STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2021AP000218-CR

TOWN OF BROOKFIELD,
Plaintiff-Respondent,

-vs.-

MARTIN M. GONZALEZ,
Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION FILED ON JANUARY 26, 2021 AND THE ORDERS DENYING DEFENDANT'S MOTIONS TO DISMISS, THE HONORABLE LAURA LAU PRESIDING, IN THE WAUKESHA COUNTY CIRCUIT COURT.
WAUKESHA COUNTY CASE NO. 2018CV002074

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

Respectfully submitted by:

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STATEMENT OF THE ISSUES

I. Whether Gonzalez's conviction for disorderly conduct violated his constitutional rights to free speech and to keep and bear arms when his speech was to sequence two social media posts of a magazine with bullets and a firearm between two other social media posts about going to see a movie?

II. Whether the trial court erred in refusing to instruct the jury regarding the Town's burden to prove that Gonzalez acted with criminal or malicious intent as required by the disorderly conduct statute?

III. Whether the trial court erred in using Wisconsin's model disorderly conduct jury instruction insofar as that instruction fails to inform the jury that the government must prove that the defendant acted with subjective intent to threaten?

The circuit court denied Gonzalez's motions to dismiss the matter and improperly instructed the jury and thus answered the aforementioned questions "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Gonzalez would welcome oral argument if it would assist the panel to understand the issue presented or answer any unanswered questions that may arise, unbeknownst to counsel, during the panel's review of the briefing.

Gonzalez believes the Court's opinion in the instant case will meet the criteria for publication as it presents important and replicable issues regarding the use of Wisconsin's disorderly conduct statute against speech, specifically, speech broadcast by social media. Further, Gonzalez is seeking a three-judge panel.

STATEMENT OF THE CASE

This case involves a 19-year-old man's posting of four images on social media and the disruptive police response that followed in a packed theater where everyone was peacefully watching the movie "Jumanji."

For his four social media posts the Town of Brookfield (herein "the Town") issued Gonzalez a

municipal citation for Disorderly Conduct, citing and incorporating Wis. Stat. §947.01(1). (R1:4; A-Ap 4). The citation called for a fine of $628.00. (R1:4; A-Ap 4). A municipal court trial was held on October 18, 2018 where Gonzalez was found guilty of disorderly conduct. (R1:2; Ap-A 2). A de novo trial at the Waukesha Circuit Court was timely requested and the Clerk of Court accepted the case on November 13, 2018. (R1:1-5; A-Ap 1-5).

Gonzalez filed a pretrial motion to dismiss the matter citing violations of his U.S. and Wisconsin state constitutional rights to engage in free speech and keep and bear arms, and his statutory right to carry a firearm without criminal or malicious intent. (R4:1-10; A-Ap 6-15). The Town of Brookfield filed a response in opposition to the motion on February 8, 2019 (R5:1-23; A-Ap. 16-38).

On February 15, 2019 a motion hearing was held before the Honorable Judge Laura Lau who denied

Gonzalez's motion to dismiss without offering analysis of the issues presented. (R33:1-11; A-Ap. 46-56).

On January 26, 2021 a one-day, six-person jury trial was held before Judge Lau who further denied Gonzalez's motions to dismiss at the close of the Town's evidence and after the verdict. (R34:142-145, 172, R4:1-10; A-Ap. 117-120, 123, 6-15). The court denied both motions without providing analysis of the constitutional and statutory rights at issue. (R34:147, 172; Ap-A. 122, 123). The court instructed the jury who convicted Gonzalez of disorderly conduct. (R17:1, Ap-A. 41). The court reimposed the $628.00 fine. (R34:173, Ap-A. 124).

This appeals follows.

