EFFECT OF *COUNTERMAN V. COLORADO* ON VIRGINIA STALKING STATUTE,

VA Code Ann §18.2-60.3

In *Counterman v. Colorado*, ___U.S.___, 143 S.Ct. 2106 (June 27, 2023), the Supreme Court reversed a conviction for stalking under Colorado's stalking law where the court concluded that the only stalking proved at trial were the defendant's facebook posts which "envisaged harm befalling the victim." *Id*., at 2112. The victim believed the defendant was "threat[ening her] life" and "was very fearful that he was following" her and was "afraid [she] would get hurt." *Id*. The state relied solely on the communications and the effect on the victim of feeling threatened to obtain their conviction, although Colorado law allowed for other options such as following, approaching, or contacting and causing serious emotional distress. *See People v. Cross*, 127 P.3d 71, 72 (2006). The victim did testify to having a lot of trouble sleeping, suffering severe anxiety as a result, stopping walking alone and canceling some of her performances (she was a musician) which caused her financial strain.

The court's focus on the threats of harm as the basis for the prosecution is particularly important in VA where all the effects on the victim which would allow a stalking prosecution are harms: "reasonable fear of death, criminal sexual assault or bodily injury . . .," and the conduct highlighted in the statute are communications: "mail, telephone or an electronically transmitted message." VA Code Ann § 18.2-60.3. There is no option for the victim feeling serious emotional distress, such as feeling harassed, intimidated, or tormented, as there was in earlier versions of the law. See e.g. Woolfolk v. Commonwealth, 18 Va. App. 840, 846, 447 S.E.2d 530 (1994). Because "conduct" includes "any other means" there are prosecutions that could stand as long as the communications are not solely what the prosecution relies on.

However, where communications are the foundation of the Commonwealth's case, the *Counterman* issue will arise where the Commonwealth relies on that portion of the statute which allows a conviction if the defendant, "knows or reasonably should know" that their conduct would place the victim in "reasonable fear of death, criminal sexual assault, or bodily injury . . ." *Id*. If the Commonwealth can rely on "with the intent", then there is no issue.

In *Counterman* at 2117 and fn. 5, the court rejected what it termed the "objective", or negligence standard as discussed in Slide 27 of the ppt: "Just to complete the *mens rea* hierarchy, the last level is negligence—but that is an objective standard, of the kind we have just rejected. A person acts negligently if he is not but should be aware of a substantial risk—here, that others will understand his words as threats. See *Borden*, 593 U. S., at ——, 141 S.Ct., at 1823–1824 (plurality opinion). That makes liability depend not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature. See *Elonis*, 575 U.S. at 738, 135 S.Ct. 2001 ('Having liability turn on whether a reasonable person regards the communication as a threat—regardless of what the defendant thinks—reduces culpability ... to negligence.')."

Instead, the standard set by the court for *mens rea* in criminal cases involving punishment for threats of harm is, "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 U.S. at 746, 135 S.Ct. 2001 (ALITO, J., concurring in part and dissenting in part)." *Id*.

SLIDE 27 would have to be amended to read:

§18.2-60.3. A.: the defendant "***KNOWS*** or ***REASONABLY SHOULD KNOW*** that the conduct places that other person in

- reasonable fear of death, criminal sexual assault, or bodily injury to
- that other person or
- to that other person's family or household member"

~~This is an OBJECTIVE standard – even if offender denies knowing the adverse effects his course of conduct would have on the victim, the jury gets to decide that he should have known, BECAUSE ANY REASONABLE PERSON WOULD KNOW, or because of a prior investigation, arrest, prosecution, email, verbal warning, phone call or **STALKING WARNING LETTER. (see in materials)**~~

A prosecution based on this portion of the statute, rather than the "intent" portion, where the threatening substance of communications are involved, would have to be able to prove that the speaker, or writer, or typist, of the threat was AWARE that other persons COULD regard their statements as threatening violence, such as death, criminal sexual assault, or bodily harm, and delivers them anyway. The jury instruction should be changed in each case to reflect this new standard.

The Commonwealth could prove that a defendant was AWARE that others COULD regard their statements as threatening the prohibited violence by a prior investigation or arrest or prosecution, the issuance of an injunction, a verbal warning or phone call or email, or a STALKING WARNING LETTER, included in the materials. With that kind of history, a defendant's denial that he was "aware" would be easily defeated, and likely upheld against constitutional challenge.

Because there is no statutory definition of "with the intent", cases in VA have found, "Specific intent is defined as the 'intent to accomplish the precise criminal act that one is later charged with.'" *Winston v. Commonwealth,* 268 Va. 564, 600, 604 S.E.2d 21, 41 (2004), *cert. denied,* 126 S.Ct. 107 (2005). *See David v. Commonwealth,* 2 Va. App. 1, 4, 340 S.E.2d 576, 578 (1986) (holding that criminal intent may result from doing an intentional act that has the inherent potential of doing harm). The requisite intent may be determined from "'the outward manifestation of [a person's] actions leading to usual and natural results, under the peculiar facts and circumstances disclosed.'" *Hughes v. Commonwealth,* 18 Va. App. 510, 519–20, 446 S.E.2d 451, 457 (1994) (quoting *Ingram v. Commonwealth,* 192 Va. 794, 801–02, 66 S.E.2d 846, 849 (1951)).

Furthermore, Virginia law recognizes that "the fact finder may infer that a person intends the immediate, direct, and necessary consequences of his voluntary acts." *Moody v. Commonwealth,* 28 Va. App. 702, 706–07, 508 S.E .2d 354, 356 (1998). In other words, and this is hugely important, the jury is not bound to have to take the offender's word that he wasn't "aware" that someone would take his words as threatening but rather can draw the inference from his actions and words that he WAS aware that a person COULD take his words as threatening.