suffer serious emotional distress. For purposes of this paragraph (c), a victim need not show that he or she received professional treatment or counseling to show that he or she suffered serious emotional distress.

The defendant moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats." *Counterman*, 600 US at 71. The trial court denied the motion because an objective, reasonable person would have viewed the messages as threatening. *Id.* The state appellate court affirmed the order, ruling that the prosecution did not need to prove that the defendant subjectively intended to threaten CW and that his messages were true threats under the state's objective standard. *Id.* at 71-72. The Colorado Supreme Court denied review of the defendant's application for leave to appeal. *Id.* at 72.

Thereafter, the United States Supreme Court determined that, in a true-threats case, a subjective mental state was constitutionally required in order to avoid chilling constitutionally protected speech. *Id.* at 75. In doing so, the Court reasoned that a recklessness *mens rea* was the subjective standard required by the First Amendment. *Id.* at 79. It explained:

A person acts recklessly, in the most common formulation, when he "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another." *Voisine v United States*, 579 US 686, 691; 136 S Ct 2272; 195 L Ed 2d 736 (2016) (internal quotation marks omitted). That standard involves insufficient concern with risk, rather than awareness of impending harm. See *Borden v United States*, 593 US \_\_\_, \_\_\_; 141 S Ct 1817, 1823-1824; 210 L Ed 2d 63 (2021) (plurality opinion). But still, recklessness is morally culpable conduct, involving a "deliberate decision to endanger another." *Voisine*, 579 US at 694. In the threats context, it means that a speaker is aware "that others could regard his statements as" threatening violence and "delivers them anyway." *Elonis*, 575 US at 746 (Alito, J., concurring in part and dissenting in part). [*Id.*]

Accordingly, the Court held that, in a true-threats case, "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The State need not prove any more demanding form of subjective intent to threaten another." *Id.* at 69. Because Colorado applied an objective standard in the defendant's prosecution, the *Counterman* Court ruled that the defendant's conviction violated his First

Amendment rights. *Id.* at 82. Accordingly, the Court vacated the judgment of the Colorado Court of Appeals and remanded the case for further proceedings. *Id.* at 83.

## 2. STATUTORY INTERPRETATION

Kvasnika is charged with making a threat of terrorism under MCL 750.543m(1)(a).<sup>1</sup> In prior caselaw addressing the constitutionality of MCL 750.543m, this Court has determined that MCL 750.543m only applies to true threats. *People v Osantowski*, 274 Mich App 593, 603; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103 (2008); *People v Byczek*, 337 Mich App 173, 186; 976 NW2d 7 (2021); and *People v Gerhard*, 337 Mich App 680, 687-688; 976 NW2d 907 (2021). Specifically, the *Byczek* Court explained:

The prosecution is not required to prove that the defendant had the intent or the capability to actually carry out the threatened act of terrorism, MCL 750.543m(2), but the prosecution must prove the defendant's general intent to communicate a true threat; that is, the "communication of a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," made with "an intent to 'intimidate or coerce.'" [*Byczek*, 337 Mich App at 185-186, quoting *Osantowski*, 274 Mich App at 603].

*Osantowski*, *Byczek*, and *Gerhard* were decided prior to the United States Supreme Court's decision in *Counterman*. Moreover, given that a statement can qualify as a true threat "based solely on its objective content," *Counterman*, 600 US at 72, the mere fact that the prior cases determined that MCL 750.543m only applies to true threats does not answer the question of whether the "general intent to communicate a true threat" is to be judged by an objective or a subjective standard.

Having concluded that prior caselaw does not answer the question at issue, we turn to the relevant statutory language. If a statute criminalizes pure speech, then it "must be interpreted with the commands of the First Amendment clearly in mind." *Watts*, 394 US at 707. "The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of [legislative] intent." *McKinley*, 496 Mich at 415. However, under the constitutional-doubt canon, "[w]hen the validity of an act . . . is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Sole*, 509 Mich at 419 (quotation marks and citations omitted; alteration in original). Under this canon, "courts reasonably presume that the Legislature did not intend to enact a statute that raises serious constitutional doubts." *Id.* at 419-420 (quotation marks and citation omitted). To avoid such an outcome we must "adopt any other construction of the statute *that is fairly possible*." *Id.* at 421 (quotation marks and citations omitted; emphasis added).

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<sup>1</sup> In addition to the charge of making a threat of terrorism, Kvasnika was also charged with using a computer to commit a crime, MCL 752.796. Both charges arise from a message that Kvasnika sent to a young girl via social media stating that she was "not gonna be laughing once I come to your school and shoot it up or blow it up like [C]olumbine."

