No. _____

IN THE

Supreme Court of the United States

CALVIN FAIR,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

APPENDIX
ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

JENNIFER N. SELLITTI, Esq.
New Jersey Public Defender

DANIEL S. ROCKOFF, Esq.*
New Jersey Assistant Deputy Public Defender

Office of the New Jersey Public Defender
31 Clinton St., 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
(973)-877-1200
(973)-877-1239 (fax)
Daniel.Rockoff@opd.nj.gov

Attorneys for Petitioner
**Counsel of Record*

INDEX OF APPENDICES

Pages

SUPREME COURT OF NEW JERSEY

A-20 September Term 2022

086617

State of New Jersey,

Plaintiff-Appellant,

v.

Calvin Fair,

Defendant-Respondent.

On appeal from the Superior Court,
Appellate Division, whose opinion is reported at
469 N.J. Super. 538 (App. Div. 2021).

Argued	Decided
September 12, 2023	January 16, 2024

Alecia Woodard, Assistant Prosecutor, argued the cause for appellant (Raymond S. Santiago, Monmouth County Prosecutor, attorney; Daniel I. Bornstein, Designated Counsel, of counsel and on the briefs).

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for respondent (Joseph E. Krakora, Public Defender, attorney; Daniel S. Rockoff, of counsel and on the briefs).

Michael L. Zuckerman, Deputy Solicitor General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Jeremy M. Feigenbaum, Solicitor General, Michael L. Zuckerman, David M. Galemba, Tim Sheehan, and Catlin

A. Davis, Deputy Attorneys General, of counsel and on the briefs).

Alexander Shalom argued the cause for amicus curiae American Civil Liberties Union of New Jersey (American Civil Liberties Union of New Jersey Foundation and Rutgers Constitutional Rights Clinic Center for Law & Justice, attorneys; Alexander Shalom and Jeanne LoCicero, of counsel and on the briefs, and Ronald K. Chen, on the briefs).

Bruce S. Rosen argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, attorneys; CJ Griffin, of counsel and on the briefs, and Bruce S. Rosen and Dillon J. McGuire, on the briefs).

JUSTICE WAINER APTER delivered the opinion of the Court.

This case requires us to decide whether a prosecution for terroristic threats under N.J.S.A. 2C:12-3(a) premised on a mens rea of recklessness is constitutional under the First Amendment to the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution. N.J.S.A. 2C:12-3(a) provides that a person is guilty of third-degree terroristic threats "if he threatens to commit any crime of violence with the purpose to terrorize another or . . . in reckless disregard of the risk of causing such terror or inconvenience."

Defining recklessness in this context as "morally culpable conduct, involving a 'deliberate decision to endanger another,'" Counterman v. Colorado, 600 U.S. 66, 79 (2023) (quoting Voisine v. United States, 579 U.S. 686, 694 (2016)), we hold that a mental state of recklessness is constitutionally sufficient for a "true threats" prosecution under N.J.S.A. 2C:12-3(a). We also hold that an objective component is necessary for a "true threats" prosecution to survive constitutional scrutiny: the State must prove that a reasonable person similarly situated to the victim would have viewed the message as threatening violence.

Finally, defendant Calvin Fair was charged with terroristic threats in violation of N.J.S.A. 2C:12-3(a) and/or (b). We agree with the Appellate Division that on remand, the jury should be charged that they must unanimously agree as to whether defendant violated N.J.S.A. 2C:12-3(a), (b), or both.

We thus affirm in part and reverse in part the judgment of the Appellate Division and remand for a new trial consistent with this opinion.

I.

A.

In February 2015, State Police executed a search warrant at the home defendant shared with his mother and tenants in Freehold. They seized several handguns. In April 2015, defendant referenced the search in three public Facebook posts or comments: (1) "And all thm hammers[1] they found inn my house! None of thm was mines, I still got all of mines lol"; (2) "This is a post for, Freehold Boro poli$e, . . . keep wall wat$hin ur not gonna get my life from fb"; (3) "I hope they burn freehold down!!! . . . & yu if look my way again, im joinin ISIS. Lol."

On May 1, 2015, three Freehold Borough Police Department officers, including Officer Sean Healey, responded to a 911 domestic-violence call at defendant's home. Healey knew defendant and was aware that firearms had been recovered during the February raid.

When police arrived, they saw defendant's girlfriend L.W. outside with her children and some of her belongings. She told police that she had been "thrown out of the house" but wanted to retrieve her television, which was still

---

[1] "Hammers" is a commonly used slang term for guns.

inside. Officers repeatedly knocked on the door, trying to speak to defendant to get the TV returned. Defendant did not answer.

L.W. stated that she did not want to file a complaint or seek a restraining order against defendant. While the police were filling out a victim-notification form, defendant stuck his head out of a second-floor window and yelled: "Please. Just leave. Just leave this property. Because I don't want nothing -- I don't want to talk. There's nothing to talk about. All I did was put her stuff out and she can leave. . . . Please just leave. . . . You all causing too much chaos over here for nothing."

Police moved off defendant's front yard and onto the sidewalk. They asked defendant if he would return L.W.'s television. Defendant appeared to become more agitated, calling the situation "petty" and shouting, "[h]ow many times y'all been through this? How many times y'all came over here? . . . . Just leave my property. Just leave my property. I'm taking care of my mother." Officer Healey yelled, "[w]e're going to go. Have a good day, Calvin. Thank you for your cooperation."

Instead of leaving, Officer Healey told L.W. they were going to sign a complaint on her behalf "right now." L.W. said "Calvin, go in the house before you get in trouble," but defendant began yelling profanities at Officer Healey,

repeatedly calling him the "f---ing devil." When Officer Healey said, "[w]e'll be back with your warrant. . . . So, have fun," defendant shouted, "[y]ou talking crazy, [epithet], talking about signing a f---ing complaint. . . . Always trying to break somebody's a--. That's all you think about, breaking somebody's a--. Sign a complaint to what? I never did anything to you . . . . Absolutely nothing. I never did anything. . . . Get the f--- out of here, [epithet]." Healey responded, "That's disorderly conduct, too."

Defendant then yelled: "F---ing thirsty a-- [epithet]. You thirsty. Worry about a head shot, [epithet]." Officer Healey replied, "And that there is a threat." Another officer on the scene agreed, "That is threats right there." At no point did defendant brandish a weapon.

The officers then got in their cars and left.

