No. 16-6250

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT PEREZ,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

BRIEF IN OPPOSITION

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COUNSEL OF RECORD FOR RESPONDENT

QUESTIONS PRESENTED

Petitioner stated his questions as follows:

1. Does a special jury instruction as to section 790.162, Florida Statutes, that an accused may be convicted of that offense with the "stated intent" to do bodily harm to any person or damage to the property of any person amount to an unconstitutional diminishment of the required criminal *mens rea* or scienter under the United States Supreme Court's decision in Elonis v. United States, 135 S.Ct. 2001 (2015)?

2. Whether, under the United States Supreme Court's decision in Elonis v. United States, 135 S.Ct. 2001 (2015), section 790.162, Florida Statutes, contains the necessary criminal element of "mens rea" or guilty knowledge instead of a mental state of mere negligence.

Respondent restates and consolidates the questions as follows:

1. Whether this case raises a substantial federal question when the Florida appellate court affirmed without opinion Perez's challenge to the *mens rea* of section 790.162, Florida Statutes, which criminalizes the action of making a threat to throw, place, project, or discharge a destructive device with the stated intent to do bodily harm or damage to property.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEAL

Respondent, State of Florida, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the Florida Fifth District Court of Appeal's *per curiam* affirmance rejecting Perez's claim that the Florida criminal statute under which he was convicted, section 790.162, Florida Statutes, which includes a *mens rea*, just not the *mens rea* Perez contended it should, and, thus, his conviction and sentence should be vacated.

OPINIONS BELOW

The Florida Fifth District Court of Appeal opinion *per curiam* affirming his judgment and sentence on March 15, 2016, is published and is found at Perez v. Florida, 189 So. 3d 797 (Fla. 5th DCA

2016). The Florida Fifth District Court of Appeal denied the motion for rehearing *en banc* on April 26, 2016, and the order is included as Petitioner's Appendix E.

JURISDICTION

Presumably, Perez is asserting this Court has jurisdiction pursuant to 28 U.S.C. section 1257(3). However, pursuant to Rule 10 of the Rules of the Supreme Court of the United States, Petitioner cannot invoke jurisdiction as a matter of right. Given that Perez has failed to show a compelling reason for the Florida appellate court's decision to be reviewed since the state statute under which he was convicted does require a *mens rea*, just not the *mens rea* Perez alleges it should, this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Perez's claims do not implicate any issue of federal constitutional dimension. Perez is relying upon this Court's holding in Elonis v. United States, ----U.S.—, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015), wherein this Court conducted a statutory interpretation analysis of the intent or scienter element (or lack thereof) of a federal statute, 18 U.S.C. section 875(c). Generally, whether or not a criminal statute requires proof of a defendant's mental state is a question of statutory interpretation. Staples v. United States, 511 U.S. 600, 604, 114 S.Ct. 1793, 1796, 128 L.Ed. 2d (1994). Furthermore, the *mens rea* presumption requires knowledge only of the

facts that make the defendant's conduct illegal, lest it conflict with the related presumption, "deeply rooted in the American legal system," that, ordinarily, "ignorance of the law or a mistake of law is no defense to criminal prosecution." Cheek v. United States, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991).

STATEMENT OF THE CASE AND FACTS

Respondents supply the following facts given that Perez's factual recitation omits relevant facts.

During the pretrial discussion on the issue of the State of Florida's (hereinafter the State) request to add "stated" before intent in the jury instruction on the charge of threat to throw, place, project, or discharge a destructive device, the defense indicated it was going to argue that the State had to prove Perez had the intent to do bodily harm or property damage. (Respondent's Appendix A, Pages 31-32, 39-41). Perez contended there was a distinction between the fact that the State did not have to prove Perez had the ability to carry out the threat, and the lack of intent to cause bodily harm or property damage. (Respondent's Appendix A, Pages 32-33). The trial judge admitted she was having difficulty with his distinction and that his argument would be an incorrect statement of Florida law because the threat was part of the intent, and not distinct from it. (Respondent's Appendix A, Pages 36, 45).