Additionally, as it relates to the application of the Michigan Anti-Terrorism Act, MCL 750.543a *et seq.*, we also consider MCL 750.543z, which provides that “[n]otwithstanding any provision in this chapter, a prosecuting agency shall not prosecute any person or seize any property for conduct presumptively protected by the first amendment to the constitution of the United States in a manner that violates any constitutional provision.” This does not mean that all prosecutions under the Michigan Anti-Terrorism Act automatically survive constitutional scrutiny. To be sure, the prefatory phrase “notwithstanding any provision in this chapter,” acknowledges that, under some circumstances, application of the statutory provisions in the Michigan Anti-Terrorism Act—including MCL 750.543m—may result in an unconstitutional infringement upon a person’s First Amendment rights. The second part of the sentence, however, clarifies that the Legislature does not, in fact, intend any such unconstitutional application of the statute to be used by the prosecution, notwithstanding the existence of statutory language to the contrary.

With these principles in mind, we turn to the language in MCL 750.543m. MCL 750.543m(1)(a) provides that “[a] person is guilty of making a terrorist threat” if he or she “[t]hreatens to commit an act of terrorism and communicates the threat to any other person.” MCL 750.543(1)(a). An “act of terrorism” is defined as

a willful and deliberate act that is all of the following:

- (i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.
- (ii) An act that the person knows or has reason to know is dangerous to human life.
- (iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion. [MCL 750.543b(a).]

Unlike a charge of making a false report of terrorism, which requires that the defendant “[k]nowingly makes a false report of an act of terrorism and communicates the false report to another person, *knowing* it is false,” MCL 750.543m(1)(b) (emphasis added), there is no scienter requirement expressly stated in the plain language of MCL 750.543m(1)(a). Rather, based upon the plain statutory language, a defendant is guilty of making a terrorist threat if he or she threatens to commit an act of terrorism and communicates that threat to another.

However, a statute is not unconstitutional merely because it is silent regarding the element of intent. *Elonis v United States*, 575 US 723, 734; 135 S Ct 2001; 192 L Ed 2d 1 (2015). In *Elonis*, the defendant was charged with several counts under 18 USC 875(c) for transmitting interstate commerce threats to injure another person. The defendant moved to dismiss the charges because, although the prosecution showed that he intentionally made a communication, it did not show that he intentionally made a threat. *Id.* at 731. The trial court denied the motion, and, at trial, the defendant asked for a jury instruction that the prosecutor had to prove that he intended to communicate a true threat, but the trial court denied his request. *Id.* Instead, the trial court told the jury that a statement is a true threat if a person makes a statement under circumstances in which a reasonable person would foresee that the recipient would interpret the statement as a serious

statement of an intention to inflict bodily injury. *Id.* The prosecution argued to the jury that it did not matter what the defendant thought or whether he intended the posts to be threats. *Id.* at 732. After he was convicted of four counts, the defendant raised his intent arguments in the appellate court, but it ruled that the intent required in the statute was “only the intent to communicate words that the defendant understands, and that a reasonable person would view as a threat.” *Id.*

The *Elonis* Court recognized that 18 USC 875(c) did not include an intent element, but held that the failure to state a level of intent in the words of the statute did not mean that none existed. *Id.* at 734. The *Elonis* Court reasoned:

We have repeatedly held that “mere omission from a criminal enactment of any mention of criminal intent” should not be read “as dispensing with it.” *Morrisette v United States*, 342 US 246, 250[; 72 S Ct 240; 96 L Ed 288] (1952). This rule of construction reflects the basic principle that “wrongdoing must be conscious to be criminal.” *Id.*, at 252. As Justice Jackson explained, this principle is “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Id.*, at 250. The “central thought” is that a defendant must be “blameworthy in mind” before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id.*, at 252; 1 W LaFave, *Substantive Criminal Law* § 5.1, pp 332–333 (2d ed. 2003). Although there are exceptions, the “general rule” is that a guilty mind is “a necessary element in the indictment and proof of every crime.” *United States v Balint*, 258 US 250, 251[; 42 S Ct 301; 66 L Ed 604] (1922). We therefore generally “interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them.” *United States v X-Citement Video, Inc.*, 513 US 64, 70[; 115 S Ct 464; 130 L Ed 2d 372] (1994). [*Elonis*, 575 US at 734.]

The *Elonis* Court then considered the defendant’s conduct of transmitting a threat of violence under 18 USC 875(c) and concluded that it was not enough to show that his posts would be understood to be threatening by a reasonable person. *Elonis*, 575 US at 737-738. Although a reasonable-person standard may be sufficient to establish civil liability in negligence cases, the Court ruled that to convict a person of a criminal offense, the person had to have some awareness of wrongdoing. *Id.* at 738. Because the defendant was convicted under an objective standard regarding his state of mind, the *Elonis* Court reversed his conviction. *Id.* at 740. The *Elonis* Court, however, declined to determine whether it was enough to show that the defendant acted recklessly or whether a prosecutor must prove that the defendant had a higher level of intent to meet the *mens rea* requirement in the statute, *id.* at 740-742. That question was later answered in *Counterman*, which, as noted above, held that it was sufficient to show that the defendant acted recklessly. *Counterman*, 600 US at 72-73.