STATEMENT OF RELEVANT FACTS

The Town's primary witness was a young man, Garrett Bartelt, who on January 2, 2018, attended a showing of Jumanji at the Majestic Theater in the Town of Brookfield with friends. (R34:70-71; Ap-A. 58-59). The showing was on a "$5 Tuesday" and was at near

capacity with 102 patrons, including Gonzalez and his friend Edgar. (R34:98-99, 106; Ap-A. 86-87, 94). Bartelt had played youth baseball with Gonzalez and considered him an acquaintance. (R34:88; Ap-A. 76).

While sitting in the theater, Bartelt by "happenstance" or "randomly" viewed an Instagram Story posted by Gonzalez. (R34:85; Ap-A. 73). Bartelt had not seen Gonzalez at the theater and did not know he would be there. (R34:85; Ap-A. 73). Conversely, Gonzalez did not know Bartelt would be at the theater and did not direct his social media posts to Bartelt (R34:85-86; Ap-A. 73-74). Gonzalez had about 300 social media followers. (R34:140-141; Ap-A. 115-116). Bartelt, and presumably Gonzalez, had attempted to attend an earlier showing of Jumanji, but because the earlier showing was sold out, attended the 10pm showing instead. (R34:71; Ap-A. 59).

Bartelt viewed three images in Gonzalez's Instagram Story[1]:

[1] An Instagram Story is a running compilation of photos uploaded by the user over 24 hours. After 24 hours, the photos vanish from

1) A photo of a movie ticket for the 10pm Jumanji showing. (R20, Ap-A. 42). The photo was captioned "Have to wait till 10 (happy face emoji)." (R20, Ap-A. 42).
2). A photo of a loaded magazine and bullets with no caption. (R21, Ap-A. 43).
3.) A photo of a darkened movie theater with no caption. (R22, Ap-A. 44).

After viewing Gonzalez's Instagram Story, Bartelt switched to the SnapChat app and saw a fourth image. (R34:83; Ap-A. 71). That image was of:

4). A pistol and the magazine. (R23, Ap-A. 45).[2]

The timestamps on each app's images made clear this fourth image was posted online contemporaneous to the second image of the loaded magazine and bullets. (R34: 82-83; Ap-A. 70-71).

Notably, the exhibits showing the Instagram Story show the first photo of the movie ticket was actually the third photo in Gonzalez's Instagram Story. No evidence was presented regarding what was

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the Story. The photos in the Story play chronologically from oldest to newest. Stories do not allow for public comments or "likes." This feature was added to Instagram in August of 2016. *See* Instagram Stories: The Complete Guide to Using Stories, Ash Read, https://buffer.com/library/instagram-stories/ (Accessed 5/4/2021).

[2] SnapChat originated the "ephemeral" or vanishing content style later adopted by Instagram.

depicted in the first two preceding photos. (R20; Ap-A. 42).

Bartelt became afraid due to the sequence of the posted photos, the last of which (the theater photo) partially depicted him and his friends. (R34:89, 22; Ap-A. 77, 44). Bartelt conveyed his fears regarding the photos to his friends and then a theater security officer (R34:80, 84; Ap-A. 68, 72). Security directed Bartelt and his friends to a conference room and the police were called to the theater. (R34:78; Ap-A. 66).

Bartelt conceded the posted photos were not directly threatening, and he did not believe Gonzalez was trying to scare him specifically, but he perceived the photos as an implied or vague threat. (R34: 86-87; Ap-A. 74-75). Bartelt agreed there was no express statement of anger or violence in the postings. (R34:88; Ap-A. 76). Further, Bartelt did not observe Gonzalez doing anything in the back of the theater. (R34:88-89; Ap-A. 76-77).

An operations manager for the theater testified he was shown the social media images and "(i)t brought

concern. You know, with how things are going these days, you just never know. So you have to make that call (to the police)." (R34:94; Ap-A. 82). The manager did not delay in calling the police who were dispatched to the theater at 11:05pm.[3] (R34:100, 111; Ap-A. 88, 99). The documented nature of the dispatch was for an "implied threat." (R34:111-112; Ap-A. 99-100).

