

**STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Law Court Docket No. AND-22-317

STATE OF MAINE,

Plaintiff – Appellee,

v.

JACOB R. LABBE, SR.,

Defendant – Appellant.

**APPEAL FROM A JUDGMENT OF THE ANDROSCOGGIN
COUNTY UNIFIED CRIMINAL DOCKET**

**BRIEF OF AMICUS CURIAE
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INTEREST OF AMICUS CURIAE

Amicus Curiae Lawrence C. Winger, Esq. is a resident of Falmouth, Maine, and an attorney currently practicing law in Portland, Maine. Mr. Winger is interested in improving Maine law's protection for Free Speech and submits this Amicus Brief at the invitation of the Court as stated in the Court's Notice dated September 11, 2023. Mr. Winger has prepared and hereby submits this Amicus Brief independently and without compensation from any party or other person. Mr. Winger has not communicated with or consulted with the Appellant or the Appellee.

LIMITATIONS OF THIS AMICUS BRIEF

Amicus takes no position on and makes no comment on Appellant Labbe's appeal claims (1) that the Maine stalking statute is unconstitutionally vague, (2) that the trial evidence was insufficient to sustain Labbe's conviction for domestic violence stalking, (3) that the trial court's admission of certain items of evidence concerning Labbe's legal and criminal history prejudicially violated Rules 403 and 404 of the Maine Rules of Evidence, and (4) that any technical violations of any statutes by Labbe were de minimis under 17-A M.R.S. § 12.

BRIEF STATEMENT OF FACTS AND PROCEDURAL HISTORY

For a period of less than three weeks in November and December, 2019, Labbe had multiple interactions and communications (including text messages) with his ex-wife. The interactions and communications related to Labbe's son (the ex-wife was the son's mother), Labbe's recovery of his personal property from the ex-wife's residence, and related matters. The ex-wife found some of these interactions and communications to be "concerning" and "upsetting." The State considered the interactions and communications to be stalking under 17-A M.R.S. § 210-A and violations of a protection order.

On December 30, 2019 the police arrested Labbe for felony domestic violence stalking and two misdemeanor charges for PFA violations. A. 1.

On March 3, 2020 the State indicted Labbe for domestic violence stalking (Class C), 17-A M.R.S. § 210-C(1)(B)(3), and two counts of violating a protection from abuse order (Class D), 19-A M.R.S. § 4011(1). A. 3, 34-35.

On July 25 and 26, 2022, the UCD Court conducted a jury trial on Labbe's charges. A. 15. Labbe did not assert or mention a First Amendment defense to the stalking charge during the trial. Trial Transcript. The jury convicted Labbe of all charges. A. 15.

After the trial Labbe moved for a new trial or a judgment of acquittal on the felony stalking charge. A. 36-37. Labbe did not assert or mention a First

Amendment defense to the stalking charge in that motion. *Id.* The UCD Court denied the motion. A. 16 (the 09/28/2022 Docket Record entry erroneously states the motion was “granted”; in fact the motion was denied).

On September 21, 2022 the UCD Court sentenced Labbe to two and one - half years of imprisonment on the felony stalking conviction and one concurrent year each on the two misdemeanor convictions. A. 20-23. At the sentencing hearing the UCD Court expressed the view that even “a pretty benign statement” can constitute stalking. Sentencing Tr. 7-8.

On September 27, 2022 Labbe timely filed a notice of appeal to this Court. A. 18.

On June 27, 2023, while this appeal was pending before this Court, the United States Supreme Court decided *Counterman v. Colorado*, 600 U.S. ____ (2023), in which the Court recognized a First Amendment defense or limitation to a Colorado stalking statute very similar to Maine’s stalking statute.

On September 11, 2023 this Court invited amicus briefs on the application of the *Counterman* decision to Labbe’s stalking conviction and this appeal.

ARGUMENT

POINT I: This Court should hear and decide the application of the *Counterman* decision to Labbe’s stalking conviction and this appeal.

