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No. TBD

IN THE

SUPREME COURT OF THE UNITED STATES

Robert Edwin Perez Jr. — PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FIFTH DISTRICT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Robert Edwin Perez Jr.
(Your Name)

Hamilton Correctional Inst. Annex E2-145-S
(Address)

Jasper, Fla. 32052
(City, State, Zip Code)

(Phone Number)

RECEIVED
2016 JUL 28 PM 1:11
OFFICE OF THE ATTORNEY GENERAL
DAYTONA BEACH, FLORIDA

QUESTION(S) PRESENTED

"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)**?

AND

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.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the FIFTH DCA court appears at Appendix A to the petition and is

[ ] reported at Case No. 5D14-2391; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was 03-15-2016. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: 3-30-2016, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including NA (date) on NA (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF THE CASE

The State charged the Appellant, Robert Perez, Jr., in an information filed on February 12, 2013, with threatening to throw, project, place, or discharge a destructive device with the intent to do bodily harm to any person or with the intent to do damage to any property of any person. (R[1] 50; Vol. 1) The State filed a notice to seek a habitual felony offender sentence on February 25, 2013. (R 61; Vol. 1)

The Appellant proceeded to jury trial on May 13-15, 2014, before Circuit Court Judge Morgan Reinman. (T[2] 1-379; Vols. 2-3; SR2[3] 221-385; Vol. 5) At the close of the State's case, which was the conclusion of all of the evidence, defense counsel made a motion for judgment of acquittal as to the charged offense. (T 240-243, 281-285; Vol. 3) The trial court denied the motion for judgment of acquittal as to the charged offense. (T 243, 285; Vol. 3)

The jury returned a guilty verdict for the charged offense of threat to throw, project, place, or discharge a destructive device with the intent to do bodily harm to any person or with the intent to do damage to any property of any person. (R

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[1]R=Record on appeal volume.

[2]T=Trial transcript volumes.

[3]SR2=Second Supplemental Record, Vol. 5

123; Vol. 1; T 370-375; Vol. 3) The Appellant's motion for a new trial and renewed motion for a judgment of acquittal/directed verdict was also denied by the trial court. (R 128-134; Vol. 1; T 377; Vol. 3) The Appellant was found to qualify as a habitual felony offender by the trial court and was sentenced as a habitual felony offender for the charged offense to fifteen (15) years and one (1) day. (R 1-48, 141-148; Vol. 1)

The Appellant filed a notice of appeal on July 2, 2014. (R 163; Vol. 1) The Office of the Public Defender was appointed on July 7, 2014, to represent the Appellant in this appeal. (R 168; Vol. 1)

STATEMENT OF THE FACTS

Ken Wescott testified on the evening of October 12, 2012, he worked at a Publix grocery store as a bagger and was in the front vestibule area of the store when he noticed a blue backpack or nap sack on the floor by the door in the area by the shopping carts. (T 80-82, 98-99; Vol. 2) Mr. Wescott further testified he informed someone at the front desk of the store about the backpack and walked back towards where the backpack was on the floor. It was at this point Mr. Wescott testified the Appellant walked towards the bag from inside the store. According to Mr. Wescott, the Appellant stated it was his backpack and "I only have one Molotov cocktail in there." Mr. Wescott additionally testified he wrote in his police statement, which was more accurate than his earlier testimony, that the Appellant stated: "I could set fire to the place." (T 82-83, 86-87, 97-102, 109-111, 114-115; Vol. 2)

Mr. Wescott next testified he took this to be a threat, that he was afraid the Appellant really had a "Molotov cocktail," and that he or others could be hurt or they could loose their lives. Mr. Wescott described the Appellant's demeanor as "[l]ackadaisical...[l]ike just taking his- - I don't know...I felt like it was a menacing tone that he had...[b]ut he's just saying it...[a]nd I thought- -I mean, I'm not expert...[s]o that's what I thought...there was something in that bag and I was

worried." (T 87-88, 95-96, 102-103; Vol. 2) Mr. Wescott also testified the Appellant smiled at him, picked up the backpack "like kind of laughing about it." Mr. Wescott told the Appellant: "That's not funny, you shouldn't say things like that" and the Appellant left the store with the same backpack. Mr. Wescott additionally testified he proceeded to the courtesy counter and reported what happened to someone there, he believed was Carrie Barfield, but he did not personally speak to the store manager. (T 82-83, 88-90, 102-103 106-107; Vol. 2)

As for the events that followed, Mr. Westcott testified, approximately twenty to thirty minutes later, the Appellant came back to the store with the same backpack and placed it on the floor in front of the courtesy counter. (T 90-91,104-106; Vol. 2) According to Mr. Westcott, then Publix administrator coordinator, who was Ms. Barfield, spoke with Appellant and the Appellant mad some comment he did not hear verbatim about a Molotov cocktail. (T 91-92, 106-107; Vol. 2) According to Mr. Westcott, he heard the Appellant say: " I'll blow the whole f-'g place up," which he acknowledged he did not indicate in his written police statement that contained wording that was different. Mr. Westcott also acknowledged he did not hear what was said by Ms. Barfield to the Appellant. Mr. Westcott additionally testified the Appellant then walked towards the bakery department as the grocery manager, Keith Carpenter, was contacted. Finally, Mr.

Westcott testified that the backpack remained by the front counter while Mr. Westcott stayed by the cash register and resumed his work duties until his work shift ended. (T 92-93, 101-102, 106-108, 114-115; Vol. 2)

Carrie Barfield testified on October 12, 2012, she was the administrative coordinator for the Publix store and worked the evening shift when the Appellant came into the store as she stood by the front entrance. (T 119-121; Vol. 2) Ms. Barfield further testified she made eye contact with the Appellant, she nodded her head to him as a hello gesture, and she observed he had a backpack. (T 121-122; Vol. 2) According to Ms. Barfield, the Appellant looked at her, laid or tossed the backpack down on the ground near a coupon rack grinning while he said: "I'm going to blow up this whole f- - -g world," and walked off towards the deli and bakery in the store. (T 121-124, 148-149, 160-161; Vol. 2)

Ms. Barfield next testified the Appellant stopped again, turned his head around, looked over at the backpack, looked at her, grinned, and then continued to walk off in the store. (T 121-124, 128, 159-161; Vol. 2) Ms. Barfield described her feelings in response to the Appellant's putting the bag down and making the statement as uneasy, disbelief, and scared. (T 127; Vol. 2) In addition, Ms. Barfield testified she had the grocery manager of the store, Keith Carpenter, paged as she kept an eye on the Appellant and on the backpack. (T 132-133, 141; Vol. 2)

Ms. Barfield also testified, when she got no response, she then personally paged Mr. Carpenter and then received a phone call back from Mr. Carpenter. (T 133-134; Vol. 2)

As for the events that followed, Ms. Barfield testified she spoke with Mr. Carpenter, who told her he had spoken with the Appellant, and not to phone the police. Ms. Barfield also had contact with Mr. Westcott after she contacted Mr. Carpenter. (T 134-135, 138-140; Vol. 2) Ms. Barfield testified, as well, the Appellant spoke with Mr. Carpenter, then paid for his purchase, picked up his backpack, and left the store. (T 140-141; Vol. 2) According to Ms. Barfield, she could have called 911. The next day, she informed the manager of the store, Mr. Phillip Wearsch, of the incident and they reviewed the store video available during the incident, which was when Mr. Wearsch phoned the police. (T 141-144,180-182, 192-194; Vol. 2) Finally, Ms. Barfield acknowledged that the store video does not show anyone stopping, only that the Appellant continued to walk in the store, that she asked a few patrons she stopped to exit the other door in the store, and that she asked someone to have other store patrons to exit the other door in the store, but only some of the patrons did. (T 162-163, 182-183; Vol. 2)

Robin Pontius testified she is the Publix store bakery clerk and was speaking with Ms. Barfield at the customer service counter when a male individual

entered the store, who appeared to be angry, and said "f- - this s- -t." (T 197-198; Vol. 2) Robin further testified the male individual also threw his backpack down on the floor and started to walk away as he made the statement. This caused Robin to laugh, saying: "That's it, I'm out of here," and she returned to her bakery department. (T 198-200; Vol. 2) In addition, Robin testified she could not identify the Appellant as the male individual she observed in the store who made the statement and threw the backpack on the floor. (T 200; Vol. 2; 204; Vol. 3) Finally, Robin testified the statement did not seem directed at anyone, but was made in general agitation. (T 204-205; Vol. 3)

Keith Carpenter testified, at the time of the incident, he was the grocery manager of the store and was the only manager in charge at the store that night. (T 207-208; Vol. 3) Mr. Carpenter further testified, when he received the page from Ms. Barfield around 8:30 that evening, he proceeded to the customer service counter. In addition, Mr. Carpenter testified Ms. Barfield walked him over to a bag she informed him a customer had dropped by the information station around the side entrance door. (T 208; Vol. 3) According to Mr. Carpenter, Ms. Barfield told him the customer stated: "I'm going to blow the whole fucking world up." Mr. Carpenter immediately proceeded to locate the customer, the Appellant, who was approximately twenty feet away from him. (T 208-209; Vol. 3)

Mr. Carpenter next testified the Appellant had already gotten the items he wanted to purchase and walked up to pay for the items. (T 209; Vol. 3) When Mr. Carpenter asked the Appellant how he was doing the Appellant stated: "Fine. How are you?" Mr. Carpenter then asked the Appellant if he left a bag by the door and the Appellant responded: "Yes. I don't have anything in it but a change of clothes." (T 209-210; Vol. 3) Mr. Carpenter also asked the Appellant if there was anything he could help him with, to which the Appellant stated: "No."