The manager also stated he has previously confronted customers open carrying firearms and his response had been to "either ask them to conceal it or put it in their vehicle." (R34:97; Ap-A. 85). He further stated regarding a concealed firearm "(i)f we don't know about it, it is not a concern to us." (R34:97; Ap-A. 85).

The police responded, reviewed the photos with Bartelt, and made a plan to detain Gonzalez. (R34:103-

[3] There is a discrepancy in the timeline as Bartelt believes he saw the social media posts just before the 10pm showing of Jumanji started. (34:80-81). While neither the theater staff nor police delayed response (34:100), the police were dispatched at 11:05pm. (34:111). The defense's conclusion is Bartelt did not check his social media accounts until sometime into the movie which indicates the lack of a threat by the absence of any act by Gonzalez beyond his enjoyment of Jumanji.

106; Ap-A. 91-94). The police executed their plan: the theater lights were switched on, the projector turned off, and the police rushed in with guns drawn at Gonzalez, they shouted commands to which he complied, and handcuffed him and his friend Edgar. (R34:96, 106-107; Ap-A. 84, 94-95). No weapons were found on either Gonzalez or Edgar. (R34:106; Ap-A. 94). No weapon was found in their car. (R34:114-115; Ap-A. 102-103). Gonzalez was surprised by the police action. (R34:113; Ap-A. 101).

After the police action, the manager stated approximately half of the patrons left the theater. (R34:98-99; Ap-A. 86-87). A combination of free passes and refunds were provided to the other patrons. (R34:96; Ap-A. 84).

Gonzalez was not called as a witness by either party at trial. The police admitted to not knowing Gonzalez's intent for posting the photos prior to their action to detain him. (R34:107; Ap-A. 95). They did receive a written statement from Gonzalez within the hour of his arrest – but did not offer the statement as

evidence at trial. (R34:116; Ap-A. 104). Of course, Gonzalez's only intention was to watch Jumanji.

Prior to the jury trial's commencement, the Parties and court held a short jury instruction conference wherein Gonzalez requested an amendment to pattern instruction CRIMINAL-JI 1900 (Disorderly Conduct) to mirror the statutory language of Wis. Stat. §947.01(2). This proposed addition was provided to the court in a pretrial filing. (R10; Ap-A. 39). The court rejected including the amending language ruling the instruction was inappropriate because Gonzalez was being prosecuted for his social media postings, not actually having the firearm. (R34:8; Ap-A. 57). In the final jury instruction conference, language regarding the carrying of a firearm was also sought by the defense, but this request was similarly rejected by the court. (R34:123-125; Ap-A. 111-113).

ARGUMENT

I. THE FIRST AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 3 OF ARTICLE I OF THE WISCONSIN STATE CONSTITUTION BAR GONZALEZ'S PROSECUTION.

Martin Gonzalez challenges the constitutionality of Wis. Stat. §947.01 as applied to his social media postings as the postings lacked an objectively serious intention of harming another. A comparison to the fact sets of other notable First Amendment "true threats" cases displays his posts' truly benign nature: Gonzalez did not state he would shoot the president of the United States[4], write a story about decapitating his teacher[5], post on social media that he would slit the throat of and blow up an FBI agent who had come to his home to investigate prior violent social media posts[6], or say he would kill a Wisconsin circuit court judge prior to killing himself.[7]

[4] Watts v. U.S., 394 U.S. 705 (1969).
[5] State v. Douglas D., 2001 WI 47, 243 Wis.2d 204.
[6] Elonis v. U.S., 575 U.S. 723 (2015).
[7] State v. Perkins, 2001 WI 46, 243 Wis. 2d 141.

No, Gonzalez merely "sequenced" innocent social media posts in a manner that was given a dramatically sinister implied meaning. The Town's theory of prosecution vastly outkicked the coverage of any government's ability to prosecute speech as no objective speaker in Gonzalez's situation or any objective recipient of the speech would believe his social media postings would be taken as a true threat to harm a particular individual or group of individuals.

