IN THE SUPREME COURT OF THE STATE OF MONTANA
CAUSE NO. DA 22-0478

STATE OF MONTANA,

Plaintiff and Appellee,

and

JOSIAH BRACKETT,

Defendant and Appellant.

Appellant/Defendant's Opening Brief

On Appeal from the District Court of the Eighteenth Judicial District
of the State of Montana, In and For the County of Gallatin

Before the Honorable John C. Brown
Cause No. DC-20-495C

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STATEMENT OF THE ISSUES

1. Given the U.S. Supreme Court's June 27, 2023 opinion in *Counterman v. Colorado*, the statute upon which Brackett was convicted (Mont. Code Ann. § 45-5-220, Stalking) is unconstitutional and his conviction should be vacated.
2. The factual basis supporting Brackett's guilty plea was based upon an unconstitutional standard and his conviction should be vacated.

STATEMENT OF THE CASE

On March 4, 2022, Brackett pled guilty to four counts of stalking, in violation of Mont. Code Ann. § 45-5-220. The statute of conviction requires proof that a person "purposely or knowingly" engage in a course of conduct that they know or should know would cause a "reasonable person" to fear for their safety or suffer emotional distress. As written and based upon this Court's precedent, the statute establishes an objective standard, which does not require that the offender have an understanding that their speech would cause fear or emotion distress, rather the standard established by the statute is whether a reasonable person would find the defendant's speech threatening or suffer emotional distress.

On June 27, 2023, the U.S. Supreme Court released its opinion in *Counterman v. Colorado*, ___ U.S. ___ (2023), which addressed Colorado's stalking statute as it relates to the application of the First Amendment to the U.S. Constitution. Colorado,

like Montana, requires an objective showing that a reasonable person would find the defendant's actions threatening or that a reasonable person would suffer emotional distress. In *Counterman*, the U.S. Supreme Court struck down Colorado's statute stating that the State must show "the defendant had some subjective understanding of his statement's threatening nature." Like the statute at issue in *Counterman*, Montana's statute does not require a showing that the defendant had some subjective understanding of the nature of his speech. Additionally, the factual basis provided by Brackett did not provide support for a finding that Brackett had a subjective understanding that his speech would cause a person to fear for their safety or suffer emotional distress.

Since *Counterman* establishes a new substantive constitutional rule, its rule is retroactive and applies regardless of the when the conviction became final. Given this, this Court should set aside Brackett's conviction and remand for additional proceedings consistent with the *Counterman* requirement.

SUMMARY OF ARGUMENT

The U.S. Supreme Court's *Counterman* requirement that the State must prove a subjective understanding by the defendant that their speech is threatening in nature or would cause the target of that speech to suffer emotional distress invalidates Mont. Code Ann. § 45-5-220 and Brackett's conviction under that statute should be set

aside and his case remanded for further proceedings consistent with the *Counterman* rule.

STATEMENT OF FACTS

At some point in the summer of 2019, Brackett was living in California and met Anna Lauenstein ("Lauenstein"). Affidavit of Probable Cause and Motion for Leave to File Second Amended Information ("Affidavit"), ¶ 10; Doc. 1. Lauenstein was working temporarily in Lake Tahoe, California and she described meeting Brackett as brief and stated they were no more than acquaintances. *Id*.

Despite only interacting with Lauenstein briefly, Brackett became obsessed with Lauenstein and continued to attempt to contact her after Lauenstein returned to Montana. *Id*. Lauenstein attempted to block Brackett on social media, but Brackett created new accounts or otherwise found workarounds to continue to contact Lauenstein. *Id*.

Brackett's actions lead Lauenstein to seek an order of protection, which was issued on April 3, 2020. Affidavit, ¶ 3. However, this did not stop Brackett from contacting Lauenstein, directly and indirectly. Affidavit ¶ 5. Eventually, Lauenstein reported these violations of the order of protection, giving rise to criminal charges against Brackett. Affidavit ¶ 3.

On November 23, 2020, the State filed an Information charging Brackett with four counts of Stalking, in violation of Mont. Code Ann. § 45-5-220(1)(b). Docket

3. On December 29, 2020, the State filed its First Amended Information adding one additional count of Stalking. Doc. 10. On April 30, 2020, the State filed its Second Amended Information adding another two counts of Stalking, bringing the total to seven counts of Stalking. Doc. 40.

Each of the counts alleged Brackett "purposely or knowingly engaged in a course of conduct directed at a specific person and knew or should have known that the course of conduct would cause a reasonable person to suffer substantial emotional distress and by doing such violated an order of protection…" See Counts 1-7, Doc. 40.

After plea negotiations, Brackett plead guilty to four of the seven counts of Stalking. See Transcript of March 4, 2022 Change of Plea Hearing ("Tr."). Following entry of his guilty pleas, Brackett provided an allocation to provide the factual basis for each of the counts. Tr. 12:20-14:9. Below is a exert with the relevant parts of Brackett's allocution:

> Q. Mr. Brackett, concerning Count 3, in September of 2020, did you purposely or knowingly contact Anna Lauenstein more than one time by sending her direct messages one time and calling her at least once?
>
> A. Yes, indeed I did.
>
> Q. And at that time, there was an order of protection in place that was prohibiting you from having contact with her; is that correct?
>
> A. That's correct.

