ATTACHMENT

[J-83-2017]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2017
	:	
	:	Appeal from the Order of the Superior
Appellee	:	Court entered on 8/2/16 at No. 1136
	:	WDA 2014, affirming the order of the
	:	Court of Common Pleas of Allegheny
	:	County entered 2/21/14 at Nos. CP-02-
v.	:	CR-0006621-2012, CP-02-CR-
	:	0003870-2013, CP-02-CR-0004264-
JAMAL KNOX,	:	2013
	:	
Appellant	:	ARGUED: November 28, 2017

OPINION

CHIEF JUSTICE SAYLOR **DECIDED: AUGUST 21, 2018**

In this appeal by allowance, we address whether the First Amendment to the United States Constitution permits the imposition of criminal liability based on the publication of a rap-music video containing threatening lyrics directed to named law enforcement officers.

In April 2012, Pittsburgh Police Officer Michael Kosko initiated a routine traffic stop of a vehicle driven by Appellant. Appellant's co-defendant, Rashee Beasley, was in the front passenger seat. While Officer Kosko was questioning Appellant, the latter sped away, ultimately crashing his vehicle. He and Beasley fled on foot, but were quickly apprehended and placed under arrest. The police found fifteen stamp bags containing heroin and a large sum of cash on Appellant's person, as well as a loaded,

stolen firearm on the driver's-side floor of the vehicle. At the scene of the arrest, Appellant gave the police a false name. When Detective Daniel Zeltner, who was familiar with both Appellant and Beasley, arrived, he informed the officers that Appellant's real name was Jamal Knox.

Based on these events, Appellant and Beasley were charged with a number of offenses. Officer Kosko and Detective Zeltner, both of Zone 5 of the Pittsburgh Police Department, were scheduled to testify against them in connection with the charges.

While the charges were pending, Appellant and Beasley wrote and recorded a rap song entitled, "F--k the Police," which was put on video with still photos of Appellant and Beasley displayed in a montage. In the photos, the two are looking into the camera and motioning as if firing weapons. The video was uploaded to YouTube by a third party, and the YouTube link was placed on a publicly-viewable Facebook page entitled "Beaz Mooga," which the trial evidence strongly suggested belonged to Beasley.

The song's lyrics express hatred toward the Pittsburgh police. As well, they contain descriptions of killing police informants and police officers. In this latter regard, the lyrics refer to Officer Kosko and Detective Zeltner by name. They suggest Appellant and Beasley know when those officers' shifts end and that the crimes depicted in the song may occur in the officers' homes ("where you sleep"). The lyrics also contain a reference to Richard Poplawski, who several years earlier had strapped himself with weapons and murdered three Pittsburgh police officers. *See Commonwealth v. Poplawski*, 634 Pa. 517, 130 A.3d 697 (2015). Finally, the song includes background sounds of gunfire and police sirens.

In light of the present issue – whether the song communicated a "true threat" falling outside First Amendment protections – we reproduce the lyrics in full without alteration, although they include violent imagery and numerous expletives:

Chorus:

If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets/If y'all want beef we can beef/I got artillery to shake the mother fuckin' streets.

You dirty bitches won't keep knockin' my riches/This ghetto superstar committee ain't wit it/Fuck the Police/You dirty bitches won't keep knockin' my riches/This ghetto superstar committee ain't wit it/Fuck the Police.

Verse 1 – Mayhem Mal, *i.e.*, Jamal Knox:

This first verse is for Officer Zeltner and all you fed force bitches/And Mr. Kosko, you can suck my dick you keep on knocking my riches/You want beef, well cracker I'm wit it, that whole department can get it/All these soldiers in my committee gonna fuck over you bitches/Fuck the, fuck the police, bitch, I said it loud.

The fuckin' city can't stop me/Y'all gonna need Jesus to bring me down/ And he ain't fuckin' wit you dirty devils/We makin' prank calls, as soon as you bitches come we bustin' heavy metal.

So now they gonna chase me through these streets/And I'ma jam this rusty knife all in his guts and chop his feet/You taking money away from Beaz and all my shit away from me/Well your shift over at three and I'm gonna fuck up where you sleep.

Hello Breezos got you watching my moves and talkin' 'bout me to your partner/I'm watchin' you too, bitch I see better when it's darker/Highland Park gone be Jurassic Park, keep fuckin' wit me/Hey yo Beaz call Dre and Sweet and get them two 23's/It's Mayhem.

(Chorus repeats)

Verse 2 – Soldier Beaz, *i.e.*, Rashee Beasley:

The cops be on my dick like a rubber when I'm fuckin'/So them bitches better run and duck for cover when I'm buckin'/Ghetto superstar committee bitch we ain't scared of nothing/I keep a forty on my waist, that'll wet you like a mop nigga/Clip filled to the tippy top wit some cop killas/Fuck the police, they bring us no peace/That's why I keep my heat when I'm roamin' through these streets.

Cause if you jump out it's gonna be a dump out/I got my Glock and best believe that dog gonna pull that pump out/And I'm hittin' ya chest, don't tell me stop cuz I'm resisting arrest.

I ain't really a rapper dog, but I spit wit the best/I ain't carry no 38 dog, I spit with a tec/That like fifty shots nigga, that's enough to hit one cop on 50 blocks nigga/I said fuck the cops nigga/They got me sittin' in a cell, watchin' my life just pass me, but I ain't wit that shit/Like Poplawski I'm strapped nasty.

(Chorus repeats)

Verse 3 – Mayhem Mal, *i.e.*, Jamal Knox:

They killed Ryan, and ever since then I've been muggin' you bitches/My Northview niggas they don't fuck wit you bitches, I hate your fuckin' guts, I hate y'all/My momma told me not to put this on CD, but I'm gonna make this fuckin' city believe me, so nigga turn me up.

If Dre was here they wouldn't fuck wit dis here/Los in the army, when he comes back it's real nigga, you bootin' up/Fuck the police, I said it loud, we'll repeat that/Fuck the police, I'm blowin' loud with my seat back.

They tunin' in, well Mr. Fed, if you can hear me bitch/Go tell your daddy that we're boomin' bricks/And them informants that you got, gonna be layin' in the box/And I know exactly who workin', and I'm gonna kill him wit a Glock/Quote that.

Cause when you find that pussy layin' in the street/Look at the shells and put my shit on repeat, and that's on Jesus' blood/Let's kill these cops cuz they don't do us no good/Pullin' your Glock out cause I live in the hood/You dirty bitches, bitch!

(Chorus repeats)

Officer Aaron Spangler, also of Zone 5, discovered the video while monitoring the "Beaz Mooga" Facebook page. He alerted other police personnel, including Officer Kosko and Detective Zeltner, who watched the video. Thereafter, Appellant was again arrested and charged with, *inter alia*, two counts each of terroristic threats pursuant to

Section 2706(a)(1) of the Crimes Code, and witness intimidation pursuant to Section 4952(a) of the Crimes Code.[1]

A consolidated bench trial on both sets of charges (as well as a third set of charges which is not presently relevant) ensued at which the Commonwealth introduced the video into evidence without objection and played it for the court. *See* N.T., Nov. 13, 2013, at 203, 205.[2] Officer Spangler testified that he had spent time interacting with

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[1] Terroristic threats is defined, in relevant part, as follows:

> **(a) Offense defined.**--A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another. . . .

18 Pa.C.S. §2706(a)(1). The Crimes Code defines witness intimidation as follows:

> **(a) Offense defined.**--A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to: (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime. (2) Give any false or misleading information or testimony relating to the commission of any crime to any law enforcement officer, prosecuting official or judge. (3) Withhold any testimony, information, document or thing relating to the commission of a crime from any law enforcement officer, prosecuting official or judge. (4) Give any false or misleading information or testimony or refrain from giving any testimony, information, document or thing, relating to the commission of a crime, to an attorney representing a criminal defendant. (5) Elude, evade or ignore any request to appear or legal process summoning him to appear to testify or supply evidence. (6) Absent himself from any proceeding or investigation to which he has been legally summoned.

Id. §4952(a).

[2] There is one consecutively-numbered trial transcript which covers five separate days of proceedings spanning from November 12-23, 2013.

individuals in the relevant neighborhood and had learned some of their street slang. He indicated that "busting heavy" means to shoot many rounds; a "tec" is a TEC-9, a semi-automatic pistol which holds a large-capacity magazine; to "spit with a tec" means to shoot with a TEC-9; a "cop killa" is a type of bullet that can pierce armored vests; and "strapped nasty" means carrying multiple weapons. *See* N.T., Nov. 13, 2013, at 200-02, 238. With regard to the lyric, "Hello Breezos got you watching my moves," Officer Spangler explained that *Hello Breezos* was the title of an earlier rap song by Appellant and Beasley, and that a "breezo" is a "brick" of heroin consisting of 50 stamp bags. *See id*. at 180-82, 186.

In terms of the song's effects, Officer Kosko testified that when he heard it he was "shocked" and it made him "nervous." He cited it as one of the reasons he decided to leave the Pittsburgh police force and relocate. *See id*. at 107, 109. For his part, Detective Zeltner stated he found the video "very upsetting," and that it made him concerned for his safety as well as that of his family and fellow officers. *Id.* at 147. He explained that extra personnel had to be assigned to Zone 5 to deal with "the threat." *Id.* As well, the detective was given time off and a security detail. *See id*.

By the conclusion of the trial, it became clear that the rap song was the sole basis on which the Commonwealth sought convictions for witness intimidation and terroristic threats. In his summation, therefore, Appellant argued that the song was protected speech, and hence, any conviction based on it would violate his First Amendment rights. *See* N.T., Nov. 19, 2013, at 437-39, 442. The trial court rejected this argument and found him guilty on both counts of witness intimidation and terroristic threats. *See* N.T., Nov. 21, 2013, at 462-64. In reaching its verdict on the witness intimidation counts, the court found beyond a reasonable doubt that Appellant and Beasley specifically intended to intimidate the officers so as to obstruct the

administration of criminal justice, and that they did so in collaboration with one another. *See id*. at 463. The court also found Appellant guilty of, *inter alia*, possessing with intent to deliver a controlled substance. *See id*. at 461; 35 Pa.C.S. §780-113(a)(30).