It was at this point Mr. Carpenter testified the Appellant went to the customer service desk, paid for his items, grabbed the bag, and exited out the door of the store. (T 210, 216; Vol. 3) As for the Appellant's demeanor, Mr. Carpenter testified the Appellant's eyes were "kind of glassed-overed" (sic), with some expression to his speech, but Mr. Carpenter did not get any "menacing vibe" from him, and they shook hands. (T 215-216; Vol. 3) Finally, Mr. Carpenter resumed his managerial duties and approached the store manager Philip Wearsch the next day to inform him what happened the previous evening. (T 210-213; Vol. 3)

Philip Wearsch testified he was not present at the store or the manager in charge at the store on the evening of the incident. (218-219; Vol. 3) Mr. Wearsch further testified he was contacted the night of the incident as to what happened, that the next morning he reviewed the store video from the night before, and had a

conversation with Ms. Barfield. (T 219-225, 231-233; Vol. 3) Finally, Mr. Wearsch testified he called the police that morning after the incident. (T 225-226, 230-231; Vol. 3)

REASONS FOR GRANTING THE PETITION

Petitioner Robert E. Perez Jr. asked through appeal attorney Susan A. Fagan and pursuant to Rules 9.330 and 9.331, Florida Rules of Appellate procedure, hereby requests this Honorable Court to grant rehearing and/or rehearing en banc and to issue a written opinion and to certify a question of great importance to the Florida Supreme Court. As grounds, Petitioner states:

1. On March 15, 2016, the Fifth DCA rendered a panel **per curiam** decision, without a written opinion, affirming the Petitioner's judgment and sentence.

2. Rehearing is authorized by Rule 9.330 Florida Rules of Appellate procedure, where the court has overlooked or misapprehended applicable points of law or facts.

3. The Petitioner was convicted under section 790.162, Florida Statutes, based on the allegation he did "threaten to throw, project, place, put or discharge a destructive device with the intent to do bodily harm to any person or with the intent to do damage to any property of any person." The jury was instructed over defense counsel's objection as to this offense as follows:

> To prove the crime of threat to discharge a destructive device, the State must prove the following two elements beyond a reasonable doubt… (O)ne, Robert Edwin Perez Jr. threatened to throw, place, project or discharge a destructive device…(T)wo, Robert Edwin Perez Jr. did

> so with the **STATED INTENT** to do bodily harm to any person or damage to the property of any person...(A) threat is defined as a communicated intent to inflict harm of loss on another person when viewed and/or heard by an ordinary reasonable person.

4. The Petitioner challenged on appeal in point two of his amended brief, the trial court's duration over defense counsel's objection, from the **STANDARD FLORIDA** jury instruction in Fla. Std. Jury Instr. (Crim.) 10.8 for the offense of threatening to throw, project, place, or discharge a destructive device **with the intent** to do bodily harm to any person **or with the intent** to do damage to any property to any person. On appeal, the Petitioner also argued, under the recent United States Supreme Court held in **Elonis v. United States, 135 S.Ct** 2001, 2011-13 (2015), the State's special requested jury instruction, given by the trial court to the jury below fails to contain a sufficient requirement of criminal mens rea or "**scienter**" guilty knowledge and instead, employ's only a mere negligence standard. As **Elonis** points out, the necessary element of a **mental intent** in a criminal threat statute must **not** be based **solely** on how the (statements)...would be understood by **reasonable person**..." to be a threat. Rather, the "intent element" of a threat statute must be based on "the mental requirement...whether a defendant **knew the character of what was (stated)...not simply its content and context.** Id. At 2012 (emphasis added and increased).This requirement of a "mens

rea" for a criminal statute such as section 790.162 has been held to be necessary for criminal conviction in HAMLING v. STATE, 418 U.S. 87, 122-123 (1974).

5. The State, in essence, sought a conviction of the Petitioner for a violation of section 790.162 based on the "STATED INTENT" of the Petitioner's statements "**when viewed and/or heard by an ordinary reasonable person**" The **HIGH** Court further stressed in **Elonis** that a "threat statute, in that case, **18 U.S.C.S.** section 875(c) cannot be "premised solely on how (the statements) would be understood by a reasonable person...(S)uch a reasonable person" standard is a familiar feature of civil liability in tort law, but in inconsistent with "the conventional requirement for criminal conduct – **awareness** of some wrongdoing." Id. At 2011 (extra emphasis supplied) (quoting Staples v. United States, 511 U.S. 600, 606-607 (1994) quoting United States v. Dotterweich, 320 U.S. 277, 281 (1945).

6. The Supreme Court in **Elonis** mainly relief on the decision of STAPLES, SUPRA, as to the critical and necessary element of "mens rea" and "scienter" for a criminal statute that involves an "intentional" threat of some nature. **ELONIS**, 2010. Indeed, the premise underlying the decision was that "a defendant generally must know the facts that make his conduct fir the definition of the offense. Even if he does not know that those fact give rise is a crime." Id at 2009 (quoting STAPLES, SUPRA, at 608, N.3).

7. This was the Petitioner's argument in point two on appeal, namely, that the defined element of section 790.162 in the aforementioned special jury instruction given by the trial court as to Petitioner's "stated intent" fails to require any **mens rea**. The Petitioner therefore respectfully request that the fifth DCA give a written opinion the adequacy and the Constitutionality, or lack thereof, of the aforementioned special jury instruction. The Petitioner maintains the State cannot Constitutionally, under **ELONIS**, obtain a criminal conviction under section 790.162 merely by the State's reliance on the "stated intent" of the Petitioner's statements made at the Publix.

8. The Supreme Court in **Elonis** directly noted that "(t)he jury was instructed that the Government need prove only that a reasonable person would regard (the accused's communications as threats and that was error." Id at 2012. This is exactly how the jury below was instructed below, which similarly failed to include any element of intent or mens rea. As the High Court further noted:

> Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding "took deep and early root in American Soil" and Congress left it in tact here: Under Section 875(c) wrongdoing must be conscious to be criminal. "(Morissette [v. United States], 342 U.S. 246, at 252 [(1952)] ELONIS, at 2012.

9. The second basis Petitioner respectfully submits to have the fifth DCA issue a written opinion, is to address the issue, argued on appeal in point five, that

the Petitioner's conviction under section 790.162, should be vacated under the holding in ELONIS, 2011-13, because section 790.162 lacks the necessary element of any mens rea "guilty knowledge" criminal intent. The United States Supreme Court held in ELONIS that federal statute 18 U.S.C. section 875(c) which prohibits the transmission in interstate commerce "any communication containing any threat to injure the person of another, "fails to contain a sufficient requirement of criminal mens rea or "scienter," but employs only a negligence standard. Similarly, section 790.162, coupled with the State's special requested jury instruction, improperly amounts to a pure "strict liability" standard that the Petitioner's conviction could stand merely on the "stated intent" of my words alone, without any required scienter or intent necessary to be proven by the State. Thus, the Petitioner respectfully submits that a written opinion by the Fifth DCA addresses whether under ELONIS, the Petitioner can be convicted of a criminal violation of section 790.162, without any criminal intent element, would permit the Petitioner further appellate review of this important Constitutional issue.

10.EN BANC review of a panel decision is authorized by Rule 9.331, Florida Rules of Appellate Procedure, whether the issue is of exceptional importance. A decision of exceptional importance is one that effects large numbers of persons or one that interprets a fundamental legal or Constitutional right. In interest of D.J.S., 563 So.2d 655 N.1 (Fla. 1st DCA 1990); Felts v. State, 537 So.2d

995 (Fla. 1st DCA 1988). My counsel Susan A. Fagan, expresses a belief, based on a reasoned and studied professional judgment that this case and the issues raised on appeal in this case are of exceptional importance.

11. My counsel Susan A. Fagan also expresses a belief based upon a reasoned and studied professional judgement, that a written opinion would provide a legitimate basis for Supreme Court review of the jury instruction issues raised on appeal in this case and whether it properly instructed the jurors as to the Constitutionally required criminal mens rea or "scienter" guilty knowledge element under section 790.162, particularly in light of ELONIS, supra. A written opinion by the fifth DCA will also permit the Petitioner further review by the Florida Supreme Court of the aforementioned Constitutional issue as to whether section 790.162 itself adequately contains a Constitutionally required criminal mens rea or scienter guilty knowledge element.

