

To: Commission
From: Jayne J. Johnson
Re: Bias Intimidation Statute
Date: March 11, 2013

MEMORANDUM

This Memorandum results from Staff monitoring of state judicial decisions calling for legislative action. Staff seeks Commission authorization for a project that proposes revising a subsection of the Bias Intimidation Statute (statute), *N.J.S. 2C:16-1, et. seq.*, to remove language in subsection a.(3) that permits the victim's perception of the alleged offense to be the basis for conviction and to add language that requires the State to prove the defendant's biased intent to commit the offense.

In *State v. Pomianek*, the Appellate Division concluded, after reviewing legislative history, that subsection (3) of the statute requires proof that the defendant intended to commit the underlying crimes." 429 N.J. Super. 339, 343 (App. Div. 2013). The Court resorted to looking beyond the face of the statute "[t]o avoid an interpretation that would render the provision unconstitutional, and to effectuate the Legislature's purpose in enacting the statute." *Id.* The statute, which requires enhanced penalties for committing the delineated offenses, lacks a scienter requirement and could benefit from revision to preserve the legislative intent and comport with the First Amendment safeguards for content based speech.

In *State v. Pomianek*, the defendant David Pomianek, along with other members of a public works crew, took refuge from a rainstorm in a storage facility. The facility contained a "cage," an equipment storage unit affixed to the wall, nine feet above ground, sixteen feet wide and eight feet deep with chain link fencing. Michael Dorazo, defendant's co-worker and friend, lured a fellow worker, Steven Brodie, up the stairway to the cage by stating that a supervisor wanted them to retrieve equipment from the area. Dorazo shut the door once Brodie was inside and secured the padlock. Until a key was obtained from another location, Brodie who is African American was locked for several minutes inside the cage and was derided by the defendant and Dorazo, both of whom are Caucasian. Brodie heard Defendant say, "[o]h, you see, you throw a banana in the cage and he goes right in." *Id.* at 348. The defendant was charged with harassment by communication, harassment by alarming conduct, and official misconduct. The defendant was also charged with bias intimidation pursuant to *N.J.S. 2C:16-1a(3)*, elevating the petty disorderly harassment offenses to fourth degree crimes. The trial court instructed the jury, when discussing the bias intimidation charge, to "consider the victim's perception of the crime rather than the defendant's intent in committing it." *Id.* at 343-44. The defendant was convicted of each of the offenses and sentenced to 270 days of weekend imprisonment.

The Appellate Division upheld the harassment convictions but reversed the bias intimidation and official misconduct convictions. The court indicated that the jury did not find the defendant acted with the purpose to intimidate because of the victim's race. The court noted that the jury convicted the defendant under subsection (3), which relies on the victim's perception that the defendant's conduct was intended to intimidate the victim because he is a

member of a protected class, instead of subsections (1) or (2) which require proof of the defendant's *mens rea*. *Id.* at 361. The trial testimony described Dorazo as an individual who subjected vulnerable employees to pranks and indicated that Brodie was selected because he was "gullible" not because of his race. *Id.* 349. The Court inferred that *N.J.S.* 2C:16-1 subsection a.(3) requires the State to prove that the defendant: (1) intended to commit the predicate offense; (2) intended to intimidate the victim because he or she is a member of a protected class; and (3) intended that the victim perceived the conduct as bias-motivated. Consequently, the Court found that the State failed to prove the defendant's biased intent and reversed the conviction and remanded for retrial.

The Court in *Pomianek* said that, on its face, *N.J.S.* 2C:16-1 subsection a.(3) "run[s] afoul" of the First Amendment because, as written, it requires the State to prove the victim reasonably believed that the offense was committed with the purpose to intimidate because of the victim's protected class. *Id.* at 348-49. The Court found that the statutory language contravenes precedent established in the First Amendment line of cases in which the U.S. Supreme Court prohibited criminalizing speech based on its content and the viewpoint of the speaker. *Id.* at 352-55. See *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992); *Virginia v. Black*, 538 U.S. 343 (2003). The Court also determined, while rejecting the amicus assertions that the statute was overbroad or vague, that it must regulate conduct and look to the specific intent of the actor and not the emotive impact of the conduct or speech. *Id.* at 352. See *State v. Vawter*, 136 N.J. 56, 67 (1994).

The Court explained that in order to save the statute it must look to the legislative history. The statute was enacted in response to *Apprendi v. New Jersey*, in which the U.S. Supreme Court held that a prior New Jersey "hate crime" statute which required the judge to determine whether the defendant committed an offense with the purpose to intimidate, violated due process because it did not allow the jury to make that determination as an element of the offense. 530 U.S. 466 (2000). Later that year, the New Jersey legislature proposed the original version of subsection a.(3) which, like the enacted subsections (1) and (2), included a *mens rea* element.

The court's decision in *Pomianek* highlights the risk of charging an individual under subsection a.(3). In an interview, Deborah Cummis, the prosecutor in *State v. Pozar* the first known bias intimidation case that ended in acquittal, acknowledged, "subsection (3) was worrisome even then." Gialanella, David, *Victim Perception Held Insufficient To Prove Case of Bias Intimidation*, N.J.L.J., Feb. 4, 2013 at 10. Ms. Cummis agreed with the Appellate Division's findings and admitted that she "never charged under that section precisely because of the concerns that the court pointed out." *Id.* More recently in the high profile case of *State v. Dharun Ravi*, currently pending on appeal, only one of the defendant's four bias intimidation charges was based on subsection a.(3) with invasion of privacy as the underlying offense.

Staff seeks approval to pursue proposed revisions to *N.J.S.* 2C:16-1 subsection a. and potentially incorporate language from the original proposed version of the statute since that original version seems to more closely track the court's determination in *Pomianek*. The statute currently reads:

a. A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified

in chapters 11 through 18 of Title 2C of the New Jersey Statutes; *N.J.S.2C:33-4*; *N.J.S.2C:39-3*; *N.J.S.2C:39-4* or *N.J.S.2C:39-5*,

(1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or

(2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or

(3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

Staff seeks authorization to continue research in this area to determine whether the language of the statutory section in question can be modified to address concerns regarding its constitutionality and to avoid the existence of a statutory section that is deemed unusable by prosecutors by adding language that requires the State to prove the defendant's biased intent to commit the underlying offenses.