Whether the speech was insufficient to allow prosecution is a decision that is made as a matter of law. State v. Perkins, 2001 WI 46 at ¶ 48, 243 Wis. 2d 141. The circuit court erred in not granting the defense's motion at each stage of the prosecution and the matter should not have been allowed to proceed to jury trial. Burks v. U.S., 437 U.S. 1, 18 (1978). The Supreme Court directs appellate courts reviewing First Amendment cases to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free

expression.'" Bose Corp.v. Consumer Union of United States, Inc. 466 US 485 at 499 (1984), quoting New York Times Co. v. Sullivan, 376 U.S. 254 at 284-286.

Whether the disorderly conduct statute was unconstitutionally applied to Gonzalez's speech is a "question of law that (an appellate court) review(s) de novo. ... (When a statute) implicates First Amendment rights, the State has the burden to prove that the statute is constitutional beyond a reasonable doubt." State v. Baron, 2009 WI 58, ¶ 10, 318 Wis.2d 60, 769 N.W.2d 34.

The facts of Gonzalez's speech were essentially uncontested and a full review of the record is straightforward.

Classes of speech the government may punish include obscenity, defamation, fighting words, incitement to imminent breach of the peace, and "true threats." Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003). The Black case involved a violation of a federal cross burning statute and

described a "true threat" as a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Id. at 360. The decision goes on to state:

> The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359-360.

The Wisconsin Supreme Court recognized "for purposes of First Amendment analysis, a 'threat' is very different from a 'true threat.'" State v. Douglas D., 2001 WI 47 at ¶ 31. In that case, our court decided the permissible application of Wis. Stat. § 947.01 to speech was under its "abusive" element. Id. at ¶ 32. The Town could not fashion a theory that Gonzalez's social media "sequencing" was abusive (i.e. "injurious, improper, hurtful, offensive, reproachful…insulting."). Id. Instead the Town deliberately choose to proceed under the

incredibly nebulous and vague term "otherwise disorderly conduct." (R34:122; Ap-A. 110). The use of this term should have signaled to the circuit court that the Town was over its skis on a permissible use of its prosecutorial power to punish speech. However, the court offered no analysis as to legality of the Town's prosecution.

Tens of millions of teenagers like Gonzalez document their activities via social media. Indeed, the number of teenagers who sometimes "post things only their closest friends would understand (or post) updates on where they are or what they're doing," is 50% and 42% respectively. Pew Research Center, Teens' Social Media Habits and Experiences (Nov. 28, 2018).

Under the objective speaker / objective recipient standard used to instruct the jury in this case, Gonzalez's social media posts cannot be construed as a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black at 360.

First, what was Gonzalez objectively expressing? The first photograph depicted a movie ticket with a caption that he would need to wait until 10pm. The photo also included a "happy face" emoji. Because the Town did not offer any evidence from Gonzalez about the meaning of the photo, the court should derive its most apparent and obvious meaning – that Gonzalez wanted to attend an earlier showing of Jumanji but was only able to attend the later 10pm showing. This is consistent with Bartelt's own experience of having to attend the later showing. Further, certainly a "happy face" emoji does not demonstrate an expression to harm or any other anti-social meaning. Instead, the literal interpretation would be the emoji expressed happiness.

The subsequent photo of a firearm magazine was uncaptioned. There was no contextual language to facilitate any understanding of what was being expressed. However, there was evidence that the magazine was not brought to the theater.

The photo of the firearm itself was done on an entirely different app platform as the others, SnapChat.

If Gonzalez were expressing some intentionally vague threat of future violence at the movie theater he would not have purposefully removed this photo from his chronologically displaying Instagram Story. Or he would have supplemented his SnapChat Story to include depictions of the ticket and theater. The easiest conclusion is Gonzalez was not purposefully expressing much of anything other than documenting his mundane Tuesday evening. An objective speaker in Gonzalez's shoes would be hard pressed to realize his posts on different app platforms would be put together into one vaguely or impliedly threatening narrative.