In his Rule 1925(b) statement, Appellant renewed his contention that the video was constitutionally protected speech, and also claimed there was insufficient evidence that he had the requisite *mens rea* to commit terroristic threats and witness intimidation, as he was allegedly unaware the video would be posted online. *See* Common Pleas Dkt. No. 30, at 1-2. The trial court rejected these claims. As to the First Amendment issue, the court held the song amounted to a "true threat directed to the victims"; as such, the court concluded it was not protected speech. *Commonwealth v. Knox*, Nos. 201206621, 201303870, 201304264, *slip op*. at 19-20 (C.P. Allegheny Aug. 11, 2015).

The Superior Court affirmed in a memorandum opinion. *See Commonwealth v. Knox*, No. 1136 WDA 2014, *slip op.* (Pa. Super. Aug. 2, 2016). Addressing the *mens rea* claim first, the court explained that the Commonwealth was required to establish that Appellant acted at least knowingly with respect to each element of each offense. *See id.* at 8.[3] Based on trial evidence suggesting a prior course of conduct in which Appellant and Beasley made rap videos which Beasley would then publish online, the Superior Court concluded there was sufficient evidence to support a finding that Appellant was aware that the video in question would be posted to a publicly-viewable Internet site and seen by the police. *See id.* at 10.

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[3] Although the court observed that the *mens rea* for a terroristic threats conviction is an intent to terrorize, whereas the scienter threshold for witness intimidation is knowledge or intent to impede the administration of justice, for reasons that remain unclear it proceeded to consider both offenses under the less-exacting "knowingly" standard. *See id.* at 7-8. *See generally* 18 Pa.C.S. §302(b) (defining levels of culpability, including intentional and knowing conduct). The intermediate court also overlooked that the trial court had found Appellant acted intentionally with respect to witness intimidation.

The Superior Court next rejected Appellant's First Amendment claim, albeit on different grounds than the trial court. The intermediate court characterized Appellant's argument solely as a contention that the video was inadmissible at trial due to its purportedly protected status under the First Amendment. Any such argument was waived, the court explained, as Appellant had not lodged a contemporaneous objection when the video was admitted. *See id*. at 10-11. Notably, the Superior Court did not evaluate whether the song comprised protected speech.[4]

Appellant petitioned for further review, raising the same two issues. We denied the petition in relation to the sufficiency challenge, but granted review limited to the issue of whether the rap video "constitutes protected free speech or a true threat punishable by criminal sanction." *Commonwealth v. Knox*, ___ Pa. ___, 165 A.3d 887 (2017) (*per curiam*).[5] As the question of whether a statement constitutes a true threat is circumstance-dependent, Appellant raises a mixed question of fact and law. Thus, we defer to the trial court's fact findings which are supported by competent evidence and

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[4] In this latter regard we observe that, at times during this litigation, Appellant has appeared to labor under the belief that a person's speech is inadmissible at trial if it is constitutionally protected expression. There is no rule of evidence in Pennsylvania to that effect. Still, the substantive issue of whether the First Amendment prohibits the imposition of criminal liability based on the rap song was raised at trial and in Appellant's Rule 1925(b) statement, and argued to the Superior Court. *See, e.g.*, Brief for Appellant, *Commonwealth v. Knox*, 1136 WDA 2014, at 37-45.

[5] Perhaps because of the Superior Court's waiver emphasis, in his framing of this issue Appellant suggested his First Amendment claim was "of such substantial importance" that this Court should overlook any purported waiver. *Id.* Constitutional claims are subject to waiver regardless of their importance. *See, e.g.*, *Commonwealth v. Peterkin*, 511 Pa. 299, 310-11, 513 A.2d 373, 378 (1986); *Commonwealth v. Romberger*, 474 Pa. 190, 197, 378 A.2d 283, 286 (1977). Nevertheless, and as explained, Appellant has not waived his First Amendment claim. *See supra* note 4; *see also* Brief for Appellee at 20 (reflecting the Commonwealth's concurrence that Appellant has preserved his First Amendment claim).

resolve any legal questions, such as the scope of the true-threat doctrine, *de novo*. *See Commonwealth v. Batts*, 640 Pa. 401, 444, 163 A.3d 410, 435-36 (2017). In conducting our review, we independently examine the whole record. *See In re Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 590 Pa. 431, 440, 913 A.2d 178, 183 (2006).

Appellant denies he intended to threaten the police. His assertion in this regard has two conceptually distinct facets, which at times he intermixes. The first relates to whether the evidence adequately demonstrated that Appellant intended for the video to be uploaded to the Internet and viewed by the police. *See* Brief for Appellant at 31-36; *see also id*. at 42 (suggesting Appellant acted at most recklessly in relation to the video's online publication). The second involves a contention that the song was merely artistic in nature and was never meant to be interpreted literally. In this latter regard, Appellant states that he

> consider[s] himself a poet, musician, and entertainer. Rap music serve[s] as his vehicle for self-expression, self-realization, economic gain, inspiring pride and respect from . . . peers, and speaking on public issues including police violence, on behalf of himself and others . . ..

Id. at 37; *see also id*. at 42 (urging that "rap is art, an expressive outlet for traditionally disenfranchised groups").

Appellant is supported by several *amici* who make similar observations. The ACLU of Pennsylvania argues that artistic expression "has the power to shock," and this is particularly true with rap, which is sometimes "saturated with outrageous boasts and violent metaphors." Brief for *Amicus* ACLU of Pa. at 11; *cf. id*. at 19 (describing rap as a means for those who disagree with the status quo to vent their frustrations, thereby lowering the likelihood they will engage in physical violence).

The Defender Association of Philadelphia questions whether the trial court's interpretation of street language in the rap video as conveying a literal threat was

methodologically sound. The Association advocates that the video should not have been seen as "autobiography," but as "art, poetry, and fantasy" addressing social issues. Brief for *Amicus* Defender Ass'n of Phila. at 15, 18; *see also id*. at 15-16 (arguing that rap is fiction aimed at projecting images – such as hustlers, gangsters, or mercenary soldiers – and that a "recurring rap genre" involves the "first person homicidal revenge fantasy" (internal quotation marks and citation omitted)). The Association adds that Appellant's status as a semi-professional rap artist with a distinct rap persona ("Mayhem Mal") should have been taken into account as a contextual factor suggesting Appellant did not intend to communicate an actual threat. *See id*. at 18.

The Thomas Jefferson Center for the Protection of Free Expression and the Marion B. Brechner First Amendment Project, in a joint brief, echo many of these same points. They add that violent depictions receive First Amendment protection in other media such as films and video games, and argue the same protection should extend to rap music as a medium for the expression of ideas. *See* Brief for *Amici* Thomas Jefferson Center & Brechner First Amendment Project at 11.

With respect to Appellant's challenge to the sufficiency of the evidence to show he intended to publish the video to the Internet or convey it to the police, we note that Appellant raised the same issue as a distinct basis for relief in his petition for allowance of appeal, and the issue was not selected for review. As such, it is not before this Court. Therefore, any proofs along these lines are only relevant insofar as they shed light on contextual factors tending to demonstrate whether the video amounted to a true threat under the circumstances. To answer that question, we initially review the First Amendment's true-threat doctrine as it has developed.

The First Amendment prohibits Congress from abridging the freedom of speech. *See* U.S. CONST. amend. I. This prohibition applies to the States through the Fourteenth Amendment. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907, 102 S. Ct. 3409, 3422 (1982). The "heart" of the First Amendment "has been described as the 'ineluctable relationship between the free flow of information and a self-governing people.'" *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 569 Pa. 638, 649, 807 A.2d 847, 854 (2002) (quoting *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1047 (2nd Cir. 1979)). Hence, First Amendment freedoms apply broadly to different types of expression, including art, poetry, film, and music.[6] Such freedoms apply equally to cultured, intellectual expressions and to crude, offensive, or tawdry ones.[7]

In light of the above, the government generally lacks the authority to restrict expression based on its message, topic, ideas, or content. *See Ashcroft v. ACLU*, 535 U.S. 564, 573, 122 S. Ct. 1700, 1707 (2002) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 65, 103 S. Ct. 2875, 2879 (1983)). This means the state may not proscribe speech due to its own disagreement with the ideas expressed, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992), or because those

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[6] *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569, 115 S. Ct. 2338, 2345 (1995); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 2753 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981); *Commonwealth v. Bricker*, 542 Pa. 234, 241, 666 A.2d 257, 261 (1995).

[7] *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 796 n.4, 131 S. Ct. 2729, 2737 n.4 (2011); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56, 108 S. Ct. 876, 881-82 (1988); *Cohen v. California*, 403 U.S. 15, 26, 91 S. Ct. 1780, 1789 (1971). In holding that a conviction based on wearing a jacket with the words "F--k the draft" violated the First Amendment, *Cohen* pointed out that words are sometimes used to convey not only ideas, but depth of emotion. *See id*. at 26, 91 S. Ct. at 1788.

ideas are unpopular in society. *See Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

Nevertheless, expressive rights are "not absolute." *Ashcroft*, 535 U.S. at 573, 122 S. Ct. at 1707. The Constitution tolerates content-based speech restrictions in certain limited areas when that speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 769 (1942); *see R.A.V.*, 505 U.S. at 383, 112 S. Ct. at 2543 (noting that freedom of speech "does not include a freedom to disregard these traditional limitations"). Accordingly, *J.S.* recognized that "certain types of speech can be regulated if they are likely to inflict unacceptable harm," and listed several examples. *J.S.*, 569 Pa. at 650, 807 A.2d at 854 (citing *Chaplinsky*, 315 U.S. at 572, 62 S. Ct. at 769 (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969) (*per curiam*) (incitement to imminent lawlessness); *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973) (obscenity); *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964) (defamation)); *see also United States v. Alvarez*, 567 U.S. 709, 717, 132 S. Ct. 2537, 2544 (2012) (mentioning these categories as well child pornography, fraud, and other "speech integral to criminal conduct" (citations omitted)).