Approximately two hours later, defendant posted the following on Facebook:

> I think its about tht time to give Mr. Al Sharpton & Mr Rev[] Jackson, internal affairs & my law[yer] a $all, one thg yu wont do is disrespe$t me or my 84 year old mother kause yu $arry a badge & another thg yu not doin is tryin to keep me inn system with patty fines & $omplaints whn im not ur job . . . . My 84 year old mother didnt deserves her door bein ki$k inn by 30 armed offi$ers with aks & shields drawn. . . . YU WILL PAY, WHOEVA HAD ANY INVOLVEMENT. WASTIN TAX PAYERS MONEY! BRINING ALL

> THM OFFI$ERS OUT FOR A 84 YEAR OLD WOMEN! SO SAD BUT WE WILL HAVE THA LAST LAUGH! #JUSTWAITONIT[.]

Defendant then replied to his own post, "THN YU GOT THESE . . . OFFI$ERS THINKIN THEY KNO UR LIFE!!! . . . . I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT[.]"

After reviewing the public posts, police issued a terroristic threats complaint against defendant. Officer Healey testified that in addition to the "[w]orry about a head shot" comment, he was concerned from the Facebook posts that defendant still had his guns and knew where the officers lived and what cars they drove.

B.

The terroristic threats statute under which the police charged defendant reads, in relevant part:

> (a) A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror . . . .
>
> (b) A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.

[N.J.S.A. 2C:12-3 (emphasis added).]

On August 13, 2015, a Monmouth County Grand Jury indicted defendant on one count of third-degree terroristic threats for

> threatening to commit a crime of violence with the purpose to terrorize [Officer Healey], or in reckless disregard of the risk of causing such terror, or by threatening to kill [Officer Healey], with the purpose to put him in imminent fear of death under circumstances reasonably causing [Officer Healey], to believe the immediacy of the threat and the likelihood that it would be carried out, contrary to the provisions of N.J.S.A. 2C:12-3a and/or b.

Defendant moved to dismiss the indictment, arguing, among other things, that N.J.S.A. 2C:12-3(a) is unconstitutionally overbroad because it criminalizes terroristic threats made with a mens rea of recklessness. The trial court denied the motion, finding defendant's statements, including the "worry about a head shot" comment and the subsequent Facebook post about knowing "what cars the officers drove and where they lived," were a true threat that was not protected by the First Amendment. The court also concluded that defendant's statements were "properly categorized as a threat to kill or to harm" Healey, and "were not political and were not made in a political context."

At trial, the State asked that the court charge the jury on N.J.S.A. 2C:12-3(a) and/or (b). Defendant did not object. The court charged the jury on N.J.S.A. 2C:12-3(a) as follows:

> The first element that the State must prove beyond a reasonable doubt is that defendant threatened to commit any crime of violence. The State alleges that defendant threatened to kill Patrolman Sean Healey.
>
> The words or actions of the defendant must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person. It is not a violation of this statute if the threat expresses fleeting anger or was made merely to alarm.
>
> The second element the State must prove beyond a reasonable doubt is that the threat was made with the purpose to terrorize another or in reckless disregard of the risk of causing such terror. In this case, the State alleges the defendant intended to terrorize Sean Healey. The State need not prove the victim actually was terrorized.
>
> . . . .
>
> A person acts recklessly with respect to the result of his conduct if he consciously disregards a substantial and unjustifiable risk that the result will occur from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the actor, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. One is said to act recklessly if one acts with recklessness, with scorn for the consequences, heedlessly, or foolhardily.

The court then charged the jury on N.J.S.A. 2C:12-3(b), along with the lesser included offense of disorderly conduct. On unanimity, the court instructed: "The verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means you must all agree if the defendant is guilty or not guilty of the charge."

The verdict sheet mirrored the indictment, directing the jury to determine whether the State had proven beyond a reasonable doubt that defendant committed third-degree terroristic threats in violation of N.J.S.A. 2C:12-3(a) and/or (b):

> Defendant Calvin Fair did commit the crime of Terroristic Threats by threatening to commit a crime of violence with the purpose to terrorize Sean Healey, or in reckless disregard of the risk of causing such terror, or by threatening to kill Sean Healey with the purpose to put him in imminent fear of death under circumstances reasonably causing Sean Healey to believe the immediacy of the threat and the likelihood it would be carried out. With respect to this charge, how do you find?

Defendant did not object to any portion of the charge or verdict sheet.

During deliberations, the jury sent a note, asking: "Do both 2C:12-3(a) and 2C:12-3(b) have to be proven beyond a reasonable doubt or just one or the

other?" With the consent of both parties, the court responded: "the answer is it could be . . . one or the other . . . ."

Twenty minutes later, the jury reached a guilty verdict. They were not polled as to whether they found defendant guilty of N.J.S.A. 2C:12-3(a), (b), or both.

Defendant was sentenced to three years in prison.

C.

Defendant appealed, arguing that the "reckless disregard" portion of N.J.S.A. 2C:12-3(a) is unconstitutionally overbroad and that the indictment, jury instructions, and verdict sheet were "'poorly structured,' making it '[im]possible to know whether the jury reached a . . . unanimous verdict.'" State v. Fair, 469 N.J. Super. 538, 541 (App. Div. 2021) (alteration in original).

The Appellate Division reversed and remanded, agreeing with defendant that the "reckless disregard" portion of N.J.S.A. 2C:12-3(a) is "facially invalid." Id. at 548. According to the Appellate Division, in order to comply with the First Amendment, a prosecution for true threats "requires proof that a speaker specifically intended to terrorize." Ibid. The Appellate Division relied on the United States Supreme Court's statement in Virginia v. Black that "'[t]rue threats' encompass those statements where the speaker means to

communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." 538 U.S. 343, 359 (2003) (quoting Watts v. United States, 394 U.S. 705, 708 (1969)); Fair, 469 N.J. Super. at 550.

The court also agreed with defendant that "[w]ithout an instruction that would have made . . . clear to the jury" that they needed to be unanimous on whether defendant violated N.J.S.A. 2C:12-3(a), (b), or both, "we can have no confidence that the jury did not produce an impermissibly fragmented verdict." Fair, 469 N.J. Super. at 558. When the jury asked if both (a) and (b) had to be proven beyond a reasonable doubt, or if it could be just one or the other, "[t]he judge should have explained, for example, that a guilty verdict could not be rendered if only some of the jurors found a violation of subsection (a) but not (b), and the others found a violation of subsection (b) but not (a)." Id. at 556.

The Appellate Division therefore dismissed the portion of the indictment that charged defendant with acting "in reckless disregard of the risk of causing" terror under N.J.S.A. 2C:12-3(a) and remanded for a new trial on the remainder of the indictment. Id. at 558.