Accordingly, under *Elonis*, the lack of an express *mens rea* in MCL 750.543m(1)(a) is not dispositive as to the statute’s constitutionality because the statute should be broadly interpreted to

include a *mens rea* requirement even though the statute is otherwise silent.<sup>2</sup> In turn, under the constitutional-doubt canon of statutory interpretation, it is “fairly possible” to construe MCL 750.543m(1)(a) as constitutional by interpreting MCL 750.543m(1)(a) to include a *mens rea* requirement that does not fall foul of the decision in *Counterman*. See *Sole*, 509 Mich at 421. We, therefore, construe MCL 750.543m(1)(a) as requiring that the prosecution prove (1) that the defendant *recklessly* threatened (2) to commit an act of terrorism and (3) that the threat was communicated to another person. The term “recklessly” means that the defendant “consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence.” See *Counterman*, 600 US at 69.<sup>3</sup>

### 3. INSTRUCTIONS TO THE TRIAL COURT ON REMAND

Under MCR 2.512(D)(2), the use of the model jury instructions is generally required unless the trial court determines that the instruction does not accurately reflect the state of the law. The model jury instructions for making a terrorist threat are stated in M Crim JI 38.4, which provides:

(1) The defendant is charged with the crime of making a threat to commit an act of terrorism. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant communicated with [*identify recipient(s) of communication*] by speech, writing, gestures, or conduct.

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<sup>2</sup> This is contrary to ordinary principles of statutory interpretation, which provide that “[t]he touchstone of legislative intent is the statute’s language.” *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Ordinarily, “[i]f the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.” *Id.* (quotation marks and citation omitted). Additionally, given that the Legislature added a “knowingly” scienter requirement to the crime of making a false report of an act of terrorism charge, but did not add a scienter requirement to the crime of threatening to commit an act of terrorism, we would ordinarily conclude that the omission of an intent requirement for the latter crime was intentional and so we would not add an intent requirement that was omitted by the Legislature. See *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 565; 741 NW2d 549 (2007) (“The omission of a provision in one part of a statute that is included in another part of the statute should be construed as intentional, and a provision not included in one part of a statute should not be included by a court.”). It is only with the utmost hesitation and reluctance that we read into MCL 750.543m(1)(a) a *mens rea* requirement that the Legislature did not deem necessary to expressly state when enacting MCL 750.543m(1)(a). The more proper fix would be for the Legislature to amend MCL 750.543m(1)(a) to conform to the law, as set forth in *Counterman*, and we encourage it to do so.

<sup>3</sup> Because MCL 750.543m(1)(a) can be construed as constitutional under *Elonis* and the constitutional-doubt canon of statutory interpretation, we need not consider whether a limiting construction would be appropriate under *Burkman*, 513 Mich 300, and *Osborne*, 495 US 103, to remedy any remaining constitutional deficiencies.

(3) Second, that during the course of the communication, the defendant threatened to commit an act of terrorism. A threat does not have to be stated in any particular terms but must express a warning of danger or harm. Further, it must have been a true threat, and not have been something like idle talk, or a statement made in jest, or a political comment. It must have been made under circumstances where a reasonable person would think that others may take the threat seriously as expressing an intent to inflict harm or damage.

To prove that the defendant threatened to commit an act of terrorism, the prosecutor must prove:

(A) that the defendant communicated that [he / she] would commit the felony crime of [*state felony*];

(B) that the defendant knew or had reason to know that committing the felony would be dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury, or the felony involved a kidnapping;

(C) that, by committing the felony, the defendant would intend to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

It does not matter whether the defendant actually could commit the felony or actually intended to commit the felony, but only whether the defendant threatened to commit the felony as an act of terrorism.

Because M Crim JI 38.4(3) only requires that the prosecution must prove that an objectively reasonable person would understand that his message was a true threat, not that the defendant must be subjectively aware that his message was a true threat, we conclude that it is contrary to law. Accordingly, the trial court should not use the model jury instruction in this case as written. See MCR 2.512(D)(2)(b).<sup>4</sup> Rather, if it uses the model jury instruction it should adapt it so as to “give additional instructions on applicable law not covered by the model instructions.” MCR 2.512(D)(4). Specifically, and in either event, consistent with our construction of MCL 750.543m(1)(a), the court should instruct the jury that the prosecution must prove that Kvasnika recklessly threatened to commit an act of terrorism, i.e., that he “consciously disregarded a substantial risk that his [or her] communications would be viewed as threatening violence.” See *Counterman*, 600 US at 69.

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<sup>4</sup> The rules for adopting, amending, or repealing a model jury instruction are set forth in MCR 2.512(D). Notably, the authority to do so falls upon committees appointed by our Supreme Court. MCR 2.512(D)(1). And the ultimate decisionmaker on the adoption, amendment, or repeal of such instructions is our Supreme Court. See MCR 1.201. Although we lack the authority to order that M Crim JI 38.4(3) be amended, we recommend that the Michigan Supreme Court consider such an amendment of the instructions.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Mark T. Boonstra

/s/ Allie Greenleaf Maldonado

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