12. The Petitioner further respectfully requests that the Fifth DCA issue a written opinion that addresses and certifies the following questions of great public importance namely: "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)? AND 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. Wherefore, Petitioner respectfully requests the Honorable 5th DCA to grant rehearing and/or rehearing en banc, withdraw the panel per curiam affirmed decision reverse the Petitioner's conviction and sentence and order that the Petitioner be discharged or granted a new trial. Alternatively, the Petitioner respectfully request the fifth DCA issue a written opinion and certify the aforementioned questions of great public importance to the Florida Supreme Court.

When the entire testimony from all the witness's considered, what becomes clear is that there was no **intentional threat** made by Petitioner to cause bodily harm to anyone in the Public store or to damage any property in Public store. While Valdes, supra, and Reed, supra, hold that the State does not have to prove that there is an actual "destructive device" as part of the threat, it still must prove that a real threat occurred. Thus, State does not have to prove the Petitioner actually discharged a destructive device or intended that the destructive device in his possession be discharged. Nor does the State have to prove the Petitioner even had an actual destructive device in the back pack. But the State **does** have to prove

the Petitioner actually threatened to discharge a destructive device with intent to harm a person or to damage property.

Robin Pontuis another employee who was standing 5 to 7 feet from Petitioner, directly testified she did **NOT** respond to the Petitioner's words or actions in a manner that she felt threatened, or that she felt anyone else was threatened, or that she felt any property in the Publix store was in danger. In fact, "general agitation" was the term she used to describe the Petitioner's actions, not any threatening mannerisms (T197-205; Vol. 2) Keith Carpenter, Manager in charge best exemplifies the "entire context" of this incident at the Public store. Once Mr. Carpenter spoke with Petitioner and I explained all that was in the back pack was a change of clothes, we shook hands, I paid for my items, I picked up my back pack and left without further incident.

The trial Court acknowledged "I don't know what "stated intent" actually means; she ultimately granted the State's requested jury instruction of "stated intent" over defense counsel's objection to any addition to Florida Standard jury instruction that would improperly shift the burden of proof to the defense to prove that lack of intent. The jury was therefore instructed by the trial court as follows: TO PROVE THE CRIME OF THREAT TO DISCHARGE A destructive device, the State must prove the following two elements beyond a reasonable doubt...[One, Robert Edwin Perez Jr. threatened to throw, place, project or

discharge a destructive device...[two] Robert Edwin Perez Jr. did so with the **STATED INTENT** to do bodily harm to any person or damage to the property of any person...[A] **THREAT** is defined as a "COMMUNICATED INTENT" to inflict harm or loss on another person when viewed and/or heard by an ordinary reasonable person.

The standard Florida jury instruction for the offense of threatening to throw, project, place or discharge a destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person states: the State must prove two elements beyond a reasonable doubt: 1) (Defendant) threatened to [throw, project, place, discharge] a destructive device. 2) [He] did so "**with the intent to do** [bodily] harm to any person][damage to the property of any person]." **Florida Standard** jury instruction (criminal) 10.8.

The standard jury instructions are presumed to be correct and are preferred over requested special jury instruction. Further, a requested special jury instruction is not appropriate when the standard jury instructions accurately and adequately state the law while the special jury instruction confuse the law and/or misleads the issue(s) to be determined by the jury. Moody v. State, 359 So.2d 557, 560 (Fla. 4th DCA 1978); Brown, Supra, 432 (citing Tinker v. State, 784 So.2d 1198, 1200 (Fla. 2d DCA 2001) (citing Wadman v. State, 750 So.2d 655, 658 (Fla. 4th DCA 1990). "The standard jury instructions are presumed to be correct and preferred over

special instructions. "BROWN, supra, at 432, Stephens v. State, 787 So.2d 747, 755-757 (Fla. 2001)(citations omitted). Sloss v. State, 925 So.2d 419, 424 (Fla. 5th DCA 2006)(citations omitted). Moreover, in Gutierrez v. State, 133 So.3d 1125, 1131 (Fla. 5th DCA 2014)(citations omitted). Rev. granted, Guiterrez v. State, 2014 WL 4536275 (9-9-14) that the harmless error test be applied and "places the burden on the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or alternatively stated, that there is reasonable possibility that the error contributed to the conviction."

The prosecutor used Valdes v. State and Reid v. State as case law to impose her special jury instructions and in those cases there is robbery taken place. In this incident they say I blurted this statement for no reason, paid for my items and went home. The next day I was trespassed on 10-13-12 and on 2-17-13 arrested for this charge. On 10-14-12 a capius was issued but I wasn't told I would need my witness's so I was blindsided by the State when a warrant was issued on 2-12-13. From 10-13-12 until 2-17-13 everything was fine and I was waiting for the trespass to be over so I could shop at Publix again. It is very likely that when Ms. Barfield changed her written statement from "Blow up the world" (very unlikely-unrealistic) to (Blow up this place) some change of thought takes place, yet still a Molotov cocktail (Appendix B) which is the idea of what was supposed to be used, is not an explosive but a drink (Appendix B). I have tried to get my PD to explain

this but I have now. I never once had any contempt to say anything that anyone would take as a threat. I do drink free coffee in Publix and Ms. Barfield had a remark to me about a cup of coffee and I thought maybe she thought it was hers and was looking at me funny. I think she wanted me trespassed, got it, and then when she had to go further she was in over her head. That will be a skeleton in her closet. Since Mr. Wescott said he reported his incident earlier to Ms. Barfield I think it starts there. She didn't call 911; nothing would have stopped me if I thought It was a credible threat. "Wait for who?"

IN RESPONSE TO STATE'S ASSERTION THE TRIAL COURT PROPERLY DENIED THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL FOR THE CHARGED OFFENSE THREAT TO THROW, PLACE, OR DISCHARGE A DESTRUCTIVE DEVICE WITH THE INTENT TO DO BODILY HARM OR DAMAGE TO PROPERTY.

Respondent first asserts defense counsel below did not argue as to grounds for a motion for acquittal that the State's evidence failed to establish any INTENTIONAL threat by the Petitioner; the Petitioner would respond defense counsel's argument below encompassed that the State's evidence "failed to make a prima facie showing intent...[while] the court has added to that the "STATED INTENT", the testimony at this point that Mr. Perez...alleged to be stated [sic] he could set the place on fire... I don't believe that amount's to an actual threat on something you could do...(I have a pair of pants and I could hang myself; is

another example) He had no intent actually that he directed anything at [Carrie Barfield] specifically or at the store specifically, that he had any intent to do any property damage and/or damage to person. (T240-1; Vol. 3).

State next argues the issue of "strict liability" intent was not argued below by trial defense counsel. State is mistaken. As noted in the Petitioner/s initial amended brief, defense counsel continued to object to the State's reliance simply, on the Petitioner's "stated intent" in order to prove that he made any threat. Indeed, defense counsel stated to the trial court in regards to the jury instructions "all I'm arguing, your honor, is that the court does not add something that the State can then just rely upon and say, 'Well, we [sic] said it, and that's enough. Because its not enough..." (T25; Vol. 2).

State additionally argues under the decisions of Reid v. State, 405 So.2d 500 (Fla. 2d DCA 1981), and Valdes v. State, 443 So.2s 221 (Fla. 1st DCA 1984), the question of whether the Petitioner possessed THE INTENT TO THREATEN BODILY HARM OR PROPERTY DAMAGE UNDER section 790.162, Florida Statutes, is a jury question the Petitioner acknowledges Reid, Supra, 500-1 and Valdes, supra, 222, hold the State's evidence at trial must establish the accused made a threat "**conveyed an intent** to do bodily harm or property damage. (T28; Vol. 2).

State misconstrues the Petitioner's argument for the acquittal motion that the State must prove the Petitioner possessed the intent to actually cause bodily harm to a person or damage to property. What the State's evidence must establish, as argued on appeal on pages 13 through 22 of the initial brief, is that the Petitioner made an intentional threat to do bodily harm or property damage based on the particular surrounding factual circumstances. Id...222. Thus, the intent element of the charged threat requires the **intent by the Petitioner to threaten to do bodily harm or property damage**, regardless of whether the accused **actually intended** to harm an individual or damage property indeed, Mr. Wescott acknowledged, when the Petitioner's statements were allegedly made to him and reported that he did not call the police, that he had returned to his work duties, and that the Petitioner left the store without incident.