Of particular relevance to this case, speech which threatens unlawful violence can subject the speaker to criminal sanction. *See Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969) (*per curiam*) (explaining that the government may criminalize "true threat[s]" but not mere political hyperbole (internal quotation marks omitted)). Threats of violence fall outside the First Amendment's protective scope

because of the need to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *R.A.V.*, 505 U.S. at 388, 112 S. Ct. at 2546.

The true-threat doctrine has its genesis in the *Watts* case. In that matter, Watts was attending a discussion group in Washington, D.C., during the Vietnam War when the military draft was in effect. After someone suggested young people become more educated before expressing their views, Watts responded:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.

Watts, 394 U.S. at 706, 89 S. Ct. at 1401 (internal quotation marks and citation omitted).

Watts was convicted under a federal statute making it a crime to threaten the President. *See* 18 U.S.C. §871(a). The Supreme Court found the statute facially valid in light of the "overwhelming" interest in protecting the President's safety and allowing him to perform his duties unhampered by threats of violence. *Watts*, 394 U.S. at 707, 89 S. Ct. at 1401. Nevertheless, the Court concluded that Watts' conviction could only be upheld if his words conveyed an actual threat as opposed to political hyperbole. Considering the full context of the statement – it was uttered during a political debate which often involves inexact and abusive language, the alleged threat was conditioned on an event Watts vowed would never occur (his induction into the military), and the audience reacted by laughing – the Court determined that the statement could only reasonably be interpreted as an expression of political dissent and not a true threat. Thus, the Court overturned Watts' conviction. *See Watts*, 394 U.S. at 708, 89 S. Ct. at 1401-02.

In the years following *Watts*, a number of courts assessed whether a speaker's words constituted a true threat by looking to similar contextual circumstances. *See generally J.S.*, 569 Pa. at 654-56, 807 A.2d at 857-58 (discussing cases). These courts used an objective standard rather than evaluating the speaker's subjective intent. *See id*. at 655 n.8, 807 A.2d at 858 n.8 (citing cases). Various objective tests emerged, some focusing on how a reasonable listener would construe the speech in context, and others asking what kind of reaction a reasonable speaker would foresee on the part of the actual listener or a hypothetical reasonable listener. *See State v. Perkins*, 626 N.W.2d 762, 767-70 & nn.10-18 (Wis. 2001) (discussing several of these variations). *But cf. United States v. Alaboud*, 347 F.3d 1293, 1297 n.3 (11th Cir. 2003) (indicating that these formulations, in operation, are the same as they ultimately depend on how a reasonable listener would understand the communication), *overruled on other grounds by United States v. Martinez*, 800 F.3d 1293, 1295 (11th Cir. 2015) (*per curiam*).

The Supreme Court next addressed the true-threat concept in *Virginia v. Black*, 538 U.S. 343, 123 S. Ct. 1536 (2003). In that matter, the Court reviewed a Virginia statute which made it unlawful to burn a cross in public or on another's property with the intent to intimidate any person or group. Importantly, the enactment also included a statutory presumption making the burning of a cross "prima facie evidence of an intent to intimidate a person or group of persons." *Id*. at 348, 123 S. Ct. at 1541-42 (quoting VA. CODE §18.2-423).

A majority of Justices found the statutory presumption constitutionally problematic. In a portion of her lead opinion representing the views of four jurists,[8] Justice O'Connor explained that such a presumption could allow the state to criminalize

[8] Some sections of the lead opinion reflected the views of four Justices, while others were also joined by Justice Scalia, thus attaining majority status.

constitutionally-protected cross burnings such as those intended only as statements of ideology or group solidarity, those intended to anger but not intimidate, or those undertaken in a dramatic performance. *See id*. at 365-66, 123 S. Ct. at 1551 (plurality in relevant part). In a non-joining responsive opinion, Justice Souter, joined by two other Justices, articulated similar views, stating, "the symbolic act of burning a cross, without more, is consistent with both intent to intimidate and intent to make an ideological statement free of any aim to threaten." *Id.* at 385, 123 S. Ct. at 1561 (Souter, J., concurring and dissenting). His concern was that, in close cases with conflicting evidence as to the cross-burner's intent, the statutory presumption might sway a factfinder to convict – which in turn could risk converting the statute into a means of suppressing ideas. *See id.* at 386, 123 S. Ct. at 1561-62.

In the post-*Black* timeframe, courts have disagreed over whether the speaker's subjective intent to intimidate is relevant in a true-threat analysis. Some have continued to use an objective, reasonable-person standard. These courts interpret *Black*'s intent requirement as applying to the act of transmitting the communication. *See United States v. Clemens*, 738 F.3d 1, 11 (1st Cir. 2013) (citing cases). In their view, an objective standard remains appropriate for judging whether the speech, taken in its full context, embodies a serious expression of an intent to commit unlawful violence. They reason from the premise that the First Amendment traditionally lifts its protections based on the injury inflicted rather than the speaker's guilty mind. *See, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 480 (6th Cir. 2012), *abrogation on other grounds recognized by United States v. Houston*, 683 Fed. Appx. 434, 438 (6th Cir. 2017); *United States v. White*, 670 F.3d 498, 508-09 (4th Cir. 2012), *abrogated on other grounds by United States v. White*, 810 F.3d 212, 220 (4th Cir. 2016).

Other courts have read *Black* as implying that the First Amendment only allows the government to penalize threatening speech uttered with the highest level of scienter, namely, a specific intent to intimidate or terrorize. *See United States v. Cassel*, 408 F.3d 622, 632-33 (9th Cir. 2005); *but cf. Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (observing that the Ninth Circuit has not consistently followed a subjective-intent standard). Still others have charted something of a middle course, suggesting that "an entirely objective definition [of a true threat] is no longer tenable" after *Black*, while reserving judgment on whether the standard should be subjective only, or a subjective-objective combination pursuant to which a statement "must objectively *be* a threat and subjectively be *intended* as such." *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (emphasis in original).

As we read *Black*, an objective, reasonable-listener standard such as that used in *J.S*. is no longer viable for purposes of a criminal prosecution pursuant to a general anti-threat enactment.[9] It seems to us that the seven members of the *Black* Court whose views were represented by Justice O'Connor's plurality opinion and Justice

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[9] We refer to general anti-threat statutes because the government may have more leeway with regard to anti-threat laws aimed at protecting a specific class of individuals or avoiding disastrous consequences. *See, e.g.*, *CISPES v. FBI*, 770 F.2d 468 (5th Cir. 1985) (dealing with a statute making it a crime to threaten or intimidate foreign officials or internationally protected persons); *United States v. Hicks*, 980 F.2d 963 (5th Cir. 1992) (applying a law which criminalizes the threatening or intimidation of airline crews in such a way as to interfere with the performance of their duties).

The terroristic threats law under which Appellant was convicted qualifies as a general anti-threat statute. *See supra* note 1. By contrast, the witness intimidation statute is aimed at deterring not only threats, but the public harm occasioned by such threats, namely, the obstruction of criminal justice. Still, the parties' advocacy is directed to true-threat jurisprudence in a more general sense. As will be seen below, moreover, Appellant's convictions under both provisions survive First Amendment restrictions applicable to general anti-threat legislation.

Souter's responsive opinion believed the First Amendment necessitates an inquiry into the speaker's mental state. *Cf. Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001 (2015) (holding that, under longstanding common-law principles, a federal anti-threat statute which does not contain an express scienter requirement implicitly requires proof of a *mens rea* level above negligence). Our conclusion in this regard stems from the fact that these Justices viewed the Virginia statute's presumption as raising substantial First Amendment difficulties. In criticizing that aspect of the law, their focus seems to have been on values and concerns associated with the First Amendment: the social undesirability of suppressing ideas, punishing points of view, or criminalizing statements of solidarity or ideology. Construing the Court's discussion of the speaker's intent as pertaining solely to the act of transmitting the speech appears difficult to harmonize with the assertion 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, 123 S. Ct. at 1548 (majority in relevant part) (emphasis added); *see also id*. at 363, 123 S. Ct. at 1549 (majority in relevant part) ("The First Amendment permits Virginia to outlaw cross burnings *done with the intent to intimidate* because burning a cross is a particularly virulent form of intimidation." (emphasis added)).[10]

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[10] With that said, we are not fully aligned with the Ninth Circuit's view that, under *Black*, a specific intent to threaten is "the *sine qua non* of a constitutionally punishable threat." *Cassel*, 408 F.3d at 631. The *Black* majority used open-ended language to describe the true-threat classification, which is understandable as there was no need in that particular case to decide whether First Amendment protections fall away *only* when there is a specific intent to intimidate. Thus, it remains an open question whether a statute which criminalizes threatening statements spoken with a lower scienter threshold, such as knowledge or reckless disregard of their threatening nature, can survive First Amendment scrutiny. *See Perez v. Florida*, ___ U.S. ___, ___, 137 S. Ct. 853, 854-55 (2017) (Sotomayor, J., concurring in denial of *certiorari*) (expressing that, after *Black*, the distinction between protected speech and punishable threats turns in (continued…)

To summarize, then, the two facets of *Black* which are most relevant to this dispute are as follows. First, the Constitution allows states to criminalize threatening speech which is specifically intended to terrorize or intimidate.[11] Second, in evaluating whether the speaker acted with an intent to terrorize or intimidate, evidentiary weight should be given to contextual circumstances such as those referenced in *Watts*. With these principles in mind, we apply our appellate standard of review as articulated above in light of the evidence adduced at trial and the common pleas court's factual findings.