The last photo is of the theater. The Town's theory is the photos in sequence somehow connotates some intention to do something other than watch Jumanji. Again, without a caption or even an instructive emoji, the Town surmises this image was truly threatening as a serious expression to do harm.

The Pew Foundation's survey question relating to teenagers posting "updates on where they are or what

they're doing" correctly and most accurately describes all of Gonzalez's social media content.

As this Court must consider the entire record in deciding whether Gonzalez's speech fell outside of First Amendment protections, it would be instructive to search the record for any contextual clues to aid in the analysis of the prosecuted speech.[8] There would have been recognizable contextual clues regarding the photos had they been presented in a traditional fashion: if Gonzalez had walked over to Bartlet in the theater and

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[8] A recent law review article articulated the need for contextual analysis of online speech. The writers' expression as to the abundant misunderstandings in online speech that necessitate a contextual approach is well-stated:

> The spontaneous, informal, unmediated, and often-anonymous nature of social media gives users license to say things online that they would never say in person and contributes to the harm suffered by targets of both hateful speech and true threats. Yet, these same characteristics magnify the potential for a speaker's innocent words to be misunderstood...Moreover, different social media platforms have different discourse conventions and architectural features which complicate attempts to discern both the speaker's true intent and the meaning of her postings. Finally, speakers of different ages and backgrounds use social media differently to convey their messages, adding another layer of contextual complexity. Lyrissa Barnett Lidsky & Linda Riedemann Norbut, #I U: Considering the Context of Online Threats, 106 Calif. L. Rev. 1885, 1891 (2018).

shown him a photo of a firearm on his cellphone. This scenario would give context of the speech outside of the photo for Bartelt (and a reviewing court) to respond to – was Gonzalez merely showing the photo because he thought Bartelt would be impressed or envious of it, was their interaction friendly or tense, what words accompanied the exchange, would all be context that could be derived from an in-person speech. This context is completely absent from an online posting.

Indeed, the trial record provides no contextual clues linking the sequence of ticket-magazine/firearm-theater photos with a true threat. For instance, clues might be whether Gonzalez threaten violence previously, went through a recent trauma or behavioral change, or in any other way advance the idea that he would be interested in committing a mass atrocity. If there were such contextual clues the Town would certainly have provided them.

Instead, the Town decided not to enter into evidence Gonzalez's written statement made within the hour of his arrest or to call him as an adverse witness.

The Town also decided to not provide evidence as to what the first two images were in Gonzalez's Instagram Story. Presumably the first two images had nothing to do with Jumanji or firearms – and therefore nothing that added to the Town's make-believe "implied threat" sequencing theory. The Town's decision to not supplement the trial record in this respect speaks to the complete lack of contextual clues that Gonzalez's version of events would have provided (i.e. that no threat was being implied). His lack of any intent to threaten harm or realization that his posts would be taken as an implied threat is apparent.

There are extremely probative contextual clues within the record – there was no firearm present in the theater or in the car that transported Gonzalez and his friend to the theater and Gonzalez was surprised by the police action. These facts should be given great weight about what an objective speaker and objective recipient would have understood the social media posts to mean– which was anything other than serious threat to harm Gonzalez's fellow 10pm Jumanji-watchers.

The court should also undertake an analysis of whether Gonzalez objectively threatened a particular individual or group of individuals. This requires an analysis of who his speech was directed to – namely his 300 social media followers on both the Instagram and SnapChat apps. Gonzalez had no idea Bartelt, or any of his social media followers, would be at the theater. Moreover, he had no idea a social media follower from one of his apps (Instagram) would piece together some vague threat with the aid of a posting on another app (SnapChat).