As for the second incident, also outlined in the Petitioner's amended initial brief, the State relied on the testimony of what Mr. Wescott heard the Petitioner say to Carrie Barfield at the Publix Courtesy counter and what Ms. Barfield heard the Petitioner say to her in regards to blowing up the "whole f*ng place up" or "this whole f*ng world." Importantly, the Petitioner's subsequent actions of proceeding to walk off in the store and continue to shop in the store without incident does not present even a PRIMA FACIE case of any intentional threat made by he Petitioner to harm anyone or to harm anyone or to damage property in

the Publix store. (T82-96, 102-107, 121-128, 159-161; Vol. 2) This is especially true in light of grocery manager Keith Carpenter's testimony he told Ms. Barfield not to call the police, that he had spoken to the Petitioner, who then finished shopping, paid for his purchase, picked up his back pack, and left the store, again without incident. (T134-141; Vol. 2)

State also does not address the testimony of Robin Pontius, who described the reactions she witnessed to the Petitioner's actions when she was speaking with Ms. Barfield. Importantly, Ms. Pontius testified the Petitioner "came in and seemed angry...because he threw his back pack down, he said fuck this shit... and started to walk away" which is when she laughed. (T198-200; Vol. 2) Ms. Pontius also testified the Petitioner's statement were not directed at anyone "just seemed general agitation." (T204-205; Vol. 3)

Further, the determination of the meaning of an "intentional threat" is not simply a "jury question" as State suggests when the evidence fails to establish any "intent". Green v. State, 90 So.3d 835, 837 (Fla. 2d DCA 2012). In addition, any inherent "ambiguity" as to the criminal statutory language of "intent" in section 790.162 must be viewed most favorably to the benefit of the accused under Dicks v. State, 840 So.2d 408 (Fla. 4th DCA 2003). This would require more than just the mere utterance of the statements to establish the existence of an "intentional threat". Similarly, the recent decision by the United States Supreme Court in

ELONIS v. UNITES STATES, 135 S.Ct. 2001-13(2015), held that Federal Statute 18 U.S.C.S. section 875(c), which prohibits the mere transmission in interstate commerce of "any communication containing any threat...to injure the person of another" fails to contain a sufficient requirement of criminal mens rea or "scienter" but, instead, employs only a non criminal negligence standard. Accordingly, the Petitioner's conviction must be vacated and the Petitioner discharged based on insufficient proof of any **criminal intent**.

State contends the trial court properly overruled the Petitioner's objection to the State's special jury instruction that the State must prove the Petitioner had the "stated intent" to do bodily harm to any person or damage to the property of any person" under the decisions of Reid v. State, 405 So.2d 500 (Fla. 2d DCA 1981), and Valdes v. State, 443 So.2d 221(Fla. 1st DCA 1984). As argued in point one supra, and in the Petitioner's initial amended brief, an offense under section 790.162 FLORIDA STATUTES, requires that the accused make a threat with the intent to do bodily harm or property damage. This does not mean, as State suggested, the State can seek a conviction merely on the "STATED INTENT" ie. That the accused knew the "content" of the alleged "threatening statements" and that "a reasonable person would have recognized that the [STATEMENTS] would be read as genuine threats." Elonis v. United States, 135 S.Ct. 2001, 2011 (2015). The High Court pointed out a criminal conviction for a "threat" cannot "be

premised solely on how...[the statements] would be understood by a reasonable person...[S]uch a "reasonable person" standard is a familiar feature of civil liability in tort law, but it is inconsistent with the conventional requirement for criminal conduct awareness of some wrongdoing. Id. At 2011 (quoted citations omitted).

The Petitioner submits as in ELONIS, the State's special instruction amount to only a negligence standard that is insufficient proof of the required mens rea of an "intentional threat" that the accused "knew the character of what was [stated], not simply its contents and context. Id 2012 emphasis added and increased from text). In essence, under the State's theory, proffered below and on appeal, a conviction for making an intentional threat in section 790.162 may be obtained under a "strict liability" theory of criminal guilty solely by the Petitioner's "stated intent". Such an instruction to the jury, contrary to the Petitioner's argument, misleads the jury that the mere utterance by the Petitioner of his statements made in Publix would suffice to assess criminal liability. The modified jury instruction fails to define the element of the conveyance of a criminal threat with the requisite mens rea or "intent" under section 790.162. State argues the modified jury instruction was necessary to prevent the "erroneous assumption" for the jury that the State had to prove the Petitioner "actually intended on causing bodily harm or property damage." (AB21) Again as noted in point one supra, this is not the

argument made by defense counsel below or by the Petitioner in this Petition. Indeed, defense counsel acknowledged the State did not have to prove "that he actually intended to carry out the threat." (T28; Vol. 2) Further, defense counsel specifically objected to the State's requested jury instruction "completely absolves the State of proving...the elements of the charge...which is not a strict liability." (T44; Vol. 2)

Defense counsel also argued against the modified special jury instruction of "stated intent" requested by the State because it amounts to "improperly shifting the burden over to the defense to then somehow have to come back and try to prove that he didn't have this intent. (T22; Vol. 2) Clearly section 790.162 is not a "strict liability" statute, but encompasses the requirement of the accused's intent to make a threat of bodily harm to person or damage to property. By the modification of the standard jury instruction to "stated intent" the focus becomes solely on the words expressed, not whether there was an intent by the accused to make a threat of bodily harm to persons or damage to property. Accordingly, the trial courts "use of the State's special jury instruction modification for the element of intent to be redefined as the accused's "stated intent" requires the Petitioner receive a new trial for his conviction under section 790.162.

State argues defense counsel below did not preserve the trial court's denial of the defense counsel's special jury instruction request. The Petitioner disagrees.

Defense counsel, indicated to the trial court "on my stated objections...and I [sic] requested instructions to be included, I don't have any further objections in the terms of his threat" after the trial court had denied defense counsel's requested special jury instruction. (T268; Vol. 3) Consistent with the underlying problem in this case, as expressed in all points of appeal, is that the State was essentially able to prosecute the Petitioner's statements under section 790.162, Florida Statutes, as "strict liability" criminal acts.

The requested special jury instruction by the defense precisely encapsulates the requirement and pointed out recently in Elonis v. United States, 135 S.Ct 2001, 2011 (2015), that the necessary element of intent in a threat statute must not be based solely on "how the [statements]...would be understood by a reasonable person.." to be a threat. Rather, the "intent element" of a threat statute must be based on "the mental requirement...whether a defendant knew that character of what was [stated]...not simply its content and context." Id at 2012. Hamling v. State, 418 U.S. 87, 122-123 (1974). For the State to simply rely on the "stated intent" of the Petitioner's statements, "when viewed and/or heard by an ordinary reasonable person," improperly negates any necessary intent element under section 790.162. As further pointed out in Elonis, a conviction under the Federal Statute 18 U.S.C.S. 875(c) cannot be premised solely on how the [statements[would be understood by a "reasonable person"...standard is a familiar feature of civil

liability in tort law, but is inconsistent of with "the conventional requirement for criminal conduct –awareness of some wrongdoing." Id at 2011 (extra emphasis supplied)(quoting Staples v. United States, 511 U.S. 600, 606-607 (1994)(other quoted citation omitted).

In the present case, the jury instruction that the trial court ultimately gave erroneously defined the required "intent" element under section 790.162 as the "stated intent to do bodily harm to any person or damage to the property of any person" and as a threat as "a communicated intent to inflict harm or loss on another person when viewed and/or heard by an ordinary reasonable person." These instructions merely focused on an incorrect "reasonable person" negligence standard in order to asses criminal intent and guilty instead of whether the Petitioner made the statements "for the purpose of issuing a threat, or with knowledge that the communication would be viewed as a threat." Elonis, supra, at 2012 (emphasis added). The defense requested a special jury instruction that more properly defined the threat intent element as "a serious expression of an intention to inflict injury, bodily harm or property damage." And the failure of the trial court to give it requires remand for a new trial.

Indeed, the prosecutor's argument improperly defined the "intent" element to the jury that the State did not "have to prove to you what [the Petitioner's] actual intent was." Simply by telling the jurors: "It's the words and what his stated intent

was...[T]hat regardless if his actual intent or his actual ability to carry through with the threat "incorrectly placed the Petitioner's criminal liability solely on the words he used. (T298; Vol. 3) This amounts to a "strict liability" standard that is devoid of any criminal intent. The prosecutor's additional argument to the jury that "[W]e don't have to prove to you the defendant had any kind of evil intent at all, period," only served to focus the jury on the "words" themselves and not on whether Petitioner possessed the criminal intent ot threaten to harm anyone or to damage property. (T348; Vol. 3).

State next argues the prosecutor's closing argument that, based on "common understanding" that a molotov cocktail (Appendix B) would constitute an incendiary and does have a capability" was proper "common knowledge" of the jurors. The cited case law by State, however dealt with evidence of a planned conspiracy to commit arson by agreeing to burn a school with a molotov cocktail (Appendix B) in Slaughter v. State, 301 So.2d 762, 765 (Fla. 1974), or actual damage done from a "molotov cocktail," (Appendix B), and remnants of such a device found at the crime scenes. The Petitioner would submit to the prosecutor merely had evidence of the Petitioner's statements that "I only have one molotov cocktail (Appendix B) in there" and "I could set fire to this place." This did not establish the Petitioner actually had, in fact, an "incendiary device" that he referred to as "molotov cocktail" (Appendix B) or its actually capability based on

Petitioner's statements alone Appellee's further contention defense counsel's motion for judgement of acquittal argument amounted to a "wavier" of defense counsel's "facts outside of evidence" closing argument objection is similarly misplaced. The State did not have to prove the Petitioner actually had a "molotov cocktail" (Appendix B) in the back pack or that it actually had an "incendiary capacity". Thus, the prosecutor's improper reference during closing argument that a "molotov cocktail (Appendix B) would constitute an incendiary" did constitute references to facts outside of the evidence produced at trial and was unrelated to whether the State had a sufficiently proven the charged intentional threat at all.