When it was suggested Perez would be arguing the threat itself did not actually convey an intent to do bodily harm or property damage, the State agreed that would be a proper argument. (Respondent's Appendix A, Page 38). The trial court found that including "stated" would not interfere with the defense's argument that his threat did not convey an intent to do harm, but it would

contradict the improper argument under Florida law that the State had to prove Perez intended to cause harm or property damage distinct from the threat. (Respondent's Appendix A, Pages 45-48). The judge explained that, based on Florida law, the threat is part of the intent, whereas Perez was arguing that the two were separate. (Respondent's Appendix A, Page 47). The trial court inquired whether Perez preferred the language from Valdez[1] or Reid[2], and he objected to both. (Respondent's Appendix A, Page 51).

The defense complained again about making any modifications and the trial court explained that Valdez and Reid were still good law, and while the trial court understood the language was not in the standard instruction, the jury is entitled to accurate instructions on the law. (Respondent's Appendix A, Page 52). The trial judge explained her ruling as follows:

> What has changed is that I understand from your argument, that you're going to argue that he didn't have the intent to do the bodily harm to any person or damage to the property ... that the reason why he didn't have the intent was because, with all due respect, he didn't have the ability to follow through.

(Respondent's Appendix A, Pages 52-53). The defense disputed that was their argument, and the trial court advised that she was aware that the defense would not be using those exact words, but that

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[1] Valdes v. Florida, 443 So. 2d 221 (Fla. 1st DCA 1983), rev. denied, 450 So. 2d 489 (Fla. 1984).

[2] Reid v. Florida, 405 So. 2d 500 (Fla. 2d DCA 1981).

would be their argument. (Respondent's Appendix A, Page 53). When the defense protested again, the judge noted that the defense had never made any argument Perez had no intent because he was, for example, intoxicated. Id.

During the charge conference, the defense presented two alternative instructions on the definition of threat based upon United States Courts of Appeals cases. (Respondent's Appendix B, Pages 258-60). As far as the federal case law definitions of threat, the State noted that those cases did not deal with the crime Perez was charged with, but with federal crimes. (Respondent's Appendix B, Page 261). However, the State did not have an objection to the second instruction, because that was consistent with the elements of the offense regarding a conveyed intent. Id. The State objected to the first proposed instruction because it added elements the State did not have to prove under the Florida law, such as that there has to be a danger that actually existed, or that the State would have to prove actual intent to inflict bodily harm or property damage. (Respondent's Appendix B, Page 262). The judge agreed with the State regarding including the definition set forth in the second proposed instruction, but found it unnecessary to advise the jury that whether a given statement constitutes a threat is an issue of fact for the jury. (Respondent's Appendix B, Page 264). Accordingly, the judge advised she was putting "a threat" in quotation marks and defined it as "a

communicated intent to inflict harm or loss on another," and as the defense preferred "viewed and/or heard," the court agreed to that change. (Respondent's Appendix B, Page 265). The jury was instructed with Perez's alternative definition of threat. (Respondent's Appendix F, Page 350). At the conclusion of the charge conference, the judge advised defense counsel that the court was not prohibiting the defense from telling the jury during closing argument that they had to decide whether a threat was made. (Respondent's Appendix B, Page 267).

Two Publix (grocery store) employees testified about Perez's "menacing tone," or threats which caused uneasiness, fear, and disbelief. (Respondent's Appendix C, Pages 82-96, 123-124, 127).

