

Overcriminalization, Gideon, Fish and Facebook



| Tuesday, June 2, 2015

Earlier this week, for the second time this term, the U.S. Supreme Court rejected the Department of Justice's overly-aggressive use of a federal criminal statute.

In *Elonis v. United States*, the court held that the federal criminal threat statute, [18 U.S.C. 875\(d\)](#), required proof that the person intended their statement to be a threat. This decision comes on the heels of *Yates v. United States*, where the court held that the DOJ could not use the federal obstruction of justice statute to prosecute a commercial fisherman for destroying three grouper. Hidden beneath these victories (which reaffirm the rights of the individual to be free from arbitrary use of government power) is the importance of appointed criminal defense counsel to all Americans.

Elonis involved a series of offensive statements posted on Facebook about the defendant's estranged wife. He was charged with transmitting a threat in interstate commerce. Elonis claimed he was merely posting rap lyrics and did not intend to threaten anyone. At the DOJ's urging, the jury convicted Elonis on the theory that the target of his Facebook post perceived a threat, regardless of what Elonis intended. The Supreme Court threw out the conviction. It noted the self-evident proposition that a person should not be convicted of a crime unless they knew they were doing something wrong:

"[This requirement] reflects the basic principle that wrongdoing must be conscious to be criminal, [a principle that] is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. The central thought is that a defendant must be blameworthy in mind before he can be found guilty, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge, and the like."

It is always comforting when the Supreme Court steps in to protect the citizenry from overly-aggressive prosecution and abuse of government power. In both *Yates* and *Elonis*, the

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court would not have been in a position to exercise this role if not for the role of court-appointed criminal defense counsel. Both Yates and Elonis were found to be indigent. Neither defendant could have afforded to pay for defense at trial, let alone for multiple appeals. Nevertheless, they received exemplary representation that culminated in victories before the Supreme Court.

So, let us pause, more than half a century after *Gideon v. Wainwright*, to appreciate how our system's guarantee of counsel to every defendant, regardless of wealth, continues to benefit all Americans.