Respondent next turns to the prosecutor's closing argument as to Keith Carpenter and argues, under William v. State, 994 So.2d 1000, 1012 (Fla. 2008) and Spann v. State, 985 So.2d 1059, 1068 (Fla. 2008), such comments "constituted a proper inference from the evidence." The Petitioner would first respond, respondent fails to address the prosecutor's misstatement of the law that Mr. Carpenter's testimony was clearly highly revelant to the totality of the factual circumstances. Second, Respondant's claims the prosecutor's comments in reference to Mr. Carpenter were factually based on the record, but does not cite to anything in the record where the Petitioner directly threatened to "blow up" either Ken Wescott or Carrie Barfield. Mr. Carpenter's testimony clearly contradicted the testimony of both of these witness's along with Ms. Pontius as to whether the

totality of the Petitioner's sections in the Publix could be viewed as in intentional threat. Third, under Brooks v. State, 762 So.2d 879, 901 (Fla. 2000), the prosecutor's highly inflammatory comments to dismiss Mr. Carpenter's testimony and to prejudicially inject her own personal bolstering of the credibility of the testimony by Mr. Wescott and Ms. Barfield sought a conviction by inflaming the passions and emotions of the jurors instead of from the "totality of the evidence." Thus viewed individually or cumulatively, the objected to improper and inflammatory arguments require a remand for a new trial.

Respondent initially argues defense counsel below did not preserve for appellate review the recent holding in Elonis v. United States, 135, S.Ct. 2001 (2015), under Steinhorst v. State, 1112 So.2d 332, 338 (Fla. 1982). The Petitioner would first respond Elonis, supra, issued after the trial, raises fundamental error that is addressable on appeal irrespective of not being raised at trial. As the Defense argued repeatedly, that the State was required to prove the Petitioner made an intentional threat, not simply that the Petitioner's statements themselves were made, to establish a criminal threat.

Further if the totality of the State's evidence fails to show as a matter of law, that a criminal offense was committed and/or that a crime was even alleged, fundamental error occurs. F.B. v. State, 852 So.2d 226, 229-231 (Fla. 2003). Neither do the magic words "fundamental error" have to be argued to preserve the

issue on appeal that the accused has been criminally convicted of a non criminal act. Id. 229-231. Moreover, respondent's reliance on Wheeler v. State, 87 So.3d 5 (Fla. 5th DCA 2012). Is similarly misplaced because the "error" at issue in that case was that the trial court applied an improper standard of review for a suppression ruling that was also not raised in the initial brief.

Respondent additionally argues Elonis, Supra, is not applicable to the instant case because "section 790.162, Florida Statutes, contains a mental state required...that [the Petitioner] made the threat "with the STATED INTENT to do bodily harm or property damage." As argued in points one through four of the Petitioner's amended initial brief and supra, the application of section 790.162 by the trial court incorporates "strict liability" and "how a reasonable person would perceive the Petitioner's statements." This is a CIVIL LIABILITY SIMPLE NEGLIGENCE STANDARD, NOT A CRIMINAL "mens rea" standard. Elonis, Supra, Section 790.162 Lacks the necessary criminal intent by the accused of a "calculated purveyance of a threat." Id. 2012. Thus a "true threat" cannot exist unless the accused intended to install fear in the recipient to feel threatened. United States v. Heineman, 767 F.3d 970, 982 (10th Cir. 2014). Accordingly, the Petitioner's conviction and sentence should be reversed and the Petitioner discharged based on section 790.162 not requiring any criminal intent.

The initial brief and amended initial brief explain in better detail all of the above. I also express that after Ms. Barfield changed her testimony from "blowing the F*ng World up" to "blowing this F*ng place up had a great difference. I never threatened anyone.

Respectfully Submitted,

Robert Edwin Perez Jr.

Robert Edwin Perez Jr. #924225

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert Edwin Perez Jr.

Date: 07-22-2016

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ROBERT PEREZ, JR.,

Appellant,

v.

Case No. 5D14-2391

STATE OF FLORIDA,

Appellee.

_____/

Decision filed March 15, 2016

Appeal from the Circuit Court
for Brevard County,
Morgan Laur Reinman, Judge.

James S. Purdy, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Pamela J. Koller, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

LAWSON, C.J., ORFINGER and EVANDER, JJ., concur.

APPENDIX B

All She Wants to Do Is Dance
Don Henley`
They're pickin' up the prisoners
And puttin 'em in a pen
And all she wants to do is dance, dance
Rebels been rebels
Since I don't know when
And all she wants to do is dance
Molotov cocktail, the local drink
And all she wants to do is dance, dance
They mix 'em up right
In the kitchen sink
And all she wants to do is dance
Crazy people walkin' round with blood in their eyes
And all she wants to do is dance, dance, dance
Wild-eyed pistols wavers who ain't afraid to die
And all she wants to do is
And all she wants to do is dance
And make romance
She can't feel the heat
Comin' off the street
She wants to party
She wants to get down
All she wants to do is
All she wants to do is dance
Well the government bugged the men's room
In the local disco lounge

APPENDIX C

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

ROBERT PEREZ, JR.,

Appellant,

vs. DCA CASE NO. 5D14-2391

STATE OF FLORIDA,

Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR BREVARD COUNTY, FLORIDA

AMENDED REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
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COUNSEL FOR APPELLANT

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POINT ONE

IN RESPONSE TO APPELLEE'S ASSERTION THAT THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL FOR THE CHARGED OFFENSE THREAT TO THROW, PLACE, OR DISCHARGE A DESTRUCTIVE DEVICE WITH THE INTENT TO DO BODILY HARM OR DAMAGE TO PROPERTY.

Appellee first asserts defense counsel below did not argue, as grounds for a motion for acquittal, that the State's evidence failed to establish any *intentional* threat by the Appellant. The Appellant would respond defense counsel's argument below clearly encompassed that the State's evidence "failed to make a prima facie showing of the intent...[while] *the Court has added* to that the 'stated intent,' the testimony at this point reflects that Mr. Perez...alleged to be stated [sic] he could set the place on fire...I don't believe that amounts to an actual threat on something you could do...He had no intent actually that it was- -that he *directed anything at [Carrie Barfield] specifically, or at the store specifically, that he any intent to do any property damage and/or damage to a person.*" (T 240-1; Vol. 3)

Appellee next argues the issue of "strict liability" intent was not argued below by trial defense counsel. Appellee is mistaken. As noted in the Appellant's initial amended brief, defense counsel continued to object to the State's reliance simply on the Appellant's "stated intent" in order to prove that he made any threat. Indeed, defense counsel stated to the trial court in regards to the jury instructions

"all I'm arguing, Your Honor, is that the Court does not add something that the State can then just rely upon and say, 'Well, we [sic] said it, and that's enough. Because it's not enough..." (T 25; Vol. 2)

Appellee additionally argues, under the decisions of *Reid v. State*, 405 So.2d 500 (Fla. 2d DCA 1981), and *Valdes v. State*, 443 So.2d 221 (Fla. 1st DCA 1984), the question of whether the Appellant possessed *the intent to threaten bodily harm or property damage* under Section 790.162, Florida Statutes, is a jury question. The Appellant acknowledges *Reid, supra*, 500-1, and *Valdes, supra*, 222, hold the Sate's evidence at trial must establish the accused made a threat that "*conveyed an intent* to do bodily harm or property damage," *not* that the accused *actually intended* to do bodily harm or property damage. (T 28; Vol. 2)

Appellee misconstrues the Appellant's argument for the acquittal motion that the State must prove the Appellant *possessed the intent to actually cause bodily harm to a person or damage to property*. What the State's evidence must establish, as argued below and on appeal on pages13 through 22 of the amended initial brief, is that the Appellant made *an intentional threat to do bodily harm or property damage* based on the particular surrounding factual circumstances. *Id.*, 222. Thus, the intent element of the charged threat requires the *intent by the Appellant to threaten to do bodily harm or property damage*, regardless of

whether the accused *actually intended* to harm an individual or damage property.

As also argued in the Appellant's initial amended brief, the State's proof fails to establish the Appellant *intentionally* made a threat to harm person or property, based on the *factual context* in which the Appellant's statements were made. The instant factual circumstances established by the State's evidence substantially differ from those present in Reid and *Valdes*. The Appellant's initial actions with Ken Wescott simply did *not* support that the Appellant *intentionally* conveyed a threat to Mr. Wescott to do harm to anyone or to damage any property. Indeed, Mr. Wescott acknowledged, when the Appellant's statements were allegedly made to him and reported, that he did *not* call the police, that he had returned to his work duties, and that the Appellant left the store without incident.