As recounted above, the trial court convicted Appellant of two distinct crimes, terroristic threats and witness intimidation. As to both offenses, the court found beyond a reasonable doubt that Appellant acted with a subjective intent to terrorize or intimidate the officers in question. For purposes of terroristic threats, this follows from fact that such intent is an element of the offense. *See* 18 Pa.C.S. §§2706(a)(1). With regard to

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(…continued)
part "on the speaker's intent," and exhorting the Court, in an appropriate case, to "decide precisely what level of intent suffices under the First Amendment"); *Elonis*, ___ U.S. at ___, 135 S. Ct. at 2026 (Thomas, J., dissenting) ("Neither [*Watts* nor *Black*] addresses whether the First Amendment requires a particular mental state for threat prosecutions."). Because Appellant was found to have acted intentionally with regard to both terroristic threats and witness intimidation, we need not presently resolve that question. We only note here that such statutes are not uncommon. *See, e.g.*, 18 Pa.C.S. §4952(a) (penalizing threats communicated with a "knowing" *mens rea*); *State v. Pukahi*, 776 P.2d 392, 393 (Haw. 1989) (indicating that, pursuant to state law, threatening speech is a crime when coupled with "reckless disregard of the risk of terrorizing"); *cf*. 18 Pa.C.S. §2706(a)(3) (prohibiting the communication of a threat to cause serious public inconvenience or terror "with reckless disregard of the risk of causing such terror or inconvenience").

[11] While an intent to intimidate or terrorize is distinct from an intent to carry out the threat, there is little indication in *Black* that, for a statement to attain true-threat status, the speaker must have intended to follow through on his threat. As noted, the fear of violence and the disruption such fear engenders are independent harms that anti-threat statutes seek to curtail. *See R.A.V.*, 505 U.S. at 388, 112 S. Ct. at 2546.

witness intimidation, the trial court placed on the record its particularized finding that Appellant acted with such intent. Under *Black*, these findings, if supported by competent evidence, are sufficient to place the rap song within the true-threat category. Thus, we consider the content and full context of what the song communicated.

We first review the content of the speech itself, beginning with the lyrics. They do not merely address grievances about police-community relations or generalized animosity toward the police. They do not include political, social, or academic commentary, nor are they facially satirical or ironic. Rather, they primarily portray violence *toward* the police, ostensibly due to the officers' interference with Appellants' activities. In this regard, they include unambiguous threats with statements such as, "Let's kill these cops cuz they don't do us no good" and "that whole department can get it." They reference "soldiers" that will "f--k over" the police, a plan to make false emergency calls and "bust[] heavy metal" toward the officers who respond to the call, and a desire to "jam this rusty knife all in [the officer's] guts."[12]

The lyrics also appear to express a consciousness that they step beyond the realm of fantasy or fiction in that they indicate Appellant was advised by one of his elders "not to put this on CD," but he is ignoring such advice so that the whole city will "believe" him. Similarly, Appellant vows that the activities described will be "real" once a certain named individual returns from military service.

These aspects of the song tend to detract from any claim that Appellant's words were only meant to be understood as an artistic expression of frustration. Most notably

[12] The second verse, sung by Beasley, includes lyrics which portray the killing of police officers in an equally threatening manner. Due to the trial court's finding that the song was a collaborative effort on the part of Appellant and Beasley, and in light of the unifying theme of all three verses as well as the chorus, such words can reasonably be viewed as a joint expression of both defendants. Out of an abundance of caution, however, we will not consider the second verse in our true-threat analysis.

along these lines, Appellant mentions Detective Zeltner and Officer Kosko by name, stating that the lyrics are "for" them. Appellant proceeds to describe in graphic terms how he intends to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims.

Such personalization occurs, not only through use the officers' names, but via other facets of the lyrics. They reference Appellant's purported knowledge of when the officers' shifts end and, in light of such knowledge, that Appellant will "f--k up where you sleep."

Additionally, the threats are directed at the officers based on the complaint, tied to interactions which had recently taken place between them and Appellant, that the police had been "knockin' my riches" – as Officer Kosko did by confiscating cash from Appellant upon his arrest – and vowing that the police "won't keep" doing so. *See* N.T., Nov. 13, 2013, at 210 (reflecting Officer Spangler's testimony that "knocking riches" is a slang phrase which refers to a police officer confiscating cash during an arrest where drugs are involved). Along these same lines, they refer to the police having "tak[en] money away from" Beasley "and all my s--t away from me." Such harm to Appellant's personal wealth, and the officers' interference with his drug-selling activities, together with the upcoming criminal proceedings at which the latter were scheduled to testify against Appellant, are stated in the lyrics to provide the primary motivation for Appellant's desire to exact violent retribution.

Finally, the lyrics suggest a knowledge of the identity of the officers' confidential informants and a plan to murder at least one such informant with a Glock.

The words themselves are not the only component of Appellant's expressive conduct which tends to make the song threatening. The sound track includes bull

horns, police sirens, and machine-gun fire ringing out over the words, "bustin' heavy metal."[13]

Pursuant to *Watts* and *J.S.*, we also consider contextual factors in assessing whether the speech conveys a serious expression of an intent to inflict harm. *Accord In re S.W.*, 45 A.3d 151, 157 (D.C. 2012). These factors include such items as whether the threat was conditional, whether it was communicated directly to the victim, whether the victim had reason to believe the speaker had a propensity to engage in violence, and how the listeners reacted to the speech. *See J.S.*, 569 Pa. at 656, 807 A.2d at 858.

Here, unlike in *Watts*, the threats are mostly unconditional. As noted, moreover, Officer Spangler immediately notified other police personnel, reflecting that he did not see it as mere satire or social commentary. The victims developed substantial concern for their safety and took measures – such as separating from the police force earlier than planned, moving to a new residence, or obtaining a security detail – to avoid becoming victims of violence. Also, the police department allocated additional resources to Zone 5 to prevent the threatened violence from occurring.

Separately, although the song was not communicated directly to the police and a third party uploaded it to YouTube, this factor does not negate an intent on Appellant's part that the song be heard by the officers. As the Superior Court observed, Appellant's and Beasley's prior course of conduct suggested they either intended for the song to be published or knew publication was inevitable. Further, after the song was uploaded to YouTube, it was linked to the "Beaz Mooga" Facebook page. Unlike in *J.S.*, there was

[13] Although the photos of Appellant and Beasley appearing to motion as if firing weapons may have added to the menacing nature of the communication, it was unclear whether Appellant was involved with that portion of the video, and at one point the court specifically referred to the "musical track" as containing the threats. N.T., Nov. 13, 2013, at 141.

no suggestion the song was merely in jest or that it should not be conveyed to the police. *See id*. at 658, 807 A.2d at 859 (highlighting that the student's offensive web site included a disclaimer page indicating that it was not intended to be seen by school employees). For its part, the trial court, which heard all the testimony first-hand, found that Appellant intended for it eventually to reach the officers. *See* N.T., Nov. 21, 2013, at 463.

As for whether the officers had reason to believe Appellant might engage in violence, it is relevant that they were aware a loaded firearm had been found near Appellant's feet in the automobile he was driving. Although Appellant was ultimately acquitted of the firearm charges stemming from the weapon's presence in the car, the video was posted to the Internet and seen by the officers well before the trial occurred.

We acknowledge that, as Appellant and his *amici* argue, rap music often contains violent imagery that is not necessarily meant to represent an intention on the singer's part to carry through with the actions described. This follows from the fact that music is a form of art and "[a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas." Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 23 (2007) (footnote omitted). We do not overlook the unique history and social environment from which rap arose, the fact that rap artists (like many other artists) may adopt a stage persona that is distinct from who they are as an individual, or the fact that musical works of various types may include violent references, fictitious or fanciful descriptions of criminal conduct, boasting, exaggeration, and expressions of hatred, bitterness, or a desire for revenge.[14] In many

[14] Nor do we discount that First Amendment freedoms need "breathing space to survive," as *amici* forcefully argue. *See, e.g.*, Brief for *Amicus* ACLU of Pa. at 16 (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 338 (1963)).

instances, lyrics along such lines cannot reasonably be understood as a sincere expression of the singer's intent to engage in real-world violence.

With that said, the rap song here is of a different nature and quality, as detailed above. Even if we accept, *arguendo*, that most "gangsta rap" works solely constitute "art, poetry, and fantasy," Brief for *Amicus* Defender Ass'n of Phila. at 15, the content and surrounding circumstances of the song in issue do not demonstrate an adherence to the distinction between singer and stage persona sufficient to ameliorate its threatening nature. Although some attributes of the song arguably reflect the difference – such as the use of Appellant's stage name "Mayhem Mal," references to an apparently fanciful "ghetto superstar committee," and sophisticated production effects – these features are contradicted by the many factors already discussed tending to suggest the singers are in earnest. Most saliently, the calling out by name of two officers involved in Appellant's criminal cases who were scheduled to testify against him, and the clear expression repeated in various ways that these officers are being selectively targeted in response to prior interactions with Appellant, stand in conflict with the contention that the song was meant to be understood as fiction.

All of this leads us to conclude that the trial court's finding as to Appellant's intent was supported by competent evidence.

More generally, if this Court were to rule that Appellant's decision to use a stage persona and couch his threatening speech as "gangsta rap" categorically prevented the song from being construed as an expression of a genuine intent to inflict harm, we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style. We are not aware of any First Amendment doctrine that insulates an entire genre of communication from a legislative determination that certain types of harms should be regulated in the

interest of public safety, health, and welfare. *See Jeffries*, 692 F.3d at 482 ("Jeffries cannot insulate his menacing speech from proscription by conveying it in a music video[.]"); *see also State v. Jones*, 64 S.W.3d 728, 736-37 (Ark. 2002) (holding that a rap song constituted a true threat). Pennsylvania's legislative body has made such a policy judgment by enacting statutes which prohibit the making of terroristic threats and the intimidation of witnesses, and for the reasons given Appellant cannot prevail on his claim that his convictions under those provisions offend the First Amendment.