The State filed a notice of appeal as of right to this Court, pursuant to Rule 2:2-l(a)(l), based on a substantial question "arising under the Constitution

of the United States or this State." Defendant moved to dismiss the appeal. We denied defendant's motion to dismiss and ordered the appeal to proceed. We also granted leave to the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), and the Association of Criminal Defense Lawyers of New Jersey (ACDL) to appear as amici curiae.

While the State's appeal was pending, the Supreme Court decided Counterman v. Colorado, which establishes the federal constitutional requirements for a true threats prosecution. 600 U.S. 66 (2023).

II.

The State maintains that N.J.S.A. 2C:12-3(a) is constitutional because Counterman "clarified that true threats are not protected under the First Amendment if they are communicated with a mens rea of recklessness." According to the State, "[d]efendant was not prosecuted for expressing any so-called political opinions. He was prosecuted for threatening to shoot Officer Healey in the head." That threat was not protected by the First Amendment under Counterman, and this Court should not "afford greater protection to true threats under the New Jersey Constitution than that which is afforded under the First Amendment," the State contends. The State also argues that "[t]here was no need for a specific unanimity instruction as to the particular subsection of

the statute that was violated, or the particular factual predicate for a finding of guilt, especially in the absence of a request for either type of instruction."

The Attorney General agrees with the State that Counterman controls the First Amendment inquiry, and that there are no sound reasons to depart from that rule under the New Jersey Constitution. According to the Attorney General, defendant was not engaged in "political speech," and in any event, any rule varying the mens rea depending on whether the threat involved political speech would be both "unworkable" and unjustified in light of the speech-protective safeguards built into Counterman.

Defendant contends that Counterman did not resolve the First Amendment question in this case because while the speech in Counterman involved interpersonal stalking, defendant's statements amounted to "political dissent . . . about his government's criminal justice policies." According to defendant, because political speech has more First Amendment value than interpersonal harassment, it is "not too much to require the government to prove that a protesting speaker intended to make a threat before it can imprison its critic." Defendant further maintains that the "more protective" New Jersey Constitution should be interpreted more broadly than the First Amendment to require a specific intent to threaten. Defendant also asks us to affirm the

Appellate Division's "well-reasoned and unexceptionable application of the relevant case law" on unanimity. Because of the way the verdict sheet was phrased, according to defendant, it is impossible to know if all twelve jurors found him guilty of violating N.J.S.A. 2C:12-3(a), (b), or both.

The ACLU argues that there "can be no clearer example of political protest and advocacy" than defendant's speech in this case. It also contends that we should interpret our State Constitution to require "specific intent to place the victim in fear of bodily harm" in all true threats cases.

The ACDL agrees that our State Constitution "require[s] a higher mens rea than recklessness" in a prosecution for true threats. As a fallback, the ACDL advocates for "at [] least . . . a more exacting standard of recklessness." The ACDL also argues that a specific unanimity instruction was required here because N.J.S.A. 2C:12-3(a) and (b) "are not merely different means of committing the crime of terroristic threats, but separate theories of guilt based upon different acts and different evidence."

III.

A.

We review the constitutionality of a statute de novo, owing no deference to the Appellate Division in deciding a question of law. State v. Pomianek,

221 N.J. 66, 80 (2015). Where the Supreme Court has pronounced the relevant standard under the United States Constitution, "we are bound to follow it as the minimal amount of constitutional protection to be provided." State v. Adkins, 221 N.J. 300, 313 (2015). The New Jersey Constitution may of course provide protections beyond the federal minimum. See, e.g., State v. Schmid, 84 N.J. 535, 557 (1980).

B.

1.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. ___, 138 S. Ct. 2448, 2463 (2018).

But "[t]rue threats of violence . . . lie outside the bounds of the First Amendment's protection." Counterman, 600 U.S. at 72. The canonical case setting forth the doctrine of "true threats" is Watts v. United States. In Watts, the petitioner attended a rally on the Washington Monument grounds. 394 U.S. at 706. During a small-group discussion about police brutality, the petitioner stated that he had received a draft classification of 1-A and was

supposed to report for a physical, but "'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.' 'They are not going to make me kill my black brothers.'" Ibid. The petitioner and the crowd then laughed. Id. at 707.

The petitioner was convicted of violating 18 U.S.C. § 871(a), which prohibited any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States." Id. at 705 (alteration and omission in original). The Supreme Court held that the statute was "[c]ertainly . . . constitutional on its face" but reversed petitioner's conviction because he had not made any true threat to harm the President. Id. at 707. As the Court explained, a statute which criminalizes "a form of pure speech" must, consistent with the "commands of the First Amendment," distinguish between actual threats of violence and constitutionally protected speech. Ibid. Because petitioner's statement, "[t]aken in context," did not truly threaten to kill President Johnson and was instead only a "very crude offensive method of stating a political opposition to the President," the Supreme Court reversed the conviction. Id. at 708.

Under Watts, a person may be convicted of a true threat only if their speech, when taken in context, actually threatens violence. "[P]olitical hyperbole" is simply not a "true 'threat.'" Ibid.

In several subsequent decisions, the Supreme Court discussed, but did not definitively determine, what mens rea is required for a true threats prosecution under the First Amendment.

In Black, the Court explained that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular" person or group of people. 538 U.S. at 359. The Court went on: "The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats 'protects individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" Id. at 359-60 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)). Black struck down a portion of a Virginia statute that prohibited cross burning with "intent to intimidate a person or group of persons" and provided that any cross burning would itself "be prima facie evidence" of such intent. Id. at 347-48 (quoting Va. Code Ann. § 18.2-423). A plurality of the Court explained that the prima facie provision was

unconstitutional because it allowed the state to convict a defendant not only for a cross burned on a person's front yard to intimidate or threaten, but also for a cross burned at a public rally as "a statement of ideology" or "symbol of group solidarity." Id. at 364-67.

Similarly, in Elonis v. United States, the Court reasoned that criminal conduct requires "awareness of some wrongdoing," but interpreted a federal statute that prohibited transmitting "any threat to injure the person of another" through interstate commerce to include a knowing or purposeful mental state. 575 U.S. 723, 738-40 (2015). The Court expressly declined to address whether a mens rea of recklessness would suffice for a true threats prosecution under the First Amendment. Id. at 740-42.

The Supreme Court conclusively answered the question in Counterman, holding that a true threats prosecution "requires proof that the defendant had some subjective understanding of the threatening nature of his statements," but that a "specific intent to threaten the victim" is not required. 600 U.S. at 69, 73. Instead, a mental state of recklessness "is enough." Id. at 73.