As for the second incident, also outlined in the Appellant's amended initial brief, the State relied on the testimony of what Mr. Westcott heard the Appellant say to Carrie Barfield at the Publix courtesy counter and what Ms. Barfield heard the Appellant say to her in regards to blowing up the "whole f'g place up" or "this whole f'g world." Importantly, the Appellant's subsequent actions of proceeding to walk off in the store and to continue to shop in the store *without incident* does not present even a *prima facie* case of any intentional threat made by the Appellant to harm anyone or to damage property in the Publix store. (T 82-96, 102-107,

121-128, 159-161; Vol. 2) This is especially true in light of grocery manager Keith Carpenter's testimony he told Ms. Barfield *not* to call the police, that he had spoken to the Appellant, who then finished shopping, paid for his purchase, picked up his backpack, and left the store, again without incident. (T 134-141; Vol. 2)

Appellee also does not address the testimony of Robin Pontius, who described the reactions she witnessed to the Appellant's actions *when she was speaking with Ms. Barfield.* Importantly, Ms. Pontius testified the Appellant "came in and seemed angry...because he threw his backpack down, he said 'fuck this shit'...and started to walk away," which is when she laughed. (T 198-200; Vol. 2) Ms. Pontius also testified the Appellant's statement were not directed at anyone "just seemed general agitation." (T 204-205; Vol. 3)

Further, the determination of the meaning of an "intentional threat" is not simply a "jury question" as Appellee suggests, when the evidence fails to establish any "intent." *Green v. State*, 90 So.3d 835, 837 (Fla. 2d DCA 2012). In addition, any inherent "ambiguity" as to the criminal statutory language of "intent" in Section 790.162 must be viewed most favorably to the benefit of the accused under *Dicks v. State*, 840 So.2d 408 (Fla. 4th DCA 2003). This would require more than just the mere utterance of the statements to establish the existence of an "intentional threat." Similarly, the recent decision by the United States Supreme

Court in *Elonis v. United States*, 135 S.Ct. 2001, 2011-13 (2015), held that Federal Statute 18 U.S.C. Section 875(c), which prohibits *the mere transmission* in interstate commerce of "any communication containing any threat...to injure the person of another," fails to contain a sufficient requirement of criminal mens rea or "scienter," but, instead, employs only a *non criminal* negligence standard. Accordingly, the Appellant's conviction must be vacated and the Appellant discharged based on insufficient proof of any *criminal intent.*

POINT TWO

IN RESPONSE TO APPELLEE'S ASSERTION THE TRIAL COURT PROPERLY OVERRULED THE APPELLANT'S OBJECTION TO THE INCLUSION OF THE WORD "STATED" TO THE STANDARD JURY INSTRUCTION FOR THE CHARGED OFFENSE THREAT TO THROW, PROJECT, PLACE, OR DISCHARGE A DESTRUCTIVE DEVICE WITH THE INTENT TO DO BODILY HARM OR DAMAGE TO PROPERTY.

Appellee contends the trial court properly overruled the Appellant's objection to the State's special jury instruction that the State must prove the Appellant had the "*stated intent* to do bodily harm to do bodily harm to any person or damage to the property of any person" under the decisions of *Reid v. State*, 405 So.2d 500 (Fla. 2d DCA 1981), and *Valdes v. State*, 443 So.2d 221 (Fla. 1st DCA 1984). As argued in Point One *supra*, and in the Appellant's initial amended brief, an offense under Section 790.162, Florida Statutes, requires that the accused make *a threat with the intent to do bodily harm or property damage*. This does *not*

mean, as Appellee suggests, the State can seek a conviction merely on the "*stated intent*," i.e. that the accused knew the "content" of the alleged "threatening statements" and that "a reasonable person would have recognized that the...[statements] would be read as genuine threats." *Elonis v. United States*, 135 S.Ct. 2001, 2011(2015). The High Court pointed out a criminal conviction for a "threat" cannot "be premised *solely on how...[the statements] would be understood by a reasonable person...[s]uch a 'reasonable person' standard is a familiar feature of civil liability in tort law, but it is inconsistent with 'the conventional requirement for criminal conduct–awareness of some wrongdoing.'*" *Id.* at 2011 (quoted citations omitted, additional emphasis supplied). Moreover, the High Court explained "[h]aving liability turn on whether a 'reasonable person' regards the communication as a threat–regardless of what the defendant thinks–'reduces culpability on the all-important element of the crime to negligence,...and we 'have long been reluctant to infer that a negligence standard was intended in criminal statutes.'" *Id.* at 2011 (quoted citations omitted).

The Appellant submits, as in *Elonis*, the State's special instruction amounts to only a *negligence* standard that is insufficient proof of the required mens rea of an "intentional threat" that the accused "knew the *character of what was...[stated[, not simply its contents and context.*" *Id.*, 2012 (emphases added and increased

from text). In essence, under the State's theory, proffered below and on appeal, a conviction for making an intentional threat in Section 790.162 may be obtained under a "strict liability" theory of criminal guilt solely by the Appellant's "stated intent." Such an instruction to the jury, contrary to the Appellee's argument, misleads the jury that the mere utterance by the Appellant of his statements made in the Publix would suffice to assess criminal liability. The modified jury instruction fails to define the element of the conveyance of a criminal threat with the requisite mens rea or "intent" under Section 790.162.

Appellee argues the modified jury instruction was necessary to prevent the "erroneous assumption" for the jury that the State had to prove the Appellant "*actually intended on causing bodily harm or property damage.*" (AB 21) Again, as noted in Point One *supra*, this is not the argument made by defense counsel below or by the Appellant in this appeal. Indeed, defense counsel acknowledged the State did not have to prove "that he actually intended to carry out the threat." (T 28; Vol. 2) Further, defense counsel specifically objected to the State's requested special jury instruction "completely absolves the State of proving ...the elements of the charge...which this is *not strict liability*." (T 44; Vol. 2)

Defense counsel also argued against the modified special jury instruction of "stated intent" requested by the State because it amounted to "improperly shifting

the burden over to the defense to then somehow have to come back and try to prove that he didn't have this intent." (T 22; Vol. 2) Clearly, Section 790.162 is not a "strict liability" statute, but encompasses the requirement of the accused's intent to make a threat of bodily harm to persons or damage to property. By the modification of the standard jury instruction to "stated intent," the focus becomes solely on the words expressed, not whether there was an intent by the accused to make a threat of bodily harm to persons or damage to property. Accordingly, the trial court's use of the State's special jury instruction modification for the element of intent to be redefined as the accused's "stated intent" requires the Appellant receive a new trial for his conviction under Section 790.162.

POINT THREE

IN RESPONSE TO APPELLEE'S ASSERTION THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S SPECIAL REQUESTED JURY INSTRUCTION.

Appellee argues defense counsel below did not preserve the trial court's denial of the defense counsel's special jury instruction request. The Appellant disagrees. Defense counsel, indicated to the trial court "on my stated objections...*and I [sic] requested instructions to be included, I don't have any further objection in terms of this threat*" after the trial court had denied defense counsel's requested special jury instruction. (T 268; Vol. 3) Consistent with the

underlying problem in this case, as expressed in each of the points in this appeal, is that the State was essentially able to prosecute the Appellant's statements under Section 790.162, Florida Statutes, as "strict liability" criminal acts.

The requested special jury instruction by the defense precisely encapsulates the requirement pointed out recently in *Elonis v. United States*, 135 S.Ct. 2001, 2011 (2015), that the necessary element of intent in a threat statute must *not* be based solely on "how the [statements]...would be understood by a *reasonable person...*" to be a threat. (Emphasis supplied.) Rather, the "intent element" of a threat statute must be based on "the mental requirement...whether a defendant *knew the character of what was [stated]...not simply its content and context.*" *Id.* at 2012 (additional emphasis added). *See also Hamling v. State*, 418 U.S. 87, 122-123 (1974). For the State to simply rely on the "stated intent" of the Appellant's statements, "*when viewed and/or heard by an ordinary reasonable person,*" improperly negates any necessary intent element under Section 790.162. As further pointed out in *Elonis*, a conviction under the Federal Threat Statute 18 U.S.C. Section 875(c) cannot be "premised solely on how [the statements] would be understood by a reasonable person...[s]uch a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct-*awareness* of some wrongdoing.'"

Id. at 2011 (extra emphasis supplied)(quoting *Staples v. United States*, 511 U.S. 600, 606-607 (1994)(other quoted citation omitted).

In the present case, the jury instruction that the trial court ultimately gave erroneously defined the required "intent" element under Section 790.162 as the "stated intent to do bodily harm to any person or damage to the property of any person" and a threat as "*a communicated intent* to inflict harm or loss on another person when viewed and/or heard by an ordinary reasonable person." These instructions merely focused on an incorrect "reasonable person" negligence standard in order to assess criminal intent and guilt instead of whether the Appellant made the statements *"for the purpose of issuing a threat, or with knowledge that the communication would be viewed as a threat."* *Elonis, supra,* at 2012 (emphasis added). The defense requested special jury instruction more properly defined the threat and intent elements as "a *serious expression of an intention to inflict injury, bodily harm or property damage*" and the failure of the trial court to give it requires remand for a new trial.