The order of the Superior Court is affirmed.

Justices Baer, Todd, Dougherty and Mundy join the opinion.

Justice Wecht files a concurring and dissenting opinion in which Justice Donohue joins.

[J-83-2017] [MO:Saylor, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 3 WAP 2017
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court entered August 2, 2016 at No.
	:	1136 WDA 2014, affirming the Order
v.	:	of the Court of Common Pleas of
	:	Allegheny County entered February
	:	21, 2014 at Nos. CP-02-CR-0006621-
JAMAL KNOX,	:	2012, CP-02-CR-0003870-2013, CP-
	:	02-CR-0004264-2013.
Appellant	:	
	:	ARGUED: November 28, 2017

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT **DECIDED: AUGUST 21, 2018**

I agree with much of the learned Majority's opinion. For instance, I concur in the Majority's general explication of First Amendment principles in the true threat context. Specifically, I agree that one result of the United States Supreme Court's fractured decision in *Virginia v. Black*, 538 U.S. 343 (2003), is that our previously-applied objective, reasonable-listener standard for assessing whether a statement was, in fact, a constitutionally sanctionable true threat is "no longer viable." Maj. Op. at 16. The Majority correctly interprets *Black* and its progeny to require, as part of a dual-pronged analysis, an assessment of the speaker's subjective intent. Finally, I agree with the Majority that the facts of this case demonstrate that Jamal Knox intended to communicate a true threat via the lyrics of the contested rap song. Hence, I join the Majority in affirming Knox' criminal convictions.

However, I do not agree with the limited test articulated and applied by the Majority. The Majority distills the relevant jurisprudence into two general "facets:" (1) the First Amendment "allows" states to criminalize speech when it is "specifically intended" to terrorize or intimidate; and (2) "evidentiary weight should be given to contextual circumstances" surrounding the statement.[1] Maj. Op. at 18. My primary disagreement lies with- the unnecessary restraint employed by the Majority in articulating the first prong of this test. The Majority correctly concludes that the First Amendment *permits* imposing punitive actions upon a person who specifically intends to communicate a true threat. But the Majority refuses to consider the more important question of whether the First Amendment *requires* proof of specific intent, or whether the Amendment would tolerate punishment of speech based upon proof of only a lesser *mens rea* such as recklessness or knowledge. *Id.* at 17-18 n.10. The Majority accurately notes that this latter inquiry is an "open question." *Id.* I would answer that question in this case.

As a general jurisprudential matter, the Majority's restrained approach is not without merit. Nonetheless, there are compelling reasons to resolve this issue presently. First, Knox places squarely before this Court the question of whether specific intent is a necessary and essential element to a true threats analysis. Second, and perhaps more importantly, our current framework predates the United States Supreme Court's decisions in *Black* and *Elonis v. United States*, ___ U.S. ___, 135 S. Ct. 2001 (2015). Following *Black* in particular, the United States Courts of Appeals have been compelled to decide if, and how, *Black* affected their preexisting true threats analyses, and whether *Black*

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[1] The contextual circumstances referred to by the Majority derive from the United States Supreme Court's seminal true threats case, *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*). In that case, the Supreme Court held that Watts' statement was not a true threat, *inter alia*, because it was uttered during a political rally, because the statement was conditional, and because those who heard the statement did not take it seriously. *Id.* at 708.

required proof of subjective intent. Most circuits have held that *Black* does not require such proof. Regardless of the outcome, those decisions underscore the necessity of interpreting *Black* and ascertaining its impact upon a true threats analysis. We must undertake a similar analysis, not only because we are asked to do so, but also because our current test clearly is outdated and presently insufficient, in large part because we crafted it in *J.S. ex. rel. H.S. v. Bethlehem Area School District.*, 807 A.2d 847 (Pa. 2002), which predated the United States Supreme Court's most recent guidance in this area of federal constitutional law. Because it is imperative that we reconsider and modify our true threats test, we should construct a complete and final test, not a partial one that leaves uncertainty that will serve only to complicate and protract litigation in future cases.

Finally, and perhaps most importantly, declining to resolve the legal question presented in full would ignore the real and precedential effect of our decisions. Although we are deciding a First Amendment issue that arose in a criminal case, the framework that we are called upon to update and revise will not be so confined. The Majority's limited decision does not provide sufficient guidance to the next musician who seeks to express political views and wants to do so to the fullest extent protected by the First Amendment. It offers no framework for a school district faced with the possibility of punishing (and possibly expelling) a student who has created a tasteless website or made derogatory and potentially threatening comments on social media. It affords no paradigm for application to the teacher who is fired, the police officer who is suspended, or the municipal employee who is disciplined. The reach of today's decision is far more expansive than criminal cases alone. Governmental bodies should know whether they can take punitive actions against students, employees, or officers if those individuals act with something less than specific intent. Similarly, individuals should not be subjected to termination, suspension, or extended desk duty only to find out years later that their

conduct was not prohibited by the First Amendment. The issue is more than ripe for disposition, and the reasons to reach it are compelling.

Following *Black*, federal appeals courts have split over whether the subjective intent of a speaker is a necessary component of an actual true threat. *See United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (opining that, after *Black*, "whether the Court meant to retire the objective 'reasonable person' approach or to add a subjective intent requirement to the prevailing test for true threats is unclear"). Recent cases have attempted to parse the "type of intent needed by a defendant to communicate" a true threat for purposes of the various threat provisions in the United States Criminal Code[2] in the wake of *Black*. *See*, *e.g.*, *United States v. Clemens*, 738 F.3d 1, 2 (1st Cir. 2013).

The First, Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits have determined that the *Black* Court did not impose a subjective intent requirement upon the analysis. Those Circuits eschew such an element, and instead apply an objective test focused upon either a hypothetical reasonable speaker or a hypothetical reasonable recipient/listener. *See Clemens*, 738 F.3d at 10 (assessing threats based upon "an objective defendant vantage point standard post-*Black*"); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) ("The test is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury."); *United States v. Elonis*, 730 F.3d 321, 331 n.7 (3d Cir. 2013), *rev'd by Elonis v. United States*, 135 S. Ct. 2001 (2015) (describing the Third Circuit test as asking "whether a reasonable speaker would foresee the statement would be understood as a threat"); *United States v. White*, 670 F.3d 498, 508 (4th Cir. 2012), *abrogated by United States v. White*, 810 F.3d 212 (4th Cir. 2016) (explaining that a statement constitutes a true threat "if an ordinary reasonable recipient who is familiar with the context . . . would

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[2] *See*, *e.g.*, 18 U.S.C. § 875(c) ("Interstate Transmission of Threat to Injure").

interpret [the statement] as a threat of injury") (internal quotation marks omitted); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2012) (holding that a statement constitutes a true threat when "a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus)"); *Parr*, 545 F.3d at 499 (noting that the circuit traditionally has used an "objective reasonable person" test, and declining to decide whether *Black* necessitated an alteration to that test under the circumstances of that case); *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013) (holding that the government is required "to prove a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure").

The Fifth and Eleventh Circuits adopted a more general reasonable person test, with no specific reliance upon either the speaker or the listener. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (explaining that "[s]peech is a true threat and therefore unprotected if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm") (internal quotation marks omitted); *United States v. Martinez*, 736 F.3d 981, 988 (11th Cir. 2013), *vacated by Martinez v. United States*, 135 S. Ct. 2798 (2015) (*per curiam*) (holding that a true threat is "determined from the position of an objective, reasonable person").

The Ninth and Tenth Circuits read *Black* as requiring the true threats analysis to focus upon the speaker's subjective intent to intimidate a person or group of persons. *See United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005) ("We are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."); *United States v. Magleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) ("Unprotected by the

Constitution are threats that communicate the speaker's intent to commit an act of unlawful violence against identifiable individuals. The threat must be made with the intent of placing the victim in fear of bodily harm or death.") (internal citations and quotation marks omitted); *United States v. Heineman*, 767 F.3d 970, 972, 975, and 978 (10th Cir. 2014) (quoting the reasonable recipient test, but also adding a requirement that the government prove that the defendant intended the recipient to feel threatened). *But see United States v. Wheeler*, 776 F.3d 736, 743 n.4 (10th Cir. 2015) (limiting the *Heineman* analysis to the statutory definition of a true threat, and holding that the subjective test was not part of a First Amendment analysis).

As noted, the Majority holds only that the First Amendment permits regulating speech that is specifically intended to be a true threat. The Majority does not consider whether specific intent is the only *mens rea* that would pass constitutional muster. For this reason, the Majority explains that the Court is "not fully aligned with" the Ninth Circuit's rule that specific intent is "the *sine qua non* of a constitutionally punishable threat." Maj. Op. at 17 n.10 (quoting *Cassel*, 408 F.3d at 631). Contrary to the Majority, I endorse the Ninth Circuit's holding, and I would adopt it in this case. In my view, the Ninth Circuit correctly determined that the reasoning underlying the Supreme Court's *Black* decision necessitates the conclusion that the First Amendment requires such a subjective examination, and that proof of the speaker's intent to intimidate the recipient of the communication is a required inquiry in order to balance the need to protect victims of threats with the First Amendment rights of the speaker.