An objective speaker in Gonzalez's shoes would have a hard time viewing his speech as objectionable, let alone predict the three-circled Venn diagram of the allegedly threatened audience – a Instagram follower, a SnapChat follower, who was also present at the same Tuesday late showing of Jumanji. Not to mention the additional audience requirement of an Instagram and SnapChat social media follower who was accessing both social media apps during the playing of the movie! This particularized group of "threatened" individuals is so

minuscule that an objective speaker would struggle to foresee the events that unfolded.

The Town predicates its theory that there was some kind of implied threat of a "mass shooting." (R34:139; Ap-A. 114). There is nothing within the photos that creates that implication – other than the presence of a legally possessed firearm. It is unclear why the possession of a firearm prior to an individual being amongst other people is threatening behavior. Those who keep and bear arms are not forced to segregate themselves from the rest of society.

Because the Town's prosecution of Gonzalez for lawfully exercising his right to speech on his Instagram and SnapChat accounts, his prosecution was illegal as a matter of law. Therefore, this Court should vacate his conviction and dismiss the matter.

II. SECOND AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 25 OF ARTICLE I OF THE WISCONSIN STATE CONSTITUTION BARRED GONZALEZ'S PROSECUTION.

Gonzalez challenges the use of Wis. Stat. 947.01 as applied to his posting of images of a magazine, bullets, and firearm. The mere presence of a firearm magazine and firearm – whether physically or digitally possessed - cannot be criminalized.

The Wisconsin Supreme Court recently stated that: "Examining the constitutional application of a statute presents a question of law that this court reviews independently of the determinations rendered by the circuit court or court of appeals." State v. Roundtree, 2021 WI 1, ¶12, 395 Wis. 2d 94, 952 N.W.2d 765. The reviewing court should apply intermediate scrutiny Id. at ¶ 3.

The Second Amendment to the United States Constitution states that "(a) well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Second Amendment's protections apply

fully to the states. See McDonald v. City of Chicago, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)). The guarantee of this personal right extends to "lawful purposes." Id. at 780. The Wisconsin Constitution provides: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." WIS. CONST. art. I, § 25 (emphasis added).

The Wisconsin Constitution's recognition of the right to bear arms is relatively recent in comparison to the United States Constitution's. The amendment originated in the legislature and was eventually ratified by a referendum vote by the people of Wisconsin in November 1998. State v. Cole, 2003 WI 112, ¶ 9 & n.5, 264 Wis. 2d 520, 665 N.W.2d 328.

Furthermore, the right to keep and bear arms has been described as a "fundamental right" of all Wisconsinites. Wisconsin Carry, Inc. v. City of Madison, 2017 WI 19, ¶9, 373 Wis. 2d 543, 892 N.W.2d 233. The Wisconsin Constitution's recognition to the right to bear

arms has been described as "a straightforward declaration of an individual right to keep and bear arms for any lawful purpose." Id. at , ¶10.

Yet here, the Town has deemed Gonzalez's bearing of a magazine and a pistol unlawful due to the items being depicted on social media sandwiched between photos of a movie ticket and theater. The sequencing alone provided no indication that the possession of the items was done for any unlawful purpose. It is illogical that someone has the fundamental right to keep and bear arms – but be required to do so secretly or be required to demonstrate prior restraint in speaking about her arms.

The Town's assumption that Gonzalez's possession of the magazine and firearm implied a threat cannot be justified. The mere presence of a firearm does not change the nature of other communications. Otherwise, a gun owner would never be able to openly display their firearm on social media without potentially running afoul of a hypersensitive online

audience. There is nothing particular about a theater that increases the perceived danger of a firearm. After all, mass shootings occur in malls, churches, hair salons, schools, factories, nightclubs, and softball games. To allow a prosecution based on the display of a firearm would be to potentially criminalize any gun owner from ever displaying their gun in between photos of their workplace, school, place of worship, etc.