POINT FOUR

IN RESPONSE TO APPELLEE'S ASSERTION THE TRIAL COURT PROPERLY OVERRULED DEFENSE COUNSEL'S OBJECTIONS TO THE PROSECUTOR'S CLOSING ARGUMENTS.

Appellee first addresses defense counsel's objection to the prosecutor's closing argument on the improper standard of criminal liability under Section

790.162, Florida Statutes, based solely on the Appellant's "stated intent." Specifically, Appellee contends the defense centered on whether the Appellant "intended on actually causing bodily harm or property damage," which, as addressed *supra*, and in the amended initial brief, was *not* the Appellant's defense. Nor is the Appellant's "stated intent" the required intent element under Section 790.162. Indeed, the prosecutor's argument improperly defined the "intent" element to the jury that the State did *not "have to prove to you what [the Appellant's] actual intent was*." Simply by telling the jurors: "*It's the words and what his stated intent was...[t]hat regardless of his actual intent or his actual ability to carry through with the threat*" incorrectly placed the Appellant's criminal liability *solely on the words he used.* (T 298; Vol. 3) This amount to a "strict liability" standard that is devoid of any *criminal intent.* The prosecutor's additional argument to the jury that "[w]e don't have to prove to you the defendant had *any kind of evil intent at all, period*" only served to focus the jury on the "words" themselves and not on whether the Appellant possessed the criminal intent to *threaten* to harm anyone or to damage property. (T 348; Vol. 3)

Appellee next argues the prosecutor's closing argument that, based on the "common understanding" that a "Molotov cocktail *would* constitute an *incendiary and does have a capability*" was proper "common knowledge" of the jurors. The

cited case law by Appellee, however, dealt with evidence of a *planned conspiracy to commit arson by an agreeing to burn a school with a Molotov cocktail* in *Slaughter v. State*, 301 So.2d 762, 765 (Fla. 1974), or actual damage done from a "Molotov cocktail," and remnants of such a device found at the crime scenes. The Appellant would submit the prosecutor merely had evidence of the Appellant's statements that "I only have one Molotov cocktail in there" and "I could set fire to the place." This did not establish the Appellant actually had, in fact, an 'incendiary device" that he referred to as "Molotov cocktail" or its actual capability based on the Appellant's statements alone. Appellee's further contention defense counsel's motion for judgment of acquittal argument amounted to a "waiver" of defense counsel's "facts outside of evidence" closing argument objection is similarly misplaced. The State did *not* have to prove the Appellant actually had a "Molotov cocktail" in the backpack or that it actually had an "incendiary capacity." Thus, the prosecutor's improper reference during closing argument that "a Molotov cocktail *would constitute an incendiary*" did constitute references to facts outside of the evidence produced at trial and was unrelated to whether the State had sufficiently proven the charged intentional threat at all.

Appellee next turns to the prosecutor's closing argument as to Keith Carpenter and argues, under *Williamson v. State*, 994 So.2d 1000, 1012 (Fla.

2008), and *Spann v. State*, 985 So.2d 1059, 1068 (Fla. 2008), such comments "constituted a proper inference from the evidence." The Appellant would first respond Appellee fails to address the prosecutor's misstatement of the law that Mr. Carpenter's testimony was "completely irrelevant." Mr. Carpenter's testimony was clearly highly relevant to the totality of the factual circumstances. Second, Appellee's claims the prosecutor's comments in reference to Mr. Carpenter were factually based on the record, but does not cite to anything in the record where the Appellant directly threatened to "blow up" either Ken Wescott or Carrie Barfield. Mr. Carpenter's testimony clearly contradicted the testimony of both of these witnesses as to whether the *totality* of the Appellant's actions in the Publix could be viewed as an intentional threat. Third, under *Brooks v. State*, 762 So.2d 879, 901 (Fla. 2000), the prosecutor's highly inflammatory comments to dismiss Mr. Carpenter's testimony and to prejudicially inject her own personal bolstering of the credibility of the testimony by Mr. Wescott and Ms. Barfield sought a conviction by inflaming the passions and emotions of the jurors instead of from the "totality of the evidence." Thus, viewed individually or cumulatively, the objected to improper and inflammatory arguments require remand for a new trial.

POINT FIVE

IN RESPONSE TO APPELLEE'S ASSERTION THE DECISION OF *ELONIS v. UNITED STATES*, 135 S.Ct. 2001 (2015),IS NOT APPLICABLE TO SECTION 790.162, FLORIDA STATUTES.

Appellee initially argues defense counsel below did not preserve for appellate review the recent holding in *Elonis v. United States*, 135 S.Ct. 2001 (2015), under *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982). The Appellant would first respond *Elonis, supra*, issued *after* the trial, raises fundamental error that *is* addressable on appeal irrespective of not being raised at trial. Second, as argued in Points One through Four, defense counsel repeatedly argued the State was required to prove the Appellant made an *intentional* threat, not simply that the Appellant's statements themselves were made, to establish a criminal threat.

Further, if the totality of the State's evidence fails to show, as a matter of law, that a criminal offense was committed and/or that a crime was even alleged, fundamental error occurs. *F.B. v. State*, 852 So.2d 226, 229-231 (Fla. 2003). Neither do the magic words "fundamental error" have to be argued to preserve the issue on appeal that the accused has been criminally convicted of a *noncriminal* act. *Id.*, 229-231. Moreover, Appellee's reliance on *Wheeler v. State*, 87 So.3d 5 (Fla. 5th DCA 2012), is similarly misplaced because the "error" at issue in that case was that the trial court applied an improper standard of review for a suppression ruling that was also not raised in the initial appellate brief.

Appellee additionally argues *Elonis, supra*, is not applicable to the instant case because "Section 790.162, Florida Statutes, contains a mental state

requirement...that [the Appellant] made the threat 'with the *stated intent*' to do bodily harm or property damage..." (AB 36) As argued in Points One through Four of the Appellant's amended initial brief and *supra*, the application of Section 790.162 by the trial court incorporates "strict liability" and "how a reasonable person would perceive the Appellant's statements." This is a *civil liability simple negligence standard, not a criminal "mens rea" standard.* Elonis, supra. Section 790.162 lacks the necessary criminal intent by the accused of a "calculated purveyance of a threat." *Id.*, 2012 (other quoted citations omitted). Thus, a "true threat" cannot exist unless the accused intended to instill fear in the recipient to feel threatened. *United States v. Heineman*, 767 F.3d 970, 982 (10th Cir. 2014). Accordingly, the Appellant's conviction and sentence should be reversed and the Appellant discharged based on Section 790.162 not requiring any *criminal* intent.

CONCLUSION

Based on the arguments and authorities herein and in the initial brief, the Appellant respectfully requests this Honorable Court vacate his judgment and sentence and, as to Points One and Five, order him to be discharged or, alternatively, as to Points Two, Three, and Four, remand this case for a new trial.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ *Susan A. Fagan*
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COUNSEL FOR APPELLANT

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and fagan.susan@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed electronically with the Fifth District Court of Appeal, 300 South Beach Street, Daytona Beach, Florida 32114, at https://edca.5dca.org; delivered electronically to the Office of the Attorney General, 444 Seabreeze Boulevard, fifth floor, Daytona Beach, Florida 32118, at crimappdab@myfloridalegal.com; and a true and correct copy thereof delivered by USPS to Mr. Robert Perez, Jr., Inmate #924225, Hamilton Correctional Institution - Annex, 11419 Southwest County Road 249, Jasper, Florida 32052, on this 14th day of September, 2015.

/s/ *Susan A. Fagan*
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

APPENDIX D

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF
THE STATE OF FLORIDA

ROBERT PEREZ, JR.	)	
	)	
Appellant,	)	
	)	
vs.	)	DCA Case No. 5D14-2391
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

MOTION FOR REHEARING AND/OR REHEARING EN BANC AND TO ISSUE A WRITTEN OPINION AND TO CERTIFY A QUESTION OF GREAT PUBLIC IMPORTANCE TO THE FLORIDA SUPREME COURT

Appellant, Robert Perez, Jr., by and through undersigned counsel and pursuant to Rules 9.330 and 9.331, Florida Rules of Appellate Procedure, hereby requests this Honorable Court to grant rehearing and/or rehearing en banc and to issue a written opinion and to certify a question of great public importance to the Florida Supreme Court. As grounds, Appellant states:

1. On March 15, 2016, this Court rendered a panel *per curiam* decision, without a written opinion, affirming the Appellant's judgment and sentence.

2. Rehearing is authorized by Rule 9.330, Florida Rules of Appellate Procedure, where the Court has overlooked or misapprehended applicable points of law or facts.