It is crucial that we not forget that punishing a person for communicating a true threat, however reasonable it seems, is a content-based regulation of speech. As a general rule, the First Amendment prohibits content-based restraints. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (citing *Cantwell v. Connecticut*, 310 U.S. 296,

309-11 (1940); *Texas v. Johnson*, 491 U.S. 397, 406 (1989)). Indeed, "[c]ontent-based regulations are presumptively invalid." *Id.* (citations omitted). Thus, the ability to punish a true threat based upon its content is an exception to the general prohibition. The Supreme Court has insisted that content-based categories of speech that can be regulated be narrowly drawn. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). A content-based proscription of speech that is premised upon something less than the most rigorous standard is a proscription that is not narrowly drawn, particularly when considering true threats in the context of musical expression. *See, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591, 612 (Pa. 2002) (explaining that a content-based city ordinance restricting First Amendment rights passes constitutional muster only if it is narrowly drawn and if the municipality can show a compelling state interest, *i.e.*, strict scrutiny). Punishing statements that can be construed only as knowingly or recklessly uttered casts a net too wide, as it catches up and penalizes an impermissible amount of protected speech and breeds a "threat of censorship that by its very existence chills free speech." *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 964 n.12 (1984) (citations omitted). After all, the United States Supreme Court has mandated that "First Amendment standards . . . must give the benefit of any doubt to protecting rather than stifling speech." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 327 (2010) (citations and internal quotation marks omitted). Proof of specific intent strikes the correct balance between prosecuting that which is unprotected and shielding that which is protected.

However, like the Majority, I also would hold that consideration of a speaker's mindset is only part of the analysis, and would adopt a two-pronged approach to evaluating a true threat for constitutional purposes. First, I would require reviewing courts to conduct an objective analysis to determine whether reasonable recipients would

consider the statement to be "a serious expression of intent to inflict harm," and not merely jest, hyperbole, or a steam valve. *J.S.*, 807 A.2d at 858. For this purpose, I believe that the factors that we delineated in *J.S.*, a case I discuss in detail below, are relevant and useful. Those factors include: "the statements, the context in which they were made, the reaction of the listeners and others as well as the nature of the comments." *Id.* No one factor should be considered conclusive, and each should be considered and analyzed, alone and against the others, under the totality of the circumstances. Second, if the first prong is satisfied, I would require courts to conduct a subjective analysis to ascertain whether the speaker specifically intended to intimidate the victim or victims, or intended his expression to be received as a threat to the victim or victims. Failure of the government to satisfy either prong would mean that, under the First Amendment, the statement cannot be penalized or proscribed.

This framework balances the relevant interests at stake, ensuring that only true threats—those that are intended as such—are punished while, at the same time, shielding otherwise-protected speech from unwarranted governmental proscription. The first prong of my proposed test allows courts to determine objectively whether a statement is a threat and not political hyperbole, as was the case in *Watts*, or an instance of sophomoric utterances that could not be taken seriously, like those that we determined were not true threats in *J.S.* The second prong requires proof that the speaker's purpose was to strike fear in the victim, which further justifies exempting the statement from constitutional protection.

All that remains is application of my proposed test. I begin with the objective prong of the analysis. The most natural starting place, and the first *J.S.* factor, is the words of the purported threat.

Words matter. Indeed, the actual words used by the speaker to convey a thought are one of the strongest indicators of whether an utterance objectively should be perceived as an actual threat. However, those words cannot be read in isolation. An objective assessment necessarily requires consideration of the circumstances in which the statement was made. In this instance, the threats were part of a song. This makes an objective consideration of the threatening language more difficult than with other forms of communication, as music often is rife with hyperbole, boasting, exaggerated attempts at entertainment, overheated invocation of emotion, and nonsensical banter. Of course, that the statements were made in a song does not exempt them from being true threats. But it does complicate the task of determining which lyrical statements objectively should be taken seriously and which should not.

In some instances, the answers are obvious. For example, compare Coolio's "Gangsta's Paradise"[3] with "Weird Al" Yankovic's "Amish Paradise."[4] In "Gangsta's Paradise," Coolio reflects upon the difficulties that he has faced in life and upon the cycles of greed and violence in his community. It is readily apparent that Coolio's song is meant to convey a message that is serious, thoughtful, and personal. On the other hand, Yankovic's song is an obvious parody of "Gangsta's Paradise," premised upon silliness and meant to provoke laughter. Unlike "Gangsta's Paradise," Yankovic's lyrics are not meant to (and cannot) be taken seriously.

In most cases, however, determining whether the lyrics of a particular song are serious, credible statements is more challenging. The difficulty arises from the nature of song lyrics themselves. Artists often use hyperbole in their songs to illustrate emotion. The Beatles, for example, insisted that they "ain't got nothin' but love babe, eight days a

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3 COOLIO, GANGSTA'S PARADISE (Tommy Boy 1995).

4 "WEIRD AL" YANKOVIC, AMISH PARADISE (Scotti Brothers 1996).

week."[5] The hyperbole is obvious. But the exaggeration may not always be so apparent. Artists sometimes employ metaphors that defy clear definition. Consider the song "Drops of Jupiter" by Train, in which the artists ask, "Did you finally get the chance to dance along the light of day and head back to the Milky Way?"[6] Song lyrics may even lack any discernible meaning on their own, as in The Beatles' classic "Lucy in the Sky with Diamonds," which includes the instruction, "follow her down to a bridge by a fountain where rocking horse people eat marshmallow pies."[7]

Musicians sometimes use violent themes to communicate political messages. In "Bulls on Parade," Rage Against the Machine uses violent imagery ("With the sure shot, sure ta make the boddies drop . . . of tha power dons - that five sided Fist-a-gon . . . the trigger's cold, empty ya purse"[8]) as a political statement to criticize the United States government and its military. In his song "Courtesy of the Red, White, and Blue," Toby Keith employs violent imagery ("We'll put a boot in your ass, it's the American way"[9]) as a political statement to voice support for the United States Armed Forces. Others use violent lyrics to depict actual events, but the lyrics do not necessarily reflect the life of the artist. In "Delia's Gone," Johnny Cash sang: "If I hadn't shot poor Delia I'd have had her for my wife."[10] Although this song is written in the first person and depicts a murder, it

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5 THE BEATLES, EIGHT DAYS A WEEK (Parlophone 1964).

6 TRAIN, DROPS OF JUPITER (Columbia 2001).

7 THE BEATLES, LUCY IN THE SKY WITH DIAMONDS (Parlophone 1967).

8 RAGE AGAINST THE MACHINE, BULLS ON PARADE (Evil Empire 1996).

9 TOBY KEITH, COURTESY OF THE RED, WHITE, AND BLUE (THE ANGRY AMERICAN) (DreamWorks Nashville 2002).

10 JOHNNY CASH, DELIA'S GONE (Columbia 1962); *see also* JOHNNY CASH, FOLSOM PRISON BLUES (Sun Records 1957) ("But I shot a man in Reno just to watch him die.")

actually is a cover of a song about a fourteen-year-old adolescent who was murdered in 1900. SEAN WILENTZ, BOB DYLAN IN AMERICA (2011).

Songs also may contain lyrics that appear facially threatening, but that still constitute protected speech. The band Foster the People produced a song called "Pumped Up Kicks," which describes a school shooting and warns, "All the other kids with the pumped up kicks you'd better run, better run, out run my gun."[11] Further, the rap group N.W.A., in their song "Fuck tha Police," expressly described violence against police officers, stating, "and when I'm finished, it's gonna be a bloodbath of cops dying in L.A. . . . I'm a sniper with a hell of a scope / taking out a cop or two, they can't cope with me."[12] These examples illustrate that, when song lyrics are read in isolation, the task of distinguishing between words that should be understood as serious, true threats, and those which should be understood as lyrical devices is complex, to say the least.

With this in mind, I turn to the lyrics at issue herein. The words of Knox's rap song were not general or vague as to the targets, a circumstance that would have militated against a finding of a true threat. Had the lyrics been directed at police officers generally, or had they complained about perceived abuses by unnamed police officers, those lyrics objectively could have been understood as political commentary or as a musical ventilation of frustration about the rappers' real-life experiences. That is not what occurred in this case.

In response to being arrested and charged with drug-related crimes months before the release of the video, Knox used lyrics that not only were facially threatening, but were directed specifically at Officer Kosko and Detective Zeltner, whom Knox identified in the song by name. The following excerpts from the verses performed by Knox compel my

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11 FOSTER THE PEOPLE, PUMPED UP KICKS (Columbia 2011).

12 N.W.A., FUCK THA POLICE (Ruthless Records 1988).

conclusion that Knox's statements objectively must be considered threatening for constitutional purposes:

> The first verse is for Officer Zeltner and all you fed force bitches
> And Mr. Kosko, you can suck my dick, you keep knocking my riches.
> You want beef, well cracker I'm wit it, that whole department can get it.
> All these soldiers in my committee gonna fuck over you bitches
> Fuck the police bitch, I said it loud
>
> * * *
>
> We makin' prank calls, as soon as you bitches come we bustin' heavy metal
>
> So now they gonna chase me through these streets
> And I'm a jam this rusty knife all in his guts and chop his feet
> You takin money away from Beaz, and all my shit away from me
> Well your shift over at three and I'm gonna fuck up where you sleep
>
> * * *
>
> My Northview niggas they don't fuck with you bitches, I hate your fuckin guts, I hate y'all.
> My momma told me not to put this on C.D., but I'm gonna make this fuckin city believe me, so nigga turn me up.
>
> * * *
>
> They tunin' in, well Mr. Fed, if you can hear me bitch,
> Go tell your daddy that we're booming bricks.
> And them informants that you got, finna be layin in the box
> And I know exactly who workin', and I'm gonna kill him wit a Glock.

The instances of obvious hyperbole ("chop his feet") do not disturb our interpretation of this factor. These passages—even without considering the statements made during the co-author's verses—contain direct threats to named individuals. Knox threatened those officers with firearms ("bustin' heavy metal") and with knives ("I'm a jam this rusty knife all in his guts"). Knox's lyrical intimidation also extended to the officers' family homes ("I'm gonna fuck up where you sleep"). Knox's proclamation that he knew when the officers' shifts end ("your shift over at three")—regardless of whether the statement was true—conveyed a more personal message that the officers were being watched, lending credibility to the statements and further elevating them over hyperbole

or mere musical embellishments. Knox also indicated that he knew the identities of the officers' confidential informants, and threatened them as well.