A hypothetical displays the absurdity of the Town's jump to nefarious conclusions. Had Gonzalez sequenced photos of a baseball mitt and baseball bat in between the photos of the movie ticket and theater, would the implication have been that he was planning to play baseball during Jumanji? Of course the answer would be no – the sequencing of the images did not convey any serious expression of intent to play baseball at the theater. The "sequencing" was only a chronological display of what Gonzalez was doing sequentially during the 24-hour period that Instagram Stories display and broadcast.

Furthermore, the Town's jump to the conclusion that an implied threat had been made evaporated when no firearm was found on Gonzalez and after he provided a written statement to the police.

As a fundamental right that the protected by the U.S. and Wisconsin constitutions, Gonzalez is allowed to keep and bear arms – and to speak about those arms. No government can strip that right without providing some modicum of illegal purpose. Because Gonzalez was prosecuted almost solely for his decision to document his bearing of a firearm, the conviction in this case should be vacated and the case dismissed.

III. THE CIRCUIT COURT ERRED IN NOT APPLYING THE ADDED *MENS REA* BURDEN THAT THE TOWN PROVE GONZALEZ ACTED WITH CRIMINAL OR MALICIOUS INTENT.

The Wisconsin Constitution's section enshrining the right to keep and bear arms is unambiguous. However, even after its enactment, in 2016 the Legislature deemed it important to further protect the right to possess a firearm. See 2018 Act 149. The Act

created a mens rea requirement under any prosecution brought under the disorderly conduct statute at issue in this case:

> Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading a firearm, or for carrying or going armed with a firearm or a knife, without regard to whether the firearm is loaded or the firearm or the knife is concealed or openly carried.

Wis. Stat. 947.01(2)

The posted photographs of the magazine and firearm fall under this protection and should be analyzed with the foregoing arguments applied to this more specific and descriptive mens rea. Gonzalez could not have taken the photos he later posted to social media without "carrying or going armed" with the magazine and firearm.

Had Gonzalez open carried the firearm and magazine on his hip in the theater parking lot in full view of the 101 other Jumanji patrons, but then had concealed the firearm (assuming he had been granted a concealed weapon permit) and walked into theater,

there would be no grounds for the instant prosecution. In fact, the theater manager admitted that had Gonzalez merely concealed a firearm while in the theater, there would have been no issue. (R34:97; Ap-A. 85).

Instead, Gonzalez merely went armed with the firearm and loaded magazine at a different location, photographed them, and posted the photos to a social media account. It defies any logic to show how the above parking lot scenario differs or is less alarming than the case's actual facts. Going armed does not need to be done in a secretive or in a self-censoring manner. To force those who exercise their right to carry a firearm to do so without informing others due to the others' hypersensitivity to firearms chills the fundamental right to keep and bear arms.

As the record is absent of any criminal or malicious intent, this Court should vacate the conviction and dismiss the case as a matter of law or in the alternative, vacate the conviction and remand the case back to circuit court for a new trial with directions to properly instruct the jury.

IV. WISCONSIN LAW SHOULD CONFORM WITH THE SUBJECTIVE INTENT REQUIREMENT ENUNCIATED IN VIRGINIA V. BLACK AND ELONIS V. U.S.

The "true threats" jurisprudence is tortured nationally. This torture is largely due to doctrinal confusion relating to intent requirements. The torture is magnified by the common lack of statutorily provided mens rea. Additionally, due to the explosion in Internet, social media, and the ubiquity of expression of speech in modern life, there is an immediacy in clarifying the jurisprudence.[9]

The instant case provides an opportunity to clarify the State's requirements for bringing a prosecution based solely upon speech – and in particular – speech offered through social media that the speaker did not intentionally mean to be taken as a truth threat, as

[9] There is a growing recognition that First Amendment jurisprudence should be revisited due to the technology. *See* Eric J. Segall,The Internet as a Game Changer: Reevaluating the True Threats Doctrine, 44 TEX. TECH. L. REV. 183, 184 (2011). ("[T]he Internet is a game changer when it comes to criminal law and free speech [because] there is simply no pre-Internet analogy that allows speech to be disseminated so quickly, so cheaply, and to so many for such a long period of time.").