Counterman reiterated that true threats of violence must be objectively threatening to a reasonable observer when taken in context. As the Court explained, the word "true" "distinguishes what is at issue from jests,

hyperbole, or other statements that when taken in context do not convey a real possibility that violence will follow (say, 'I am going to kill you for showing up late')." Id. at 74 (internal quotation marks omitted and emphasis added). In other words, a court must consider "what the statement conveys" to the victim before deciding if a threat is objectively "true." Ibid.

But the Court held that in addition to this objective component, the defendant must also have a subjective mental state in order for a true threats prosecution to comport with the First Amendment. Id. at 73. After reviewing the mens rea requirements for some other forms of historically unprotected speech -- recklessness for defamation and purpose or knowledge for incitement and obscenity -- the Court concluded that recklessness was the correct mens rea to require for true threats. Id. at 78-82.

The Court reasoned that it would make little sense to "offer greater insulation" to true threats of violence than to defamatory statements. Id. at 80. First, the societal interests in preventing threats of violence are at least as strong as the societal interests in preventing "truthful reputation-damaging statements about public officials." Id. at 80-81. Second, any "protected speech near the borderline" of a true threat of violence against another person

is "further from the First Amendment's central concerns" than protected speech approaching defamation of a public official. Id. at 81.

Acknowledging that a mental state of purpose or knowledge is required for incitement, the Court held it is not necessary for true threats of violence. Ibid. The Court explained that although prosecutions for "incitement to disorder [are] commonly a hair's-breadth away from political 'advocacy' -- and particularly from strong protests against the government and prevailing social order," the same is not true for prosecutions for threatening actual violence against a specific person or group of people. Ibid. (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

2.

Article I, Paragraph 6 of the New Jersey Constitution provides that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."

In setting forth "an affirmative right" to free speech, the first sentence of Article I, Paragraph 6 goes beyond the text of the First Amendment, and is "broader than practically all other[]" free speech clauses "in the nation." Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000).

Although we often interpret Article I, Paragraph 6 as being "co-extensive with the First Amendment," and allow "federal constitutional principles [to] guide [our] analysis," E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of Franklin, 226 N.J. 549, 568 (2016), in certain contexts we have held that our State Constitution's free speech clause provides "greater protection than the First Amendment." Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012).

C.

Both the United States and the New Jersey Constitutions require jurors to reach a unanimous verdict in a criminal case. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 9; see Ramos v. Louisiana, 590 U.S. ___, 140 S. Ct. 1390, 1397 (2020); State v. Parker, 124 N.J. 628, 633 (1991); see also R. 1:8-9. Unanimity generally requires that jurors "'be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). Jurors must unanimously agree that the defendant committed "every element of the crime with which he is charged, beyond a reasonable doubt"; however, they need not unanimously agree as to "which of several possible sets of underlying brute facts make up a particular

element, or which of several possible means the defendant used to commit an element of the crime." State v. Macchia, 253 N.J. 232, 252-53 (2023) (internal quotation marks and citations omitted).

IV.

A.

1.

We substantially adopt the Counterman standard and hold that in a criminal prosecution for a true threat of violence under N.J.S.A. 2C:12-3(a), a mens rea of recklessness suffices for purposes of both the First Amendment to the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution.

Under this standard, to be found guilty of a violation of N.J.S.A. 2C:12-3(a), a defendant must have consciously disregarded a substantial and unjustifiable risk that their threat to commit a crime of violence would terrorize another person, and that conscious disregard must be a gross deviation from the standard of conduct that a reasonable person in a defendant's situation would observe.

In the context of true threats, a mens rea of recklessness is demanding. As the Court explained in Counterman, "[i]n the threats context," a mens rea

of recklessness "means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'" 600 U.S. at 79 (quoting Elonis, 575 U.S. at 746). Although it is not purposeful or knowing, "recklessness is morally culpable conduct, involving a 'deliberate decision to endanger another.'" Ibid. (quoting Voisine, 579 U.S. at 694). Indeed, "reckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm." Id. at 80.

This understanding of recklessness for purposes of a true threats prosecution is generally consistent with, although more specific than, the general definition of recklessness in the Criminal Code, set forth in N.J.S.A. 2C:2-2(b)(3):

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

But it requires more than the standard of recklessness conveyed in the judge's instructions to the jury in this case, which provided in part that "[o]ne

is said to act recklessly if one acts . . . heedlessly, or foolhardily." (emphasis added). That language, drawn from the relevant model charge, see Model Jury Charges (Criminal), "Terroristic Threats (N.J.S.A. 2C:12-3(a))" (rev. Sept. 12, 2016), is not consistent with the standard we announce today.

With this understanding of recklessness as "morally culpable conduct" in the context of true threats, we agree that it is constitutionally sufficient for a prosecution of a threat of violence under N.J.S.A. 2C:12-3(a). We agree with Counterman that a mens rea of recklessness, so understood, correctly balances the need to avoid chilling protected speech with the need to protect individuals and society from the profound harms that threats of violence engender.

Like Counterman, we see no reason to "offer greater insulation" to true threats of violence than to true statements made about public figures. 600 U.S. at 80. And like Counterman, we decline to impose incitement's knowing or purposeful standard on true threats of violence under N.J.S.A. 2C:12-3(a). While the context for an incitement charge is often "political advocacy" that can easily "bleed over . . . to dissenting political speech at the First Amendment's core," id. at 81, that is not true for a threat of violence directed against a specific individual.

Defendant argues that a mens rea of recklessness could "fall short in prosecutions for abrasively criticizing officials in positions of power, who are often stand-ins for displeasure at the government" and "in prosecutions for civil rights advocacy, especially when such rallying for social change involves interactions with law enforcement officers, who are historically suspicious about the alleged threats posed by reform movement sympathizers." Therefore, at least in prosecutions for "dissenting political speech at the First Amendment's core," defendant contends, like his speech in this case, the State must be held to a "strong intent requirement." (quoting Counterman, 600 U.S. at 81).

We need not decide whether a different intent requirement should apply to prosecutions under N.J.S.A. 2C:12-3(a) for dissenting political speech, because no such speech was prosecuted here.

As earlier noted, N.J.S.A. 2C:12-3(a) makes a person guilty of a crime only "if he threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror." It does not, on its face, criminalize political speech in the form of disparaging government officials, criticizing law enforcement, or even condemning the government itself.

And in this case, defendant was prosecuted for no such thing. He was prosecuted for threatening to shoot a police officer in the head.