In moving for a judgment of acquittal, Perez argued that the State had not proven any actual threat except that he could set the place on fire. (Respondent's Appendix D, Page 240). Further, that there was no testimony Perez actually had an intent to harm anyone or destroy Publix property. (Respondent's Appendix D, Pages 240-41). The State, in response, disputed that Perez's statement to a Publix employee that he had a Molotov cocktail in his bag and he could set fire to the whole place was not threatening, especially when Perez had told another employee that he was "going to blow up the whole fucking world." (Respondent's Appendix D, Pages 241-42). The State argued there was a fair inference that the place Perez was going to burn down was Publix - the same place that he set his

bag down containing, or so Perez claimed, a Molotov cocktail. (Respondent's Appendix D, Page 242). Perez responded that the State failed to prove Perez had the stated intent to destroy property and/or any person. (Respondent's Appendix D, Page 243). The trial court denied the motion for judgment of acquittal. (Respondent's Appendix D, Page 243).

During his renewal of the motion for judgment of acquittal, the defense complained that the State was combining two separate events. During the first, when Perez stated "I have one Molotov cocktail, and I could set the place on fire," he was just making a statement of possession rather than threatening to discharge a device. (Respondent's Appendix E, Pages 281-82). During the second event approximately twenty to thirty minutes later, when Perez returned to Publix, threw down his bag, and stated, "I'm going to blow up the fucking world," the Publix employee did not know about the Molotov cocktail comment made earlier. (Respondent's Appendix E, Page 282). Thus, Perez argued, there was no showing he made a threat to throw, place or discharge a destructive device simply by stating he was going to blow up the world. (Respondent's Appendix E, Page 283). The State responded by agreeing that two counts could have been filed because there were two threats, and argued there was sufficient evidence to go to a jury. (Respondent's Appendix E, Pages 283-84). The judge denied the renewed motion for judgment of acquittal. (Respondent's Appendix E, Page 285).

In the very beginning of the defense's closing argument, he stated, "what this case comes down to in my opinion is intent. Intent." (Respondent's Appendix G, Page 320). Perez argued that his comment about the Molotov cocktail was simply a statement of possession, and not a threat. (Respondent's Appendix G, Page 322). And, that his stated intent was not a threat. (Respondent's Appendix G, Pages 322-23). Perez admitted that talking about blowing up the world was frightening, but argued that did not make it a threat. (Respondent's Appendix G, Pages 325-26, 340). He also reiterated to the jury that they were the ultimate fact-finders and would have to decide whether a threat was made. (Respondent's Appendix G, Page 334). Later, the defense read aloud to the jury the definition of threat he had requested and which was included in the instructions. (Respondent's Appendix G, Page 339).

Perez filed a direct appeal to the Florida Fifth District Court of Appeal and, ultimately, an amended initial brief on August 3, 2015, raising a total of five issues. (Petitioner's Appendix F). The first claim was that the trial court erred by denying his motion for judgment of acquittal as to his intent. The second claim, related to the first, was that the trial judge erred by adding the term "stated" to the instruction on intent. The third issue raised was that the trial judge erred by rejecting Perez's special jury instruction on the definition of threat and that the threat issue was for the jury to decide. The fourth claim alleged

that the prosecutor's comments during closing argument constituted reversible error. And, finally, the additional claim alleged that the statute under which he was convicted, especially as modified by the jury instruction given at trial, did not include a *mens rea*, and, thus, his conviction and sentence should be set aside, primarily relying upon Elonis v. United States, ---- U.S. ----, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015). (Petitioner's Appendix F).

The State filed an amended answer brief on August 24, 2015, responding to the five claims. (Petitioner's Appendix F). As to the first claim, the State contended that the trial court properly denied the motion for judgment of acquittal as the crime of threatening to discharge an explosive device can be committed by actions only, such as grabbing the pin on a grenade; or with just words, such as calling in a bomb threat; or with both actions and words, as was the case here where Perez not only threw down a bag he claimed contained a Molotov cocktail, but he also threatened to start a fire and blow the place up, and whether it was Perez's stated intent to threaten bodily harm or property damage was a question for the jury and not the proper basis for a judgment of acquittal. In addressing the second related claim, the State argued that the trial court properly instructed the jury in that Perez's argument that his statement, while frightening, did not constitute a threat which conveyed an intent to do bodily harm or damage to property, was not negated by the inclusion of the term "stated," in