Q. And would you agree that by texting her or calling her or trying to communicate with her through those means in September, that you knew or should have known that that would cause her substantial emotional distress?

A. I concur. I agree.

Q. Count 5. Josiah, in November of the year 2020, do you agree that you called and left voicemails at least two times to Anna Lauenstein at the time?

A. Yes, ma'am.

Q. In that month?

A. I agree.

Q. And at that time, you were aware there was an order of protection in place that prohibited you from attempting or communicating with her in any way; is that true?

A. It's true.

Q. And so, do you agree that you knew or should have known at that time that your attempts to communicate with her, given the order of protection, would cause her substantial emotional distress?

A. That's correct, I agree.

Q. Count 6. In December of the year 2020, did you purposely or knowingly attempt or contact Anna Lauenstein by sending messages either directly to her?

A. That's correct.

Q. Did this happen more than one time --

A. It did.

Q. -- during the month of December 2020?

A. Yes.

Q. And did you purposely or knowingly attempt to contact her, either through messages or social media, during that month?

A. Yes.

Q. And there was -- you were aware there was an order of protection in place at that time that prohibited you from having any direct or indirect contact with her at that time?

A. That's correct.
Q. And, therefore, because of that, would you agree that you knew or you should have known that your attempts to contact her directly or indirectly would cause her substantial emotional distress, given that there was an order of protection in place prohibiting you from having contact?
Do you agree that your contacting her, that you knew or you should have known it would cause her substantial emotional distress?

A. I agree I should have known.

Q. For Count 7, Josiah, through March and April of 2021, when you were in custody at the Gallatin County Detention Center, did you purposely or knowingly attempt to contact Anna Lauenstein by calling her one time, I guess, and left a message that there was an inmate, that you wished to have contact with her and also by sending her direct messages while you were in custody or a direct
message?

A. That's correct. Through inmate canteen.

Q. This happened -- there were at least two times that you attempted or tried to communicate with her?

A. That's correct.

Q. And at that time, you did that purposely or knowingly? Wasn't an accident, right?

A. Knowingly.

Q. Okay. You did that knowingly, and at that time, do you agree that there was an order of protection in place that prohibited you from
attempting to contact her or having direct or indirect contact with her?

A. I agree.

Q. And given that there was the order of protection in place, do you agree that you knew or that actually you should have known at that time that these attempts to communicate and these messages would cause her a substantial emotional distress?

A. That's correct, I agree.

Tr. 12:20-17:8.

The district court accepted Brackett's plea colloquy as providing an adequate factual basis and entered guilty pleas to the four counts of Stalking, under Mont. Code Ann. § 45-5-220(1)(b). Tr. 18:7-12.

On June 30, 2022, Brackett was sentenced to 5 years commitment to Department of Public Health and Human Services for each count, running consecutive to each other. See Sentencing Order, Doc. 125.

STANDARDS OF REVIEW

This Court exercises plenary review of constitutional questions. *State v. Mercier*, 2021 MT 12, ¶ 11, 403 Mont. 34, 479 P.3d 967; *State v. Bailey*, 2021 MT 157, ¶ 17, 404 Mont. 384, 489 P.3d 889.

ARGUMENT

I. BASED UPON THE NEW REQUIREMENT IN *COUNTERMAN V. COLORADO* BRACKETT'S CONVICTION SHOULD BE VACATED.

In its recent opinion in *Counterman v. Colorado*, ___ U.S. ___ (2023), the U.S. Supreme Court established a new constitutional requirement for cases involving speech which is prohibited as threating. In such cases, the State must now show the defendant had some subjective understanding of the statements threatening nature. The *Counterman* court established "recklessness" as the required mens rea for proving the defendant had a subjective understanding of the threatening nature of their speech.

While Montana does not have a "recklessness" mens rea, it roughly equates to "negligently," as defined by Mont. Code Ann. § 45-2-101(43).

Recklessness as defined by the U.S. Supreme Court requires "a showing that a person consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another." *Counterman*, citing *Voisine v. United States*, 579 U.S. 686, 691 (2016) (internal quotations omitted).

In Montana "negligently" is statutorily defined as:

> "Negligently"--a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms, such as "negligent" and "with negligence", have the same meaning.

Mont. Code Ann. § 45-2-101(43).

A. Mont. Code Ann. § 45-5-220 Contains an Objective Standard, Disallowed Under *Counterman*

> (1) A person commits the offense of stalking if the person purposely or knowingly engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:
>
> (a) fear for the person's own safety or the safety of a third person; or
>
> (b) suffer other substantial emotional distress.

Mont. Code Ann. § 45-5-220.