It bears repeating that the aim of the law in the jurisprudence of threats is to deter and/or remedy the intimidation and fear that such statements inflict upon the victim(s). Many of the lyrics that discuss or advocate violence would not, by themselves, amount to true threats. In fact, as the examples from popular music show, violent topics often are expressed in music without being considered threatening to any particular individual(s), and could not and should not be regulated or punished. What separates this case from other music containing similar lyrics is the direction of those lyrics to specifically named officers, who are targeted as the objects of the violent expressions. Objectively, lyrics uttered in this manner are too personal, focused, and specific to be considered anything other than true threats.

Next, I consider the context in which the statements were made. As the District of Columbia Court of Appeals observed, "a determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." *In re S.W.*, 45 A.3d 151, 157 (D.C. 2012) (footnotes omitted). The lyrics in "Fuck the Police" were not created and sung as part of a broader political commentary on the state of affairs between the police and the citizenry, were not facially hyperbolic or satirical, and did not constitute any other form of speech that would receive constitutional protection. The lyrics were drafted and recorded in the wake of, and in direct response to, Knox's arrest and receipt of criminal charges at the hands of the two named officers. At the time that the song was uploaded to YouTube, the earlier criminal charges were pending, with a hearing less than

one month away, at which the two named officers were scheduled to testify against Knox and Beasley.

As part of the examination of the context in which the statements were made, it is necessary to review the means by which the statements were conveyed to the victim(s). The actual communication of the video is the aspect of the case that Knox most vigorously disputes. The crux of his argument is that, because of the dearth of evidence of record to establish that he actually created, uploaded, or published the video, he cannot constitutionally be liable for making a threat. Knox maintains that authorship of a threatening song is only one half of a true threat. The other half is the actual communication of the threat. Absent evidence of the communication, he argues, the song lyrics are no different than writing threats in a personal journal or diary, which are not intended to be seen by anyone else. *See* Brief for Knox at 36. In Knox' view, the threat can be attributed to him only if the Commonwealth proves that he was the actual person who struck the computer key that caused the video to be uploaded to YouTube.

Knox is correct that the Commonwealth did not prove that he uploaded the video. The evidence confirms that the video was uploaded using an IP address connected to the Hart family, and that the police could not connect Knox with the Harts. Moreover, the police were unable to link Knox to any of the cell phones that had access to the IP address at the time that the video was uploaded. These factors would be dispositive if Knox was correct that he can be responsible only if he personally caused the video to be uploaded. But this is not the law. Knox takes too narrow a view of communication in this context.

Knox and Beasley jointly authored and recorded the "Fuck the Police" song. Both men sang individual verses in the song. The video displays two still photos of Knox and Beasley standing together in corresponding outfits. This was not the duo's first song together. At least two other videos were posted to YouTube in which Knox and Beasley

are rapping or talking with each other. Their music, including "Fuck the Police," was promoted to the public via the "Beaz Mooga" Facebook page. There was ample evidence demonstrating that Beasley operated the page. The three email addresses that were associated with the page all contained some form of the name Rashee Beasley. Posts on the page celebrated Beasley's birthday and referenced events that corresponded to actual events in Beasley's life.

The totality of these circumstances establish a sufficient link between the creation of the song and video, its publication and promotion, and Knox. Knox was sufficiently involved in the process such that he cannot now demand immunity concerning the song's threats simply because someone else may have actually uploaded the video. Knox made no efforts to stop either the dissemination or the promotion of the song. These circumstances differ entirely from Knox's personal diary hypothetical. The record contains ample evidence to conclude that Knox was at least a complicit bystander in the publication of the video.

Having determined that Knox is not immune from liability for the threat, it bears noting that the manner by which a threat is communicated is often as important as the words themselves in an objective assessment of whether a statement amounts to a true threat. Using the example offered by Knox as an illustration, a threat—one intended to be such—that a person writes in a personal journal and that is never seen by the desired victim is unlikely to be considered objectively an actionable true threat. In such a circumstance, the intended victim is never subjected to the fear or intimidation that true threat jurisprudence aims to punish. On the other end of the spectrum, a threat that is delivered face-to-face to the victim in a menacing way almost always will constitute a threat.

The means of communication in this case fall somewhere between those two extremes. The video was distributed to the public via YouTube, and subsequently promoted on Facebook by Beasley, Knox's cohort and musical partner. Neither Knox nor Beasley sent the video directly to any police officer, police department, or local media outlet. Nonetheless, the obvious purpose of uploading a video to the Internet is for it to be viewed and shared. It is reasonable to conclude that, even though the video was not sent directly to the two named officers, it ultimately would be discovered by them as a result of general dissemination in today's electronically connected world. It is also fair to conclude that, once the video went public, Knox and Beasley knew that it would find its way to the named officers.

Notably, Knox took no efforts to prevent the video from being viewed by law enforcement authorities. To the contrary, Knox offered at least some indicia in the song itself that he did not want to restrict its access to a limited or personal audience ("My momma told me not to put this on C.D., but I'm gonna make this fuckin city believe me. . .").

Absent direct conveyance specifically to the named officers (*i.e.*, the "in your face" scenario), the communication aspect of this case is not overwhelming or conclusive. However, in light of the above discussion, the communication factor nonetheless weighs against Knox. Thus, the contextual circumstances support the conclusion that the lyrics in this case constituted true threats.

The final *J.S.* factor that is relevant to this case, the reaction of the listeners, also supports this holding. This factor was a significant aspect of the Supreme Court's threats analysis in *Watts*, which marked the genesis of the true threats exception to the First Amendment. *See*, *supra*, note 1. It is one of the more difficult factors to assess in a reliable manner. People differ in gender, race, religion, and, most importantly,

experience. One person may be emotionally stoic and might not react at all to hearing a threat, while another person might panic immediately and call the police upon hearing the same threat. A person's recent life experiences, the highs and the lows, might inform his or her reaction in that moment, and that reaction may be different than if the threat was heard a week or a month later (or before). Police officers might or might not react differently to a threat than would a hardened criminal. The scenarios and hypotheticals go on and on. The examples are innumerable, which is what makes assessing the reasonableness of a listener's reaction difficult.

Despite the general complexity of this aspect of the analysis, the factor is easily resolved in this particular case. Officer Spangler was the first police officer to hear the song. When he heard the threatening lyrics, he promptly forwarded the song to his supervisors and to Officer Kosko and Detective Zeltner. As this was happening, a local media outlet found the song and began reporting on it, apparently believing it to contain actual threats as well. Officer Kosko and Detective Zeltner were prevented from working alone, and the police presence in the entire area was increased. Both officers were emotionally distraught by the lyrics. Detective Zeltner was given time off and was provided with additional security when he returned to work. Officer Kosko chose to retire one year after hearing the song. The song necessitated significant efforts to ensure the safety of the two named officers, as well as the officers and civilians in the local community. This factor strongly weighs in the direction of a true threat.

All of these factors support concluding that, objectively, the lyrics in this case constitute true threats. Thus, under my proposed test, I now must consider whether Knox intended them as such.

For this factor, I rely upon much of the same evidence, but view it from a subjective perspective. The tone of the lyrics chosen for this song demonstrates clearly that Knox

was angered by his prior arrest and the effect that the arrest had upon his financial situation. The rage apparent in the lyrics alone would not justify a conclusion that Knox intended the lyrics to be threatening. However, the fact that Knox directed the threats specifically at Officer Kosko and Detective Zeltner does. I discern no credible argument that naming those two individuals served any purpose other than to instill fear in them. The timing of the threats is important as well. The charges that prompted the song lyrics were pending at the time that the song was published. The two officers were slated to appear in person and testify against Knox and Beasley at a hearing approximately one month later. Additionally, Knox referred specifically to the types of violence that he would inflict and when and where he would inflict them. Knox also revealed his motive for levying these threats in the song: revenge for the prior arrest, which harmed his ability to make money through drug trafficking. In the aggregate, the evidence of Knox's subjective intent is plentiful.

For these reasons, I concur with the Majority that Knox's lyrics constitute true threats, and that those lyrics do not receive First Amendment protection. Before concluding, however, I must acknowledge the similarities between this case and *J.S.*, in which this Court reached an opposite conclusion. J.S., an eighth-grade student in the Bethlehem Area School District, created a website on his home computer and uploaded it to the Internet. The website was not related to any school program, assignment, or project. When a person accessed the website, the front page consisted of a "disclaimer," which informed the viewer that, by clicking through and entering the website, the viewer agreed: (1) not to report to anyone affiliated with the school district what the viewer was about to see; (2) that the viewer was not an employee of the district; and (3) that the viewer would not disclose to anyone the identity of the creator of the website and would not cause any trouble for the creator. Although styled as a disclaimer, the front page did

not actually bar access to anyone and was not password-protected. Any person who wanted to access the site could view it simply by clicking through the front page. *Id.* at 851.