that Perez could, and did, argue that his statements which were being construed as a threat did not convey a threat to do bodily harm or property damage. On the other hand, as the trial court legitimately believed, Perez's intention on arguing that the State failed to prove an intent to actually cause bodily harm or property damage beyond the threat itself was inconsistent with Florida law and, thus, the inclusion of the term "stated" correctly countered such an argument. The State pointed out that the third claim of trial court error was waived and unpreserved for appellate review, and the fourth claim was without merit as the prosecutor's comments during closing argument were proper and did not constitute reversible error.

Finally, as to the additional fifth claim, the State presented both a preservation argument and a merits argument. As to the merits, the State argued that this Court's opinion in Elonis was inapplicable since, unlike the relevant statute in Elonis, section 790.162, Florida Statutes, contains a mental state requirement and Perez's conviction for threatening to discharge a destructive device took into consideration his state of mind, that is, he made the threat with the stated intent to do bodily harm or property damage, regardless of whether the defendant had the actual ability to carry out that threat. (Petitioner's Appendix F). An amended reply brief was filed by Perez on September 14, 2015. (Petitioner's Appendix F).

The Florida Fifth District Court of Appeal affirmed Perez's conviction and sentence without opinion on March 15, 2016. Perez v. Florida, 189 So. 3d 797 (Fla. 5th DCA 2016). His motion for rehearing *en banc* and for a certified question of great public importance was denied on April 26, 2016. (Petitioner's Appendix E).

On May 18, 2016, Perez served the State of Florida with a *pro se* notice to invoke the discretionary jurisdiction of the Florida Supreme Court. (Respondent's Appendix H). However, the Florida Supreme Court's online docket website does not reflect any such notice was ever filed with the supreme court. See Florida Supreme Court Online Docket, http://jweb.flcourts.org/pls/docket/ds_docket_search%20 (Last visited Dec. 5, 2016). Regardless, the Florida Supreme Court does not have the authority to review cases that are affirmed without an opinion. Jenkins v. Florida, 385 So. 2d 1356, 1359 (Fla. 1980), Stallworth v. Moore, 827 So. 2d 974 (Fla. 2002); Jackson v. Florida, 926 So. 2d 1262 (Fla. 2006).

On July 22, 2016, Perez filed a petition for writ of certiorari *pro se* with this Court.

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED TO REVIEW THE FLORIDA FIFTH DISTRICT COURT OF APPEAL'S *PER CURIAM* AFFIRMANCE GIVEN THAT PEREZ HAS FAILED TO SHOW A COMPELLING REASON FOR THIS COURT TO ACCEPT JURISDICTION SINCE THE STATE STATUTE UNDER WHICH HE WAS CONVICTED DOES REQUIRE A *MENS REA*, JUST NOT THE *MENS REA* PEREZ COMPLAINS THAT IT SHOULD.

Perez contends that the Florida Fifth District Court of Appeal erred by affirming his conviction and sentence for threatening to throw, project, place, or discharge any destructive device with the intent to do bodily harm to any person or with intent to do damage to any property of any person. However, the statute does require the State prove *mens rea*, just not the *mens rea* Perez contends it should. As such, Perez has failed to show a compelling reason for this Court to accept jurisdiction.

A. AS THESE PRECISE ARGUMENTS WERE NOT PRESENTED TO THE STATE COURTS, PEREZ'S ARGUMENTS SHOULD NOT BE CONSIDERED BY THIS COURT.