1. The Winchester “No Waiver” Appellate Rule Applies to This Appeal

Although Labbe did not raise in the UCD Court a First Amendment defense to the stalking charge or argue for a First Amendment limitation on Maine’s stalking statute, this Court should nevertheless hear and decide Labbe’s First Amendment argument in accordance with the appellate “no waiver” rule announced by this Court in *Winchester v. State*, 2023 ME 23, ¶ 13, 291 A.3d 707. Maine’s law concerning the First Amendment limitation on the stalking statute was and is undeveloped and indeterminate. Under these circumstances, the *Winchester* decision instructs that Labbe’s First Amendment argument should be heard and decided by this Court. To paraphrase *Winchester*, ¶ 13:

Although Winchester’s failure to develop his speedy trial claim under the Maine Constitution at the trial level potentially foreclosed his ability to raise the claim on appeal, . . . given the current indeterminate status of our precedent regarding the test for a speedy trial violation under the Maine Constitution, . . . we chose to request supplemental briefing on the issue and invited amicus briefs In light of this briefing and the parties’ arguments, we turn to an analysis of article I, section 6 of the Maine Constitution.

2. The Counterman Decision Applies to Labbe's Case

The general federal constitutional rule is that a new substantive criminal law decision of the U.S. Supreme Court applies to all criminal cases pending and “non-final” at the date of the decision. *Welch v. United States*, 578 U.S. 120, 128-131 (2016). Labbe’s instant appeal was pending and non-final on the June 27, 2023 date of the *Counterman* decision. The *Counterman* decision was a substantive criminal law decision addressing a constitutional limitation on a state stalking statute. *Id.* at 129. Thus, the *Counterman* decision applies to Labbe’s appeal now.

3. Labbe Did Not Waive His First Amendment Defense

Before the *Counterman* decision was issued, Labbe (and the State, and the UCD Court) did not even know that he had a First Amendment defense to the stalking charge, so he did not intentionally waive his First Amendment defense to the stalking charge either in the UCD Court or in this appeal in this Court. The applicable federal constitutional rules concerning waivers are “that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that [the Supreme Court does] not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)(quotes and cites omitted). The appeal record in this case shows that

the State has failed to meet its burden of showing that Labbe made “an intelligent waiver” of his First Amendment rights. *Id.*

The conclusion is that this Court should hear and decide the application of the *Counterman* decision to Labbe’s stalking conviction and this appeal.

POINT II: *Counterman* Requires that a First Amendment Limitation to Maine’s Stalking Statute be Applied to Labbe’s Case

1. Counterman Is On Point

The *Counterman* decision addressed a criminal stalking conviction under a Colorado stalking statute very similar to Maine’s stalking statute. Any differences between the two statutes are minor and not material to the First Amendment limitations on such stalking statutes. Actually, in *Counterman* the criminal defendant’s communications were more threatening and more extreme than Labbe’s communications with his ex-wife in Labbe’s case. *Compare Counterman*, Slip Op. at 1-2 (hundreds of Facebook messages over three years from a stranger; some expressly threatening, such as “Die.”) with the Labbe trial record (messages over a period of less than three weeks, from an ex-spouse and father of the parties’ child; some the UCD Court labeled “a pretty benign statement”; many not threatening but in their repetition, just annoying). Nevertheless, in *Counterman* the Court held that the criminal defendant was entitled to a First Amendment defense requiring the prosecution to prove (a) that

the defendant had a subjective understanding of the threatening nature of his statements, and (b) that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening. *Counterman*, Slip Op. at 1-2. Negligence or unforeseen consequences are not enough to establish criminal liability for stalking. This holding of *Counterman* should be followed by this Court and applied to Maine’s stalking statute and Labbe’s case.