The main pages of the website contained derogatory, profane, and threatening statements directed primarily at the principal of the middle school, A. Thomas Kartsostis, and at J.S.' algebra teacher, Kathleen Fulmer. This Court provided the following description of content of the various pages within the website:

> Within the website were a number of web pages. [C]ertain of the web pages made reference to Principal Kartsostis. Among other pages was a web page with the greeting "Welcome to Kartsostis Sux." Another web page indicated, in profane terms, that Mr. Kartsostis engaged in sexual relations with a Mrs. Derrico, a principal from another school, Asa Packer School.
>
> The web site also contained web pages dedicated to Mrs. Fulmer. One page was entitled "Why Fulmer Should be Fired." This page set forth, again in degrading terms, that because of her physique and her disposition, Mrs. Fulmer should be terminated from her employment. Another animated web page contained a picture of Mrs. Fulmer with images from the cartoon "South Park" with the statement "That's right Kyle [a South Park character]. She's a bigger b___ than your mom." Yet another web page morphed a picture of Mrs. Fulmer's face into that of Adolph [*sic*] Hitler and stated "The new Fulmer Hitler movie. The similarities astound me." Furthermore, there was a hand-drawn picture of Mrs. Fulmer in a witch's costume. There was also a page, with sound, that stated "Mrs. Fulmer Is a B___, In D Minor." Finally, along with criticism of Mrs. Fulmer, a web page provided answers for certain math lessons.
>
> The most striking web page regarding Mrs. Fulmer, however, was captioned, "Why Should She Die?" Immediately below this heading, the page requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hitman." The diagram consisted of a photograph of Mrs. Fulmer with various physical attributes highlighted to attract the viewer's attention. Below the statement questioning why Mrs. Fulmer should die, the page offered "Some Word from the writer" and listed 136 times "F___ You Mrs. Fulmer. You Are A B___. You Are A Stupid B___." Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.

Id. at 851 (footnotes omitted). Eventually, the principal learned of, and viewed, the website. Because he considered the threats to be serious, he informed the school faculty that there was a problem at the school, and he contacted the local police and the FBI, both of which ultimately declined to pursue charges against J.S.

Mrs. Fulmer also viewed the site. She became concerned for her safety. Worse, she experienced, *inter alia*, stress, anxiety, short-term memory loss, headaches, and depression. She was unable to finish the school year, and was afforded medical leave for the following school year. *Id.* at 852.

J.S. continued to attend the school and was not required to take down the website, although he did so voluntarily one week after the principal viewed it. Initially, the District did not punish J.S. However, at the conclusion of the school year, the District informed J.S.' parents that J.S. would be suspended for three days because J.S.' website constituted a threat to a teacher, harassment of a teacher and the principal, and disrespect to both, all of which affected the health, safety, and welfare of the school community.

The District held a hearing on the suspension, at which the District elected to extend the suspension from three days to ten days. After the hearing, the District reconsidered the suspension and commenced expulsion proceedings against J.S. The District conducted two expulsion hearings before the start of the new school year. J.S. did not attend the second hearing because, by that time, his parents had enrolled him in a school in a different state. At the conclusion of the hearings, the District determined that the website contained threats and harassment directed at a teacher and the principal that resulted in harm to the school community. Consequently, the District expelled J.S. *Id.* at 853.

J.S.' parents appealed the expulsion, maintaining that the sanction violated J.S.' First Amendment rights. The case ultimately reached this Court, which then turned to examine the "difficult issue of whether a school district may, consistent with the First Amendment to the United States Constitution, discipline a student for creating at home, and posting on the Internet, a website that . . . contained . . . threatening statements directed toward one of the student's teachers and his principal." *Id.* at 850.

After discussing basic tenets of the First Amendment, the Court considered how those principles "intersect with the unique school setting," which we described as "a complex and delicate task." *Id.* at 855. "Schools are given the monumental charge of molding our children into responsible and knowledgeable citizens." *Id.* On balance, both the United States Supreme Court and this Court have concluded that a student's constitutional interests must give way—in certain circumstances—to the institutional needs of a school. This includes the student's right to freedom of expression. With this framework in mind, the Court turned to the question of whether J.S.' statements on his website amounted to true threats.

This Court recounted the Supreme Court's *Watts* decision, and observed that the High Court "has offered little more since rendering its decision . . . in terms of guidelines to adjudge what constitutes a true threat." *Id.* at 857.[13] We considered extra-jurisdictional cases that have "attempted to further define what constitutes a true threat and to create

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[13] At the time that the *J.S.* Court considered what constituted a true threat, our Superior Court had been relying upon the United States Court of Appeals for the Second Circuit's decision in *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976). *See Commonwealth v. Baker*, 722 A.2d 718, 722 (Pa. Super. 1998), *aff'd*, 766 A.2d 328 (Pa. 2001). In *Kelner*, the Second Circuit opted to define a true threat as one that "on its face and in the circumstances in which it is made is so unequivocal, unconditionally immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution." *Kelner*, 534 F.2d at 1027. This Court has never adopted *Kelner*'s definition.

a standard to evaluate speech alleged to constitute a true threat." *Id*. at 857-58 (discussing *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996); and *In the Interest of A.S.*, 626 N.W.2d 712 (Wis. 2001)). Both the United States Court of Appeals for the Ninth Circuit and the Supreme Court of Wisconsin had employed an objective reasonable person standard, inquiring whether the speaker would reasonably foresee that the statement would be interpreted as a serious expression of purpose or intent to inflict harm. *See Lovell*, 90 F.3d at 372; *In the Interest of A.S.*, 626 N.W.2d at 720. To ensure that the statement was not mere "hyperbole, jest, innocuous talk, expressions of political views or other similarly protected speech," *J.S.*, 807 A.2d at 858, the Supreme Court of Wisconsin had held that courts in that state, using a totality of the circumstances approach, were bound to consider the following factors:

> how the recipient and other listeners reacted to the alleged threat; whether the threat was conditional; whether it was communicated directly to its victim; whether the makers of the threat had made similar statements to the victim on other occasions; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

In the Interest of A.S., 626 N.W.2d at 720. Five years earlier, the Ninth Circuit had prescribed a similar set of factors in articulating an objective standard for consideration of a purported true threat. *Lovell*, 90 F.3d at 372.

In *J.S.*, we found *In the Interest of A.S.* and *Lovell* compelling and consistent with the Supreme Court's holding in *Watts*. We concluded the "reasonable guideposts" offered by the Ninth Circuit and the Wisconsin Supreme Court were helpful in differentiating between a true threat and protected speech. We held that, to determine whether a statement is "a serious expression of intent to inflict harm," Pennsylvania courts must "consider the statements, the context in which they were made, the reaction of the listeners and others as well as the nature of the comments." *J.S.*, 807 A.2d at 858.

Following careful deliberation upon these factors, this Court held, ultimately, that J.S.' statements were not true threats. We acknowledged, *inter alia*, that the statements and images on the website were not conditional, and that they contributed to a significant impairment to Mrs. Fulmer's well-being and to her career. Nevertheless, we found it important that the threatening statements were not communicated directly to Mrs. Fulmer. To the contrary, the "disclaimer" indicated that J.S. did not want school faculty to view the material on the site. Moreover, there were no indications that J.S. had made other threatening statements to Mrs. Fulmer, and it was "unclear if Mrs. Fulmer had any reason to believe that J.S. had the propensity to engage in violence, more than any other student of his age." *Id.* at 859.

We observed that a student's First Amendment rights, though limited, are not vitiated entirely by the fact of his being a student, and we recognized the criminal nature of a true threat analysis. *Id.* at 856, 859, and 861. Accordingly, we held that the totality of the circumstances did not support the School District's determination that the website contained sanctionable true threats:

> [T]he web site, taken as a whole, was a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody. However, it did not reflect a serious expression of intent to inflict harm. This conclusion is supported by the fact that the web site focused primarily on Mrs. Fulmer's physique and disposition and utilized cartoon characters, hand drawings, song, and a comparison to Adolph [*sic*] Hitler. While Mrs. Fulmer was offended, certain others did not view it as a serious expression of intent to inflict harm. Indeed, the actions, or inaction, by the School District belies its assertion that the web site constituted a true threat. To allow J.S. to attend class and extracurricular activities, even if during an investigation, and to only commence discipline well after the conclusion of the school year, severely undermines the School District's position that the web site contained a true threat. The lack of immediate steps taken directly against J.S., and the lack of immediate notification of his parents about the web site, for the extended time period that passed in the case, strongly counters against a conclusion that the statements made in the web site constituted true threats.

Id. at 859-60 (footnote omitted).[14]

In the case *sub judice* and in *J.S.*, threatening language was communicated by an online medium. In both situations, the targets of the threats were named specifically, a factor to which I assign great weight in today's case. In *J.S.*, we found it particularly important that the threats were not communicated directly to Mrs. Fulmer, *see* 807 A.2d at 859, just as the threats in this case were not communicated directly to Officer Kosko or Detective Zeltner. Mrs. Fulmer suffered emotional trauma, perhaps even more extensively than did the officers here.

Despite these similarities, it is the content of the threats that distinguishes the present case from *J.S.* We ultimately concluded that the eighth grader's statements in *J.S.* objectively could not be taken seriously, characterizing the threats against Ms. Fulmer as "a sophomoric, crude, highly offensive and perhaps misguided attempt at humor or parody." *Id.* The depictions of Ms. Fulmer were cartoons, drawings, and absurd comparisons to Adolf Hitler. The same cannot be said here. Although the cases share numerous similarities, the threats themselves do not. Here, the threats to the officers were real, specific, and violent, with nothing of record to indicate that the threats should not be taken seriously or that Knox and Beasley were unable to carry them out. I discern no substantive basis that would compel us to relegate Knox's threats to the same category into which we cast J.S.' threats. Hence, I find *J.S.* to be readily distinguishable.

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[14] Ultimately, this Court held, while the School District could punish J.S. for his expressive conduct pursuant to the United States Supreme Court's decision in *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969) (holding that a school district may prohibit or punish speech if it demonstrates that the student speech materially disrupts class work, results in substantial disorder in the school, invades the rights of others, or if it is reasonably foreseeable that the speech will do so), the basis for such punishment must rest upon school disruption rather than on the assertion of a true threat. Relying upon *Tinker*, we held that the website "created disorder and significantly and adversely impacted the delivery of instruction." *J.S.*, 807 A.2d at 869. Thus, the District's disciplinary action did not violate J.S.'s First Amendment rights. *Id.*

Ultimately, because I agree with the result reached by the Majority, I concur. However, I respectfully dissent as to the analysis developed and used by the Majority.

Justice Donohue joins this concurring and dissenting opinion.