Perez argued in state court that the state statute under which he was convicted, especially as modified by the jury instruction given at trial, does not include a *mens rea* and was, in essence, a strict liability crime, so his conviction and sentence should be vacated. Here, on the other hand, he argues that the state statute, especially as modified by the jury instruction given at trial, either resulted in an unconstitutional diminishment of the required *mens rea* or required only mere negligence. To the extent that these precise arguments were not presented in the state courts, Perez's claims should not be considered by this Court. Adams v. Robertson,

520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed. 2d 203 (1997) ("With 'very rare exceptions,' Yee v. Escondido, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.") (citations omitted).

B. THE FLORIDA APPELLATE COURT'S *PER CURIAM* OPINION DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION WHERE THE COURT REJECTED A STATE CRIMINAL DEFENDANT'S CHALLENGE TO HIS CONVICTION UNDER SECTION 790.162, FLORIDA STATUTES, FOR THREATENING TO THROW, PLACE, PROJECT, OR DISCHARGE A DESTRUCTIVE DEVICE BECAUSE THE STATUTE DOES REQUIRE A *MENS REA*, JUST NOT THE *MENS REA* PEREZ ALLEGES IT SHOULD.

To the extent that the claims were raised in the state courts, there is nothing of federal constitutional dimension necessitating this Court take jurisdiction because the statute does require a *mens rea*.

Perez primarily relies upon the this Court's opinion in Elonis v. U.S., ---U.S. ---, 135 S.Ct. 2001, 192 L.Ed. 2d 1 (2015). Elonis addresses the *mens rea* required for a conviction under 18 U.S.C. section 875(c), a federal statute prohibiting a communication that contains a threat to injure another. This Court conducted a statutory interpretation analysis of section 875(c), and found that the trial judge erred in using a reasonable person standard, because that standard did not require proof that Elonis was aware of his wrongdoing. See 135 S.Ct. at 2009-12. Without

specifying the intent that section 875(c) requires, this Court held that "negligence is not sufficient." 135 S.Ct. at 2013. This Court's Elonis holding is inapplicable to Perez's prosecution for several reasons.

First, Elonis is a case of statutory construction, and, as such, it has been found to be limited to the federal statute that it addressed, 18 U.S.C. section 875(c). See, e.g., United States v. Kirsch, 151 F.Supp. 3d 311, 317 (W.D. N.Y. 2015) ("No case reported thus far extends Elonis's holding beyond [18 U.S.C.] § 875(c)."). As the Fourth Circuit Court of Appeals has explained, "[I]mportantly, the Court's holding in Elonis was purely statutory and, having resolved the question on statutory grounds, the Court declined to address whether a similar subjective intent to threaten is a necessary component of a 'true threat' for purposes of the First Amendment." United States v. White, 810 F.3d 212, 220 (4th Cir. 2016), cert. denied, --- U.S. ----, 136 S.Ct. 1833, 194 L.Ed. 2d 837 (2016); see also Elonis, 135 S.Ct. at 2012; State v. Trey M., 383 P.3d 474, 479-81 (Wash. 2016) ("Elonis is significant for present purposes in what it does not say. It provides no First Amendment true threat analysis. It resolved only how the federal threat statute, 18 U.S.C. § 875(c), is to be statutorily construed and has no application beyond that context."); People v. Herrera, 2016 Ill. App. 2d 141038-U, 2016 WL 156043, at *14 (Ill. App. Ct. Jan. 12, 2016) (Elonis did not control interpretation of state

statute and did not purport to make a constitutional ruling); People v. Murillo, 190 Cal. Rptr. 3d 119, 125 (Cal. Ct. App. 2015), rev. denied, (Oct. 14, 2015) (same); Council on Am.-Islamic Relations Action Network, Inc. v. Gaubatz, No. CV 09-2030(CKK), 2015 WL 5011583, at *3 (D.D.C. Aug. 24, 2015) (same).