3. The Appellant was convicted under section 790.162, Florida Statutes, based on the allegation he did "threaten to throw, project, place, or discharge a destructive device with the intent to do bodily harm to any person or with the intent to do damage to any property of any person." (R 50; Vol. 1) The jury was instructed, over defense counsel's objection, as to this

offense as follows:

> To prove the crime of threat to discharge a destructive device, the State must prove the following two elements beyond a reasonable doubt..[o]ne, Robert Edward Perez, Jr. threatened to throw, place, project or discharge a destructive device...[t]wo, Robert Edwin Perez, Jr. did so with the ***stated intent*** to do bodily harm to any person or damage to the property of any person...[a] threat is defined as a *communicated intent* to inflict harm or loss on another person when viewed and/or heard by an ordinary reasonable person.

(R 110; Vol. 1; T 21-54; Vol. 2; T 256-257, 261, 349-350; Vol. 3)

4. The Appellant challenged on appeal, in Point Two of his amended brief, the trial court's deviation, over defense counsel's objection, from the *standard* Florida jury instruction in Fla. Std. Jury Instr. (Crim.) 10.8 for the offense of threatening to throw, project, place, or discharge a destructive device *with the intent* to do bodily harm to any person *or with the intent* to do damage to any property of any person. On appeal, the Appellant also argued, under the recent United States Supreme Court held in *Elonis v. United States*, 135 S.Ct. 2001, 2011-13 (2015), the State's special requested jury instruction, given by the trial court to the jury below, fails to contain a sufficient requirement of criminal *mens rea* or "scienter" guilty knowledge and, instead, employs only a mere negligence standard. As *Elonis* points out, the necessary element of a ***mental intent*** in a criminal threat statute must ***not*** be based ***solely*** on "how the [statements]...would be understood by *reasonable person...*" to be a threat. (Emphasis supplied.) Rather, the "intent element" of a threat statute must be based on "the mental requirement...whether a defendant ***knew the character of what was [stated]...not simply its content and context***." *Id.* at 2012 (emphasis added and increased). This requirement of a "mens rea" for a criminal statute such as section 790.162 has been held to be necessary for a criminal conviction in *Hamling v. State*, 418 U.S. 87, 122-123 (1974).

5. The State, in essence, sought a conviction of the Appellant for a violation

of section 790.162 based on the "stated intent" of the Appellant's statements "*when viewed and/or heard by an ordinary reasonable person.*" The High Court further stressed in *Elonis* that a "threat" statute, in that case 18 U.S.C. section 875(c), cannot be "premised solely on how [the statements] would be understood by a reasonable person...[s]uch a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct-***awareness*** of some wrongdoing.'" *Id.* at 2011 (extra emphasis supplied)(quoting *Staples v. United States*, 511 U.S. 600, 606-607 (1994)(quoting *United States v Dotterweich*, 320 U.S. 277, 281 (1945)).

6. The Supreme Court in *Elonis* mainly relied on the decisions of *Staples*, *supra*, as to the critical and necessary element of "mens rea" and "scienter" for a criminal statute that involves an "intentional" threat of some nature. *Elonis*, 2010. Indeed, the premise underlying the decision was that "a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." *Id.* at 2009 (quoting *Staples*, *supra*, at 608, n. 3).

7. This was the Appellant's argument in Point Two on appeal, namely, that the defined element of section 790.162 in the aforementioned special jury instruction given by the trial court as to the accused's "stated intent" fails to require any criminal *mens rea*. The Appellant therefore first respectfully requests that this Court should address in a written opinion the adequacy and the constitutionality, or lack thereof, of the aforementioned special jury instruction. The Appellant maintains the State cannot constitutionally, under *Elonis*, obtain a criminal conviction under section 790.162 merely by the State's reliance on the "stated intent" of the Appellant's statements made at the Publix.

8. The Supreme Court in *Elonis* directly noted that "[t]he jury was instructed that the

Government need prove only that a reasonable person would regard [the accused's] communications as threats, and that was error." *Id.* at 2012. This is exactly how the jury below was instructed below, which similarly failed to include any element of intent or mens rea. As the High Court further noted:

> Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state. That understanding 'took deep and early root in American soil' and Congress left it in tact here: Under Section 875(c), 'wrongdoing must be conscious to be criminal.' *Morissette [v. United States]*, 342 U.S. 246, at 252 [(1952)]

Elonis, at 2012.

9. The second basis Appellant respectfully submits for this Court to issue a written opinion, is to address the issue, argued on appeal in Point Five, that the Appellant's conviction under section 790.162, should be vacated under the holding in *Elonis*, 2011-13, because section 790.162 lacks the necessary element of any mens rea "guilty knowledge" criminal intent. The United States Supreme Court held in *Elonis* that federal statute 18 U.S.C. section 875(c), which prohibits the transmission in interstate commerce "any communication containing any threat...to injure the person of another," fails to contain a sufficient requirement of criminal mens rea or "scienter," but employs only a *negligence* standard. Similarly, section 790.162, coupled with the State's special requested jury instruction, improperly amounts to a pure "strict liability" standard that the Appellant's conviction could stand merely on the "stated intent" of his words alone, without any required scienter or intent necessary to be proven by the State. Thus, the Appellant respectfully submits that a written opinion by this Court that addresses whether, under *Elonis*, the Appellant can be convicted of a criminal violation of section 790.162, without any criminal intent element, would permit the Appellant further appellate review of this important constitutional issue.

10. En Banc review of a panel decision is authorized by Rule 9.331, Florida Rules of Appellate Procedure, where the issue is one of exceptional importance. A decision of exceptional importance is one that effects large numbers of persons or one that interprets a fundamental legal or constitutional right. *In Interest of D.J.S.*, 563 SO. 2d 655, n.1 (Fla. 1st DCA 1990); *Felts v. State*, 537 So.2d 995 (Fla. 1st DCA 1988). I undersigned counsel express a belief, based on a reasoned and studied professional judgement, that this case and the issues raised on appeal in this case are of exceptional importance.

11. I undersigned counsel also express a belief, based upon a reasoned and studied professional judgment, that a written opinion would provide a legitimate basis for Supreme Court review of the jury instruction issue raised on appeal in this case and whether it properly instructed the jurors as to the constitutionally required criminal mens rea or scienter guilty knowledge element under section 790.162, particularly in light of *Elonis*, *supra*. A written opinion by this Court will also permit the Appellant further review by the Florida Supreme Court of the aforementioned constitutional issue as to whether section 790.162 itself adequately contains a constitutionally required criminal mens rea or scienter guilty knowledge element.

12. The Appellant further respectfully requests that this Court issue a written opinion that addresses and certifies the following questions of great public importance, namely:

> "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)?

DESIGNATION OF E-MAIL ADDRESS

I HEREBY DESIGNATE the following e-mail addresses for purposes of service of all documents, pursuant to Rule 2.516, Florida Rules of Judicial Administration, in this proceeding: appellate.efile@pd7.org (primary) and fagan.susan@pd7.org (secondary).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically delivered to The Honorable Pamela Jo Bondi, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 and mailed to Mr. Robert Perez, Jr., DOC#924225, Hamilton Correctional Institution - Annex, 11419 Southwest County Road 249, Jasper, Florida 32052 on this 30th day of March, 2016.

/s/ Susan A. Fagan
SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

AND

WHETHER, UNDER THE UNTIED 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.

WHEREFORE, Appellant respectfully requests this Honorable Court to grant rehearing and/or rehearing en banc, withdraw the panel *per curiam* affirmed decision, reverse the Appellant's conviction and sentence, and order that the Appellant be discharged or granted a new trial. Alternatively, the Appellant respectfully requests this Court issue a written opinion and certify the aforementioned questions of great public importance to the Florida Supreme Court.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

/s/ Susan A. Fagan
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COUNSEL FOR APPELLANT

APPENDIX E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ROBERT PEREZ, JR.,

Appellant,

v. CASE NO. 5D14-2391

STATE OF FLORIDA,

Appellee.
_____/

DATE: April 26, 2016

BY ORDER OF THE COURT:

ORDERED that Appellant's "Motion for Rehearing and/or Rehearing En Banc and to Issue a Written Opinion and to Certify a Question of Great Public Importance to the Florida Supreme Court", filed March 30, 2016, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Joanne P. Simmons
JOANNE P. SIMMONS, CLERK

Authorized by: Judges Lawson, Orfinger, Evander (acting on panel-directed motion(s))
En Banc Court (acting on en banc motion)

cc:

Office of Attorney General
Pamela J. Koller

Susan A. Fagan

Office of The Public Defender

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, _____

_____

Robert Edwin Perez Jr. -- PETITIONER
(Your Name)

VS.

State of Florida -- RESPONDENT(S)

PROOF OF SERVICE

I, Robert Edwin Perez Jr., do swear or declare that on this date, _____, _____, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Office of the Attorney General
Fifth District Court of Appeal
444 Seabreeze Blvd. Ste. 500 Daytona Beach 32118

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 07-22, 2016

Robert Edwin Perez Jr.
(Signature)