DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER,
Appellant,

v. **(2022-CMD-4713)**

UNITED STATES,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

Donald L. Dworsky
Bar No. 402055
P. O. Box 409
Glen Echo, Md 20812
(301) 229-1904

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES (* denotes cases principally relied on) **Page**

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CM-147

GENE R. LENINGER,
Appellant,

v. **(2022-CMD-4713)**

UNITED STATES,
Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

APPELLANT'S REPLY TO APPELLEE'S SUPPLEMENTAL BRIEF

STATEMENT OF THE CASE

On April 23, 2024, the Court vacated scheduled oral argument in this case in order to receive supplementary briefs addressing the Court's *en banc's* ruling in *Mashaud v. Boone*, 295 A.3d 1139 (D.C. 2023), a case decided after Mr. Leninger's conviction for a single count of stalking which was then pending before the Court. On May 20, 2024, Mr. Leninger submitted his supplemental pleading, followed

by the government's on June 20, 2024. This document is a Reply to that pleading. It argues that the government's supplemental brief applies the wrong standard of review to the case and urges the Court to vacate Mr. Leninger's conviction pursuant to *Mashaud.*

ARGUMENT

I. The government's reliance on *Keerikkattil v. United States,* 13 A.2d 591 (D.C. 2024) is misplaced.

The government's supplemental brief relies heavily on *Keerikkattil v. United States,* 313 A.3d 591 (D.C. 2024) a case decided after the *en banc Mashaud* decision. *Keerikkattil* was decided in February, 2024, while *Mashaud* was decided in October, 2023. Since *Keerikkattil* failed to properly instruct the jury according to the ruling in *Mashaud,* and also failed to preserve any objection, review of that case was under the plain error standard and did not warrant reversal.

This is in distinct contrast to the instant case where *Mashaud's en banc* decision in October 2023, post-dated Mr. Leninger's conviction in February, 2023. Mr. Leninger therefore could not have raised any First Amendment challenge objection to his communications as not falling under the stalking statute as unprotected free speech. It was not then a plain error, and the plain error standard of review resultingly did not apply, including the

component parts of showing that there was error that was plain, that affected his substantial rights, and that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. As the government's supplementary brief on page 5 correctly notes, the "plainness of the error is assessed in light of the state of the law at the time of the trial" (citations and internal quotations omitted). See also *Medhin v. United States,* 308 A.3d 1242, 1247 (D.C. 2024)(the error muct be clear under current law as in "at the time of our appellant review").

Instead, the new Constitutional ruling in *Mashaud* should be subject to review under the harmless error standard set forth in *Chapman v. California,* 386 U.S. 18, 24 (1967), under which reversal is required unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

***II. Mashaud* applied retroactively to Mr. Leninger's case.**

Mashaud applied retroactively to all cases then pending on direct review. "The Supreme Court held in sweeping and all-inclusive language that 'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which

new rule constitutes a 'clear break' with the past." *Kleinbart v. United States,* 553 A.2d 1236, 1239 (1989)(quoting *Griffith v. Kentucky,* 479 U.S. 314, 325 (1982). Thus, the ruling in *Mashaud* applied to Mr. Leninger's case which was then pending appeal. Any application of the plain error standard of review to his case is therefore inapplicable even though his substantial rights were affected since the jury was not informed that true speech communications could not be counted as an event in the course of conduct unless it was integral to crime.

III. There is no factual comparison between *Keerikkattil* and Mr. Leninger's case.

The government's supplementary brief observes that Mr. Keerikkattil "embarked on a month's-long campaign of retribution" against the victim", including false accusations, threatening texts and emails and "showing up at the doorstep of the victim's parents who lived across the country in Oregon". Government supplemental brief at p. 10. His "trip conveyed both the lengths to which he was willing to hurt [the victim] as well as a suggestion that his retributive efforts might reach her loved ones too." *Keerikkattil,* 13 A.2d at 608.

This is in stark contrast to even the worst allegations against Mr. Leninger in which he merely engaged in honest and direct

communications in a consensual relationship with innumerable personal communications and thoughts from both parties, as well as reconciliations between the two when they would disagree about his potential romantic interest in her. Further, once her position became clear, he agreed to not pursue her. The government's supplementary brief describing Mr. Keerikkattil's behavior as "another intrusion into [the victim]'s life from which she could not escape" in is in no way descriptive of the relationship between Mr. Leninger and the complainant in his case, despite the government's best efforts to make them sound similar.

The three events the government uses in its supplemental brief to justify evidence of stalking by Mr. Leninger are the flashing of the light into her apartment to let her know that he was outside with his dog—an event she had approved of as a method of communication; a brief non-threatening communication a month later asking how she was doing, and the subsequent pin-drop showing his location. Only the darkest of suspicious minds could elevate these acts into stalking under the law, particularly since "the mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected," *R.A.V. v. St. Paul*, 505 U. S. 377, 414 (1992), and the law does not require any showing that the targeted

person actually suffered emotional distress. *Mashaud* at 1148. Nor were there any threats or anything akin to conduct integral to crime, *Mashaud* at 1144. Indeed, Mr. Leninger acceded to her request, saying, "in case you mean this literally I will give you your space sorry yours to (*sic.*) kind of a person to misunderstand" (gov't exh 4-59).

The law's intent is "to prohibit seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community", *Coleman v. United States,* 202 A.3d 1127, 1144 (D.C. 2019), "something markedly greater than the level of uneasiness, nervousness, unhappiness or the like which is commonly expressed in day to day living", *id.,* at 1145. It must involve a "severe intrusion" on the victim's personal privacy and autonomy to trigger criminal liability. *Id.,* at 1144. None of these occurred with Mr. Leninger's communications. As *Mashaud* said when it ruled the stalking statute to be unconstitutionally overbroad, "[b]y its plain language, the District's stalking statute criminalizes 'any communicat[ions] to or about an individual' that would reasonably cause emotional distress." *Id.,* at 1159. "[T]he most natural reading of its prohibitions would be overbroad" *Id.,* at 1161).

IV. Mr. Leninger's verdict should be vacated because the stalking law still remains unconstitutionally void for vaguenessas as well as being overly-broad.

Althought the government's supplemental brief gives short shrift to *Mashaud's* view that the statute is void for vagueness as well as being overly-broad, the fact remains that the law did not "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited", *Mashaud,* 295 A.3d at 1162, and [b]y placing [fact-finders], rather than legislators, in the position of deciding when to 'make an act a crime'", it leaves "the public to guess as to what the statute actually prohibits and the courts to define the statute's true scope". *Id.,* 1155,1162-63. Both of these problems existed with the law as it applied to Mr. Leninger, and for those reasons, *inter alia.*, his verdict should be vacated.

CONCLUSION

WHEREFOR, Mr. Leninger respectfully submits that his conviction should be vacated.

Respectfully submitted,

Donald L. Dworsky
Donald L. Dworsky
Bar No 402055
P.O. Box 409
Glen Echo, MD 20812
(301) 229-1904

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing appellant's reply to appellee's supplemental brief was served upon the Office of the U.S. Attorney for the District of Columbia by electronic filing this 5th day of July, 2024.

Donald L. Dworsky
Donald L. Dworsky