Defendant claims that he was prosecuted because he "engaged in a heated debate with an officer . . . and then spoke critically to his Facebook followers, about his government's criminal justice policies." Further, defendant submits, he was "punish[ed]" because he "challenged [the] officers' policies and called for reform," while "protest[ing] against the government and [the] prevailing social order."

That is incorrect. At trial, the State argued that defendant was guilty of terroristic threats when he said, "[w]orry about a head shot, [epithet]." And the State urged that the threat to kill Officer Healey was given "weight," "immediacy," and "legitimacy" from defendant's April Facebook post that he still had his guns, and defendant's comment on Facebook, made less than three hours after the threat, "I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT[.]"

The State did not assert that defendant was guilty of violating N.J.S.A. 2C:12-3 because he told the police they were "causing too much chaos over here for nothing"; because he called Officer Healey "the f---ing devil"; or because he said that Officer Healey was "[a]lways trying to break somebody's

a--." Instead, the State repeatedly maintained that defendant was guilty of terroristic threats because he threatened to shoot Officer Healey in the head.

The same is true for defendant's Facebook posts. Defendant was not prosecuted for writing "I hope they burn freehold down!!!" or "im joinin ISIS. Lol." He was not prosecuted for posting that it was time to contact the Reverend Al Sharpton, the Reverend Jesse Jackson, Internal Affairs, or his lawyer. He was not prosecuted for berating the police for disrespecting his mother and trying to keep him in the system with petty fines and complaints. And he was not prosecuted for writing "YU WILL PAY, WHOEVA HAD ANY INVOLVEMENT. WASTIN TAX PAYERS MONEY! … SO SAD BUT WE WILL HAVE THA LAST LAUGH! #JUSTWAITONIT[.]" Defendant was prosecuted for threatening to shoot Officer Healey in the head, and then concretizing the threat mere hours later with the words "I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT[.]"

Quite simply, it is clear from the entirety of the trial that defendant was not prosecuted for "dissenting political speech." He was prosecuted for threatening to shoot a police officer in the head.

And defendant made this statement not at a political protest, march, demonstration, or rally, but when police responded to a domestic-violence call

at his home. We therefore decline to consider whether a mens rea other than recklessness would be required if the State attempted to prosecute "dissenting political speech" as a true threat of violence under N.J.S.A. 2C:12-3(a).

We also disagree with defendant that Watts would have been decided differently under the recklessness standard we adopt today. Watts did not turn on the defendant's subjective mens rea. It turned on the objective component of a prosecution for true threats: whether the defendant's words, taken in context, would be understood as threatening to a reasonable observer. Watts, 394 U.S. at 708. In holding that they would not, the United States Supreme Court looked at the "context" of the defendant's statement during a small-group discussion about police brutality at the Washington Monument, its conditional phrasing, and the reactions of others in the group (laughter), and concluded that the defendant's statement was "political hyperbole" and not a true threat. Ibid. Watts concluded that there was no true threat because the statement at issue was not objectively threatening; the defendant's subjective mens rea did not come into play.

2.

In addition to a subjective mens rea of at least recklessness, we hold that an objective component is necessary for a prosecution for a threat of violence

under N.J.S.A. 2C:12-3(a) to survive First Amendment and Article I, Paragraph 6 scrutiny.

On the objective element, we depart from Counterman and from the charge that the trial court provided to the jury in this case in one minor respect. The trial and appellate courts in Counterman had assessed the threat under "an objective reasonable person standard," requiring the State to prove "that a reasonable person would have viewed the . . . messages as threatening." Counterman, 600 U.S. at 71 (emphasis added) (internal quotation marks and citations omitted). And the trial court here charged the jury that the threat "must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person. It is not a violation of this statute if the threat expresses fleeting anger or was made merely to alarm." (emphasis added).

But we have previously held that for a prosecution under N.J.S.A. 2C:12-3(b), which requires that a threat be made "under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out," proof "must be measured by an objective standard" that must include consideration of "a [victim's] individual circumstances and background." Cesare v. Cesare, 154 N.J. 394, 402-03 (1998) (emphasis added).

Similarly, in H.E.S. v. J.C.S., we explained that the "cause a reasonable person to fear" element in N.J.S.A. 2C:12-10(b), which criminalizes domestic-violence stalking, requires consideration of "whether a reasonable person in [the victim's] situation, knowing what [the victim knew about the defendant] under the totality of the circumstances, would have feared bodily injury as a result of [the defendant's] alleged speech and conduct." 175 N.J. 309, 330 (2003) (emphasis added). Our interpretation was in keeping with the Legislature's instruction in N.J.S.A. 2C:12-10(a)(4) that, "[a]s used in this act . . . '[c]ause a reasonable person to fear' means to cause fear which a reasonable victim, similarly situated, would have under the circumstances."

We therefore hold that the objective inquiry, in which the jury determines whether a reasonable person would have viewed the defendant's words as threatening violence, must be undertaken not from the perspective of an anonymous ordinary person, but from the perspective of a reasonable person similarly situated to the victim. As the Indiana Supreme Court has explained, because "the particular facts and circumstances known to each victim are the very facts from which threatening implications are generally drawn," the objective element of a true threats prosecution must consider "whether it was objectively reasonable for the victim to fear for their safety" in

the context of their experiences with the perpetrator. Brewington v. State, 7 N.E.3d 946, 969 (Ind. 2014) (requiring a "'reasonable victim' test," rather than a "reasonable person" test, in a true threats prosecution, to capture "what a reasonable person would perceive if similarly situated to the victim" (emphasis added)).

This is another way of saying that context matters. Considering the perspective of one similarly situated to the victim, which entails consideration of prior interactions between the parties, protects against convictions for statements made in jest, political dissent, or angry hyperbole, while allowing the State to prosecute true threats of violence that would instill fear of injury in a reasonable person in the victim's position. The inquiry in this case is thus not whether any ordinary person would have feared for their safety, but whether a reasonable police officer in Officer Healey's position would have feared for their safety, given the entire interaction with defendant.

3.

We thus remand for a new trial correctly charging the jury on both the objective and subjective components of N.J.S.A. 2C:12-3(a), consistent with this opinion.

We also ask the Model Criminal Jury Charges Committee to revise the model charge for N.J.S.A. 2C:12-3(a), both as to the subjective recklessness standard -- including by removing the terms "heedlessly" and "foolhardily" -- and the objective standard discussed herein.

B.

On remand, the court should additionally charge the jury that it must agree unanimously on whether defendant violated N.J.S.A. 2C:12-3(a), (b), or both.