The statute requires first that the defendant "purposely or knowingly" engage in a course of conduct, this requires the defendant to purposely or knowingly perform an act, in this case speech, and that speech must be directed at a specific person. The final part of the statute requires that the defendant "know or should know" that speech would cause a reasonable person to be afraid or suffer substantial emotional distress.

It is the final part of the statute that is at issue, as defined within the statute:

> "Reasonable person" means a reasonable person under similar circumstances as the victim. **This is an objective standard**.

Mont. Code Ann. § 45-5-220(2)(b), emphasis added.

As defined by this Court, the standard employed when construing the statute is that of the "reasonable person." *State v. Martel*, 273 Mont. 143, 150, 902 P.2d 14, 19 (1995). A reasonable person standard is an objective one, which asks if a reasonable person faced with the defendant's conduct would experience substantial emotional distress. *Id*.; see also *State v. Yuhas*, 2010 MT 223, ¶ 9, 358 Mont. 27, 243 P.3d 409. The defendant's subjective understanding of the threatening nature of their speech is irrelevant under the statute.

B. Montana's Requirement that the Defendant Knows or Should Know Fails to Save the Statute

Montana's statute as written and applied, is very similar to the Colorado statute stricken down by the U.S. Supreme Court. The Colorado statute makes it unlawful to repeatedly make any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress. Colo. Rev. Stat. § 18-3-602(1)(c).

Unlike the Colorado statute, Montana requires the defendant "knows or should know" their conduct will result in a reasonable person fearing or suffering emotional distress. While the requirement that the defendant knows the conduct at issue will cause a reasonable person to suffer fear or substantial emotional distress

would be a higher requirement than the recklessness standard, the "or should know" causes the statute to fail.

Should know implies that regardless of the person's actual knowledge, circumstances exist that imply that a reasonable person would have such knowledge. This again is an objective standard, barred by *Counterman*.

Recklessness requires a showing that the defendant "consciously disregarded a substantial and unjustifiable risk that his conduct will cause harm to another." The "should know" does not encapsulate this requirement and dooms the statute at issue.

C. Counterman's Requirement Applies and is Retroactive Because This Case is on Direct Appeal

This Court determines the retroactivity of a constitutional rule as a matter of law. *State v. Reichmand*, 2010 MT 228, ¶ 6, 358 Mont. 68, 243 P.3d 423. The U.S. Supreme Court's retroactivity analysis for federal constitutional errors is binding upon states when federal constitutional errors are involved. *Reichmand*, at ¶ 13.

"[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Reichmand*, at ¶ 14, citing to and quoting *State v. Egelhoff*, 272 Mont. 114, 124, 900 P.2d 260, 266 (1995); see also *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). There is no requirement that the appellant have objected below for this Court to review the new rule on appeal. *Reichmand*, at ¶ 11.

Here, this case is on direct appeal and the *Counterman* rule must be applied. The Appellant did not object below because *Counterman* had not yet been decided, the opinion was only released while this case was pending appeal.

II. BRACKETT'S PLEA COLLOQUY DOES NOT SUPPORT A PLEA OF GUILTY BASED UPON THE NEW RULE

The district court received a plea colloquy from Brackett for each of the four counts of stalking. Based on the statute as written and then existing law the plea colloquy would have been sufficient to provide a factual basis for each of Brackett's guilty pleas. However, after applying the new rule, Brackett's colloquy can no longer provide an adequate factual basis for his guilty plea.

Specifically, for each count, defense counsel asked Brackett if he "knew or should have known" that his actions would cause Lauenstein to suffer substantial emotional distress. Again, it is the "should have known" portion which causes the defect in Brackett's plea colloquy. As discussed above, this does not meet the "recklessness" showing required under *Counterman* and cannot provide an adequate factual basis to support a Stalking conviction.

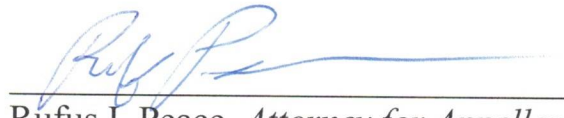
CONCLUSION

Based upon the new, retroactive, *Counterman* rule, the statute of conviction in this case is unconstitutional and Brackett's conviction should be set aside and remanded. Additionally, with the new rule in place, Brackett's plea colloquy fails to

provide an adequate factual basis to find him guilty of a constitutionally sound criminal charge.

DATED this 27th day of July 2023.

PEACE LAW GROUP, LLC



Rufus I. Peace, *Attorney for Appellant/Defendant*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Appellant's Opening Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes, quoted, and indented material; and that the word count calculated by Microsoft Word Professional Edition is 2,668 words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 27th day of July 2023.

PEACE LAW GROUP, LLC

Rufus I. Peace, *Attorney for Appellant/Defendant*

APPENDIX

U.S. Supreme Court Opinion - *Counterman v. Colorado*, ___ U.S. ___ (2023).

CERTIFICATE OF SERVICE

I, Rufus I. Peace, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-27-2023:

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