Gonzalez clearly did not intend for speech to be taken as a serious threat to harm anyone.

In 2001, State v. Perkins announced an objective speaker / objective recipient standard for prosecuting "true threats:"

> This court …concludes that the test for a true threat that appropriately balances free speech and the need to proscribe unprotected speech is an objective standard from the perspectives of both the speaker and listener. A true threat is determined using an objective reasonable person standard. A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech. It is not necessary that the speaker have the ability to carry out the threat. In determining whether a statement is a true threat, the totality of the circumstances must be considered.

2001 WI 46, ¶ 29, 243 Wis. 2d 141, 626 N.W.2d 762;

The Perkins decision deserves revisiting as the case was decided before Facebook, Instagram, Twitter, and SnapChat were yet to be conceived, let alone before the apps transformed global speech habits and customs.

The defense further believes that the Virginia v. Black decision overruled Perkins regarding whether the government must show the speaker had a subjective

intent to threaten. In Black the Supreme Court explained that "(i)ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Black, 538 U.S. at 360

Indeed, in the post-Black case of State v. Robert T., the Wisconsin Court of Appeals observed that because the defendant "apparently intended to frighten the listener...his call appears to fall within the gambit of a 'true threat.'" 2008 WI App 22, ¶ 16, 307 Wis. 2d 488, 746 N.W.2d 564. See also United States v. Cassel, 408 F.3d 622, 631 (9th Cir.2005) (holding that, under Black, statement qualifies as "true threat" only if speaker subjectively intended it as threat); United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (same); United States v. Parr, 545 F.3d 491, 496–97 (7th Cir. 2008).

The revolution in online communications and the U.S. Supreme Court's findings of a subjective intent

requirement in the federal criminal statutes they have reviewed in Black and Elonis v. U.S. displays the need for a new analysis of the intent requirements for online communications.

Although most recently, Elonis was decided on the narrow grounds of interpreting the federal threat statute, not on First Amendment grounds, the Supreme Court did enunciate important guidance in interpreting criminal statutes used to prosecute speech. 575 U.S. 723, 135 S. Ct. 2001, 2012 (2015). This guidance should not be ignored, but rather incorporated into Wisconsin law.

Writing for the majority, Chief Justice Roberts stated the following:

> The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal."

Id. At 2009. (Quoting Morissette v. United States, 342 U.S. 246, 250, 72 S.Ct. 240, 96 L.Ed. 288 (1952)).

The Elonis decision goes on to state each federal crime should have presumed scienter (or mens rea) appl(ied) to "each of the statutory elements that criminalize otherwise innocent conduct." Id. at 2011.

Gonzalez's situation is one that will be replicated in other cases in the future. Internet speakers, especially youthful ones, continue to document their days. Some of these speakers will be immature, troubled, seeking attention, or just oblivious to how their speech may be taken by others. Criminalizing their speech where they have no consciousness or intent to harm others turns the First Amendment on its head. Wisconsin law should catch up to the technological and society factors that require a deeper look at speakers' intents before rushing them into a criminal process.

CONCLUSION

For the aforementioned reasons, Gonzalez asks this Court to vacate his municipal conviction and dismiss the prosecution against him, or in the alternative, to remand the case for a new trial with a properly instructed jury.

Dated this 19 day of May 2021.

ADAMS LAW GROUP LLC
Attorney for Defendant-Appellant

Electronically signed by:
Attorney Daniel M. Adams

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 5633 words, as counted by the commercially available word processor Microsoft Word.

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties by either electronic filing or by paper copy.

Dated this 19 day of May 2021.

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Attorney Daniel M. Adams

CERTIFICATION OF APPENDIX CONTENT

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(13)

I hereby certify that I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

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