2. Traditional Criminal Law mens rea Requirements Should Be Applied to Maine’s Stalking Statute

Counterman’s stalking statute *mens rea* requirement is consistent with traditional federal and Maine criminal law principles. *Morrisette v. United States*, 342 U.S. 246 (1952)(intent is normally implied in a criminal statute even when not expressly mentioned); *Rehaif v. United States*, 588 U.S. __ (2019), Slip Op. at 3 (the criminal law’s “a presumption in favor of scienter” is applied “even when [the Legislature] does not specify any scienter in the statutory text.”); 17-A M.R.S. § 34 (strict liability crimes are disfavored). These traditional *mens rea* requirements should be applied to Maine’s stalking statute, as delineated in *Counterman*.

3. Proposed Proper Jury Instruction for Maine’s Stalking Statute

The trial court’s instructions to the jury concerning the domestic violence stalking charge are contained in the trial transcript at pages 286-287. The trial was conducted in July, 2022 before the *Counterman* decision, and Labbe did not request any First Amendment instruction, so the trial court’s instructions did not

mention any requirement that the State prove that defendant subjectively understood his acts to be threatening and consciously disregarded a substantial risk that his acts would be viewed as threatening.

Amicus respectfully suggests that a modified version of the instruction given would be a proper, *Counterman*-compliant instruction, such as this (the name of the alleged victim is replaced here with “his ex-wife”):

Count I, domestic violence stalking. In Count I of the case the State has charged the defendant with the crime of domestic violence stalking. The State has alleged that Mr. Labbe committed this crime against his ex-wife, and the State has alleged further that the defendant and his ex-wife were family or household members as defined by Maine law.

Pursuant to Maine law, a person is guilty of stalking if the person intentionally or knowingly engages in a course of conduct directed at or concerning a specific person that would cause a reasonable person to suffer serious inconvenience or emotional distress, and the actor subjectively understood his acts to be threatening and consciously disregarded a substantial risk that his acts would be viewed as threatening.

Therefore, in order to prove that the defendant committed domestic

violence stalking, the State must prove beyond a reasonable doubt each of the following elements:

- (1) that on or about or between November 15, 2019 and December 3, 2019, in Lewiston, Androscoggin County, Maine,
- (2) that the defendant engaged in a course of conduct directed at or concerning his ex-wife,
- (3) that such course of conduct would cause a reasonable person to suffer serious inconvenience or emotional distress,
- (4) that the defendant engaged in the course of conduct either intentionally or knowingly,
- (5) that the defendant subjectively understood his course of conduct to be threatening,
- (6) that the defendant consciously disregarded a substantial risk that his course of conduct would be viewed as threatening, and
- (7) that the defendant and ex-wife were family or household members as defined by Maine law.

This is the type of jury instruction to which Labbe was entitled under the *Counterman* decision. Without an instruction such as this, Labbe may have been and, if this case is remanded may be again, convicted of engaging in constitutionally protected conduct.

Amicus realizes that the above proposed jury instruction seems overly long and complicated, but the *Counterman* case in effect added two elements to what was otherwise a five element domestic violence stalking statute, and those two constitutionally-required elements cannot be omitted or short-circuited.

CONCLUSION

Even though Appellant Labbe did not raise the First Amendment issue in the trial court, this Court should hear and decide, consistent with *Counterman*, the First Amendment's limitation on the Maine stalking statute. Said statute should be interpreted as including a *mens rea* requirement that the actor (1) has a subjective understanding of the statements' threatening nature, and (2) made the statements recklessly. That requirement of the stalking statute was not presented to the jury that convicted Labbe of domestic violence stalking, so Labbe's conviction for domestic violence stalking should be vacated and the matter remanded for further prosecution consistent with the correct interpretation of the stalking statute.

Dated at Portland, Maine this October 10, 2023.

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Certificate of Service

The undersigned Lawrence C. Winger, Esq. hereby certifies that two copies of this Brief of Amicus Curiae Lawrence C. Winger, Esq. were served on this date by U.S. Mail, and one PDF copy by email, on each of the following parties:

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