The difference between an element of an offense and a means of committing an offense can be difficult to parse. The definition of "element" in the criminal code does not provide help: it defines "element" and "material element" to include different means or brute facts that would satisfy a single element of a crime. See N.J.S.A. 2C:1-14(h) ("'Element of an offense' means (1) such conduct or (2) such attendant circumstances . . . as (a) Is included in the description of the forbidden conduct in the definition of the offense; (b) Establishes the required kind of culpability . . . ."); N.J.S.A. 2C:1-14(i) ("'Material element of an offense' means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other

matter similarly unconnected with (1) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense . . . .").

As we explained in Macchia, if a statute required the use of a deadly weapon as a single element of a crime and provided that the element could be satisfied through use of a "'knife, gun, bat, or similar weapon,'" then the use of a knife, gun, bat, or other weapon would be different types of "conduct" that would be "included in the description of the forbidden conduct in the definition of the offense," and would "[e]stablish[] the required kind of culpability" -- making each fall within the statute's definition of "material element" in N.J.S.A. 2C:1-14(i). Macchia, 253 N.J. at 254 (quoting Mathis v. United States, 579 U.S. 500, 506 (2016) and N.J.S.A. 2C:1-14(h) and (i)). Yet the four weapons would undeniably be means of satisfying one single element of the crime: use of a deadly weapon.

Here, it suffices to note that the terroristic threats statute, N.J.S.A. 2C:12-3, "does not identify an individual element of which subsections [(a) and (b)] are mere examples," but rather "lists in the disjunctive [two] separately enumerated, alternative" crimes of terroristic threats. United States v. McCants, 952 F.3d 416, 426 (3d Cir. 2020) (analyzing N.J.S.A. 2C:15-1). That is clear from the plain text of the statute, which does not consist of one

section setting forth a crime of terroristic threats that can be satisfied through various alternative means, and instead sets forth two separate crimes of terroristic threats. See N.J.S.A. 2C:12-3 ("(a) A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another . . . or in reckless disregard of the risk of causing such terror . . . . (b) A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out."). Given the structure of the statute, we conclude that a jury must unanimously agree as to whether a defendant is guilty of N.J.S.A. 2C:12-3(a), (b), or both, and must be so charged.

V.

The judgment of the Appellate Division is affirmed in part and reversed in part, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, FASCIALE, and NORIEGA join in JUSTICE WAINER APTER's opinion.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0913-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CALVIN FAIR,

Defendant-Appellant.

APPROVED FOR PUBLICATION

December 9, 2021

APPELLATE DIVISION

Argued October 19, 2021 – Decided December 9, 2021

Before Judges Fisher, Currier and DeAlmeida.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Indictment No. 15-08-1454.

Daniel S. Rockoff, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Daniel S. Rockoff, of counsel and on the brief).

Carey J. Huff, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Lori Linskey, Acting Monmouth County Prosecutor, attorney; Carey J. Huff, of counsel and on the brief).

The opinion of the court was delivered by

FISHER, P.J.A.D.

Defendant was charged in a one-count indictment of making terroristic threats within the meaning of "N.J.S.A. 2C:12-3a and/or b." The indictment was never amended, and defendant never moved for a particularization of what part of N.J.S.A. 2C:12-3 was being charged. Instead, the matter went to trial and, after two days of testimony, the jury was asked to decide: whether, on May 1, 2015, defendant threatened to commit a crime of violence "with the purpose to terrorize" Officer Sean Healey, or whether he made that threat "in reckless disregard of the risk of causing such terror," or whether he made that threat "with the purpose to put [Officer Healey] in imminent fear of death" under circumstances reasonably causing Officer Healey "to believe the immediacy of the threat and the likelihood it would be carried out." The jury responded "guilty" to this multi-faceted question.

Defendant appeals, arguing (1) the reckless-disregard portion of N.J.S.A. 2C:12-3(a) is unconstitutionally overbroad, and (2) the indictment, jury instructions, and verdict sheet were "poorly structured," making it "[im]possible to know whether the jury reached a truly unanimous verdict." We agree with both arguments. The reckless-disregard portion of N.J.S.A. 2C:12-3(a) is unconstitutionally overbroad because it has the capacity to criminalize speech and expressions protected by the First Amendment. This holding alone requires

that defendant be given a new trial since no one can tell from the jury verdict whether defendant was convicted under the unconstitutional portion of N.J.S.A. 2C:12-3(a) or the remaining provisions which clearly pass constitutional muster. We also agree with defendant's argument that the jury verdict sheet insufficiently guarded against the lack of jury unanimity.

We first discuss the evidence adduced at trial and the manner in which the jury was asked to determine defendant's guilt, and then explain why the reckless-disregard portion of N.J.S.A. 2C:12-3(a) is unconstitutionally broad, followed by a discussion as to why the judge's instructions did not ensure a unanimous verdict as required by Rule 1:8-9.

The jury heard evidence that, on May 1, 2015, Patrolmen Sean Healey and Samuel Hernandez, as well as another officer, responded to an alleged domestic violence incident at defendant's Freehold home. When they arrived, officers found L.W., defendant's girlfriend, standing outside with her child; defendant was inside. L.W. explained to the officers that she was asked to leave the home and she merely wanted her television, still inside, before departing. Defendant then began yelling from a second-story window. An exchange between defendant and the officers that lasted about twenty minutes was recorded by a

dash-mounted motor vehicle recording device; it included the following excerpts:

> DEFENDANT: (Indiscernible). Please. Just leave. Just leave this property. Because I don't want nothing -- I don't want to talk. There's nothing to talk about. All I did was put her stuff out and she can leave. This is private property. Please just leave. I don't want --
>
> . . . .
>
> DEFENDANT: -- back up. If she wants the TV she can have that, but I want you all to leave off my property, because you all cause too much -- too much chaos over here for nothing.
>
> HEALEY: Okay.
>
> DEFENDANT: She call you over here for nothing.
>
> HEALEY: Calvin, --
>
> DEFENDANT: For nothing.
>
> HEALEY: -- you want to give her the TV now?
>
> . . . .
>
> DEFENDANT: I want her to leave my property. . . . So give her the TV. I don't want to try to keep nothing she owns.
>
> HEALEY: Okay.
>
> [ANOTHER OFFICER]: We're off your property.
>
> DEFENDANT: Because it's -- it's -- it's petty bro. Petty.

. . . .

DEFENDANT: I don't understand. Like, you all come -- like, this is (indiscernible). How many times you all been through this? How many times (indiscernible) over here and (indiscernible) you all have to think of. How many times?