Second, in Elonis, the federal criminal statute that this Court was faced with, 18 U.S.C. § 875(c), criminalized communicating a threat through interstate commerce but was silent on the *mens rea* required to commit the offense. On the other hand, section 790.162, Florida Statutes, the relevant state statute in Perez's prosecution, does specifically require a *mens rea*, i.e., that the State had to prove the defendant made a threat "with the stated intent" to do bodily harm or property damage, "regardless of whether the defendant had the actual ability to carry out that threat." Valdes v. Florida, 443 So. 2d 221 (Fla. 1st DCA 1984); see also Reid v. Florida, 405 So. 2d 500, 501 (Fla. 2d DCA 1981) (The defendant's argument that because there was no evidence he had any intent to do bodily harm or damage to property, the trial court should have granted the motion for judgment of acquittal would lead to an absurd result. ... "[W]e think that section 790.162 requires only that the threat must convey an intent to do bodily harm or damage to property."). Unlike the reasonable person *mens rea* disapproved of in Elonis, the state statute's *mens rea* satisfies the basic principle enunciated in Elonis that "wrongdoing must be

conscious to be criminal" and that a defendant must be "blameworthy in mind" before he can be found guilty.

And, Perez's argument that the State has to prove an intent to harm or cause damage beyond the intent in making the threat itself imposes an impossible burden where, as here, a defendant does not actually possess a destructive device. Because, without a destructive device, the State would have to prove a presumably competent defendant intended on causing harm or property damage without possessing any destructive device. Alternatively, the defendant must be insane or completely delusional believing that he or she could somehow harm people or damage property without a device. Thus, his arguments are, as the Florida appellate courts have concluded, contrary to the legislative intent and would create an absurd result. As the Fifth District Court of Appeal's *per curiam* affirmance of Perez's conviction is in full compliance with the statutory interpretation of section 790.162, Florida Statutes, there is no compelling reason for this Court to accept jurisdiction as there is no substantial federal question or even any question of constitutional dimension to this case.

Third, the appellate court's affirmance of Perez's conviction is proper in light of the evidence in this case as there was ample proof of Perez's intent or *mens rea* required by section 790.162, Florida Statutes. For example, the State presented the testimony of the Publix employees regarding Perez's actions and words in leaving

his bag, stating he had a Molotov cocktail in there and he could set fire to the place, especially when taken in conjunction with his later threat made approximately twenty or thirty minutes later, again after dropping his bag in the store, that he would blow the whole place up, evidenced that Perez made threats with the stated intent to cause bodily harm or property damage. Obviously, a Molotov cocktail could start a fire to the store resulting in bodily harm or property damage. Similarly, blowing the whole place up could also result in bodily harm or property damage. Accordingly, the state appellate court correctly affirmed Perez's conviction for threatening to throw, project, place, or discharge any destructive device.

In conclusion, this Court should decline to take jurisdiction in this case for several reasons. First, Perez's specific claims were not presented to the state courts. Second, the holding in Elonis is inapplicable to Perez's situation since, unlike the relevant statute in Elonis, section 790.162, Florida Statutes, contains a *mens rea*, just not the *mens rea* Perez contends it should. Third, the Florida district court's *per curiam* affirmance of his conviction and sentence was in full compliance with the statutory interpretation of section 790.162, Florida Statutes, and correct in light of the State's evidence establishing Perez possessed the stated intent or *mens rea* to threaten to do bodily harm or damage to property based upon his actions and statements.

Thus, there is no compelling reason for this Court to accept jurisdiction as there is no substantial federal question or even a question of any constitutional dimension to this case.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PAMELA J. KOLLER, a member of the Bar of this Court, hereby certify that on this _____ day of December, 2016, a copy of the Response to Petition for Writ of Certiorari in the above-styled case was delivered via United States Mail to *pro se* Petitioner Robert Edwin Perez, Jr., Florida DOC# 924225, at Hamilton Correctional Institution - Annex, E2-145-S, Jasper, Florida 32052. I further certify that all parties required to be served have been served.

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APPENDIX

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