

WHEN ARE WORDS A THREAT?

The Supreme Court has taken up a case with implications for songwriters – and anyone who posts on Facebook!

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"Da da make a nice bed for mommy at the bottom of the lake...tie a rope around this rock...there goes mama splashin' in the water, no more fightin' your dad."

– Lyrics from the rap artist Eminem

THE LYRICS ABOVE, from Eminem's song "97 Bonnie and Clyde" (later released as "Just the Two of Us"), illustrate violent and homicidal feelings the narrator has towards his wife. These shocking lyrics were also uttered by Supreme Court Chief Justice Roberts during oral argument last December. (I am amazed that the chief justice is even aware of rap artists like Eminem.) The case in question will define the outermost contours of the First Amendment and could lead to a ruling that subjects anyone posting words like these on the Internet – or even in a rap song – to a felony conviction. The case, Anthony Elonis vs. the United States, is expected to be ruled on later this year and is eagerly antici-

pated by First Amendment advocates and recording artists alike.

We all know that the First Amendment protects freedom of speech and expression. Rights protected under the amendment are vigilantly protected by the courts, especially when they impact political issues, matters of public interest and artistic expression. However, even the protections of the First Amendment have limitations. You are not engaged in protected speech if you yell "Fire!" in a crowded theater when there is no fire. There, the public interest in promoting public safety outweighs the people's right to say whatever they wish. "Fighting words" – that is, words that incite others to violence – are also not protected and are outlawed in many jurisdictions. Another exception, called "true threats," is what is at issue in the case at hand. The concept of a "true threat," which may be a very imprecise use of language, is that the words spoken carry a meaning that will be perceived as a threat of bodily harm to a specific individual.

Who is the plaintiff in this case, Anthony Elonis? His legal story begins when Mr. Elonis' wife left him and took the kids too. As a result of the deep depression he plummeted into, he lost his job as a manager at Dorney Park. With time on his hands, and after his wife had acquired an order of protection against him, Mr. Elonis decided to write what he called "rap verses" and post them on his Facebook page. Here's one example: "Did you know that it's illegal for me to say I want to kill my wife? It's indirect criminal contempt. I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a motor launcher at her house would be from the cornfield behind it because of the easy access to a getaway road and you'd have a clear line of sight through the sunroom." Then he drew a diagram.

You get the gist. Should these words be considered artistic expression protected by the First Amendment, as Eminem's rap lyrics are, or are they a true threat subject to criminal prosecution? Well, one federal jury believed the latter. Mr. Elonis was convicted of violating a federal statute, 18 U.S.C. §875 c, which makes it illegal for an individual to transmit communications across state lines that contain a threat to injure the person of another. He is currently serving a multiple year jail sentence.

If a person makes threats against his ex-wife online, can he be convicted? What if the person is a famous rap artist?

The Court of Appeals for the Third Circuit affirmed the conviction and held that a "true threat" is to be judged by whether a reasonable person would find the words threatening. This is a very low legal standard, usually applied in negligence cases, and not one one would expect in a criminal prosecution.

The Supreme Court is now grappling with whether that is an appropriate standard or whether a heightened standard, such as whether the person uttering the words actually intended that the words be threatening, is a more appropriate one. There are also possible legal standards that fall between these two:

1. Did the person show a "reckless indifference" to whether his or her words would be perceived as a threat?
2. Did the person uttering the words in question know that they would be perceived as a threat?

During oral argument, the Supreme Court seemed divided on this issue and

it is hard to tell which standard they will select. It should be noted that the majority of the circuit courts in our country utilize the "reasonable person" standard, which is indeed the standard that Mr. Elonis was convicted under.

One thing is clear: the context of the speech at issue must be carefully examined, no matter what standard is selected. Did Eminem truly intend to kill his wife and throw her body in the lake? Despite the fact that he may not, did she perceive it as a threat? Does the fact that the words were sung by a well-known rap artist matter? Justice Roberts said that if that is the case, how does one go about becoming a rap artist?

These issues will be considered by the Supreme Court and hopefully resolved by the end of the year. Meanwhile, Mr. Elonis remains incarcerated, most likely creating additional verses for his "song." One additional factor that should weigh in the mix: at the end of some of his posts, Mr. Elonis wrote that they were meant to be artistic expression, attempting to neutralize the possibility that he actually intended to threaten his wife with bodily harm. This disclaimer, however, cuts both ways. If the "reasonable person" standard is used, it would demonstrate that Mr. Elonis actually knew that his words would be perceived as a threat. Why else put a disclaimer? On the other hand, if the "subjective intent" standard is applied, the disclaimer would overturn his conviction.

The lesson to be learned here is that we all need to be extremely careful what we post online. What we perceive to be a joke may actually be perceived as a threat, even if contextually it is presented in a protected medium like a song. Hopefully, the Supreme Court will fashion a standard that both protects public safety and preserves artistic expression. When the decision is rendered, I'll let you know.