. . . .

DEFENDANT: Just leave my property.

HEALEY: It's my fault?

DEFENDANT: I'm taking care of my mother.

HEALEY: It's my fault now?

DEFENDANT: I'm taking care of my mother.

. . . .

DEFENDANT: Just leave the property. There's nothing to talk about. Just (indiscernible) --

HEALEY: Yeah, so you can keep barking at me and --

. . . .

HEALEY: Hey, all right. We're going to go. Have a good day, Calvin. Thank you for your cooperation.

. . . .

L.W.: Calvin, go in the house before you get in trouble.

DEFENDANT: -- ass nigga. You're the fucking devil.

L.W.: Go ahead before you get in trouble.

HERNANDEZ: What kind of devil are you?

HEALEY: I don't know.

. . . .

HEALEY: You're the one barking out of the window like a six-year-old.

. . . .

DEFENDANT: -- (indiscernible), you won't even leave.

. . . .

DEFENDANT: -- (indiscernible) it's nothing. It is about nothing. That's what I'm talking about. The devil. (Indiscernible) you the fucking devil, nigga. Fucking devil. I never did anything to fucking disrespect you or any officer, nigga. So what is -- what was you trying to convince her to sign a complaint? On what? For nothing. For nothing.

. . . .

HEALEY: We'll be back with your warrant.

HERNANDEZ: And then --

HEALEY: So, have fun.

. . . .

DEFENDANT: You fucking devil ass nigga.

. . . .

DEFENDANT: I'm taking care of my mother right now, yo.

HEALEY: Okay. That's why I said we'll be back. It's fine. Go back and take care of your mother.

DEFENDANT: Who cares if you coming back? That don't mean nothing.

HEALEY: Listen to yourself.

DEFENDANT: And a $200,000 bail and (indiscernible) and now you think I'm fucking -- a fucking -- complaint now on me?

. . . .

DEFENDANT: You talking crazy, nigga, talking about signing a fucking complaint. Like that shit means something. Always trying to break somebody's ass. That's all you think about, breaking somebody's ass. Sign a complaint to what? I never did anything to you. (Indiscernible), nigga.

. . . .

HERNANDEZ: Go back inside, brother.

DEFENDANT: Absolutely nothing. I never did anything. You (indiscernible) sign a complaint. Get the fuck out of here, nigga.

HEALEY: That's disorderly conduct, too.

. . . .

DEFENDANT: (Indiscernible) fucking tough guy.

HEALEY: I'm not the one hanging out the window.

. . . .

HEALEY: Come out here.

DEFENDANT: Yeah, I'm hanging out the window because I'm taking care of my fucking mother, my 83-year-old mother, nigga.

. . . .

DEFENDANT: I don't got nothing to come down there to talk to you about. I didn't do anything, so why I got to talk to you?

. . . .

DEFENDANT: Fucking thirsty ass nigga. You thirsty. Worry about a head shot, nigga.

HEALEY: And that there is a threat.

HERNANDEZ: That is threats right there.

With those last comments, the officers departed.

Later, Officer Healey checked defendant's Facebook page, finding the following statements posted on Facebook by defendant on April 8, 2015:

> Yall niggas gonna fu$kin morn! R yall tryin take another life, its probably sumbdy yu growup with right! Smh Whts its gonna take! To see another life go right Smh for all yu niggas tht wanna be on ur bs at times

> like this! Im take ur fu$kin soul! And all thm hammers they found inn my house! None of thm was mines, I still got all of mines[1] lol Im askin yu freehold niggss ni$e, PlZ DON'T DO THIS BEEFIN SHIT AT A TIME LIKE THIS. -- [angry face emoji] feeling mad.

On April 9, 2015, defendant posted again:

> This is a post for, Freehold Boro poli$e, Homdel State poli$e, & Monmouth county Tfor$e, FBI, DEA, keep wall wat$hin ur not gonna get my life from fb doesn't show anythg about my life but only tha thgs i wanna post lol Oh yea . . . it does show I TAKE VERY GOOD $ARE OF MY MOTHER & KIDS LMFAO KEEP TRYING. -- [tongue-out emoji] feeling silly.

Defendant also added a comment to this post: "I hope after everythg is done!! I hope they burn freehold down!!! [smiley face emoji] & yu if look my way again, im joinin ISIS. Lol."

Defendant posted a similar message on Facebook about an hour after the officers left his home on May 1, 2015, followed by an additional comment a few hours later: "THN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FU$K OUTTA HERE!! I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT." All these social media statements were admitted into evidence at trial.

---

[1] Put in perspective, the record reveals that a few months earlier, the State Police raided the same home – in which defendant, his mother, and three tenants resided – and seized multiple handguns and heroin.

The State called three witnesses to testify: Officers Healey and Hernandez, and Detective Richard Schwerthoffer, who testified about the search of defendant's home in February 2015 and his suggestion on May 1, 2015 that Officer Healey look into what might be on defendant's Facebook page. Defendant called Officer Healey to testify in his case and then rested.

In charging the jury, the judge read the single count of the indictment – repeating the confusing statement in the indictment that defendant was charged with acting "contrary to the provisions of N.J.S.A. 2C:12-3(a) and/or (b)" (emphasis added)[2] – and then read N.J.S.A. 2C:12-3(a), appropriately leaving out irrelevant phrases:

> A person is guilty of a crime if he threatens to commit any crime of violence with the purpose to terrorize another or in reckless disregard of the risk of causing such terror.[3]

---

[2] See State v. Gonzalez, 444 N.J. Super. 62 (App. Div. 2016) (recognizing the dangers of the phrase "and/or" in similar circumstances).

[3] Subsection (a) of N.J.S.A. 2C:12-3 states in full:

> A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience. A violation of

The judge then broke down the statute for the jury, explaining that to convict the State was required to prove beyond a reasonable doubt two things, the first being that defendant "threatened to commit a crime of violence." The second element was described in alternatives, requiring the jury to determine whether the threat: "was made with the purpose to terrorize another" or was made "in reckless disregard of the risk of causing such terror." He then defined for the jury the words "purposely" and "recklessly."

The trial judge then told the jury that "[t]here's another form of terroristic threats that applies to this case," referring to N.J.S.A. 2C:12-3(b), which he quoted in pertinent part as follows:

> A person is guilty of a crime if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the

---

> this subsection is a crime of the second degree if it occurs during a declared period of national, State or county emergency. The actor shall be strictly liable upon proof that the crime occurred, in fact, during a declared period of national, State or county emergency. It shall not be a defense that the actor did not know that there was a declared period of emergency at the time the crime occurred.
>
> [Emphasis added.]

As with his description of subsection (a), the judge sensibly read to the jury only the emphasized parts of subsection (b).

> victim to believe the immediacy of the threat and the likelihood that it will be carried out.[4]

As for this part of the charge, the judge described for the jury the three elements the State needed to prove beyond a reasonable doubt in order to convict, namely: (1) "[t]hat defendant threatened to kill another person"; (2) "[t]hat the threat was made with the purpose to put the person in imminent fear of death"; and (3) "[t]hat the threat was made under circumstances which reasonably caused the person to believe that the threat was likely to be carried out." The judge then accurately defined each of these elements for the jury.

After additional instructions not relevant here, the judge told the jurors that "[t]he verdict must represent the considered judgment of each juror and must be unanimous as to each charge. This means you must all agree if the defendant is guilty or not guilty of the charge."

The judge did not explain that a unanimous verdict was required on any one of the different terroristic-threat allegations charged here. Near the end of the charge, the judge provided the jury with a verdict sheet, which asked the jury to determine whether defendant was guilty or not guilty of the following:

> On or about 01 May 2015 in the Borough of Freehold, [d]efendant Calvin Fair did commit the crime of

---

[4] The judge quoted the statute verbatim, leaving out only the statute's reference to that crime as being "of the third degree."

> [t]erroristic [t]hreats by threatening to commit a crime of violence with the purpose to terrorize Sean Healey, or in reckless disregard of the risk of causing such terror, or by threatening to kill Sean Healey with the purpose to put him in imminent fear of death under circumstances reasonably causing Sean Healey to believe the immediacy of the threat and the likelihood it would be carried out.

The jury started deliberating shortly after noontime and continued until sent home about three hours later.

The next day the jury continued deliberating until, later in the afternoon, it sent to the judge a note posing the following question: "Do both 2C:12-3(a) and 2C:12-3(b) have to be proven beyond a reasonable doubt or just one or the other?" In a brief colloquy with counsel, the judge revealed he intended to tell the jury that it could be either one – that the jury did not have to find guilt beyond a reasonable doubt under both subsections (a) and (b) – to which the prosecutor and defense counsel agreed. The judge then instructed the jury that the prosecution had "two alternative theories of terrorist threats," and he again described the elements of those theories. At the conclusion of his remarks, the judge added:

> So, yes, the answer [to the jury's question] is it could be . . . one or the other, but in either event it has to be proven beyond a reasonable doubt to your satisfaction.

He lastly instructed the jurors that if he had not answered the question to their satisfaction, they should send out another note. The jury sent no further notes and returned a guilty verdict twenty minutes later.

As can be seen, the jury was permitted to find defendant guilty without specifying whether it found defendant violated subsection (a) or (b) of N.J.S.A. 2C:12-3, or, if it found defendant guilty under subsection (a), whether he acted "with the purpose to terrorize another" or whether he acted "in reckless disregard of the risk of causing such terror."

Because we conclude, as defendant has argued, that the "reckless disregard" portion of subsection (a) of N.J.S.A. 2C:12-3 is unconstitutionally overbroad, defendant must be given a new trial because the manner in which the jury was asked to publish their verdict does not reveal whether it found defendant guilty under the "reckless disregard" standard. We also agree with the argument that the judge's instructions did not ensure that the jury was unanimous on whatever portion of N.J.S.A. 2C:12-3 it may have convicted defendant of committing. We turn first to the constitutional argument.

I

Defendant argues N.J.S.A 2C:12-3(a) is unconstitutionally overbroad because it proscribes speech that does not constitute a "true threat." He argues

the First Amendment requires proof that a speaker specifically intended to terrorize and subsection (a)'s reckless-disregard element is facially invalid, and the statute is overbroad, because it "permits a true threat prosecution even if a reasonable listener would not have believed that the threat would be carried out." We agree.[5]

The First Amendment declares that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This limitation on governmental power is made applicable to the States by the Fourteenth Amendment. Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2463 (2018). "The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." R.A.V. v. St. Paul, 505 U.S. 377, 382 (1992) (citations omitted). The Supreme Court, however, has recognized "a few limited" categories of speech which may be restricted based

[5] Defendant's notice of appeal did not identify the pretrial order that denied his motion to dismiss the indictment on First Amendment grounds as required by Rule 2:2-3 to preserve the argument for appellate review. But because defendant has raised important constitutional issues that have been thoroughly briefed by both sides, we exercise our discretion to consider the issue despite defendant's mistaken failure to comply with Rule 2:2-3. See Kornbleuth v. Westover, 241 N.J. 289, 299 (2020); Ridge at Back Brook, LLC v. Klenert, 437 N.J. Super. 90, 97 n.3 (App. Div. 2014).

on their content, including defamation, obscenity, "fighting words," incitement to imminent lawless action, and – as relevant here – true threats. Virginia v. Black, 538 U.S. 343, 358-59 (2003).

The true threat doctrine originated in Watts v. United States, 394 U.S. 705 (1969), where the defendant was convicted under a federal statute that prohibited "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States"; the defendant stated at a public rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Id. at 705-06. The Court held that the defendant's conviction violated the First Amendment, reasoning that, in context, his statement was not a "threat" but mere political hyperbole. Id. at 708. In so ruling, the Court emphasized our "profound national commitment to the principle that debate on public issues . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," as well as "vituperative, abusive, and inexact" language. Ibid. (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Defendant argues N.J.S.A. 2C:12-3(a) also goes too far because, by authorizing convictions based on speech made in "reckless disregard" for its consequences, the statute crosses the constitutional line the Supreme Court drew

in Black. That is, Black held that Virginia's statute did "not run afoul of the First Amendment" because it did not just ban cross burning; it banned cross burning "with intent to intimidate." 538 U.S. at 362. The Court held that a state can punish threatening speech or expression only when the speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Id. at 359 (emphasis added).

Following Black, some federal courts of appeals recognized that, when charging a threat crime, the prosecution must prove that the speaker intended to intimidate or terrorize and anything less would fall outside the "true threat" exception to the First Amendment's protection. In United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011), the court of appeals, recognizing the inconsistencies in its own pre-Black cases, concluded in the wake of Black "that 'the element of intent [is] the determinative factor separating protected expression from unprotected criminal behavior'" (quoting United States v. Gilbert, 813 F.2d 1523, 1529 (9th Cir. 1987)). And, so, the Bagdasarian court held that an Act of Congress, which made it a felony to threaten to kill or do bodily harm to a major presidential candidate, required proof that "the speaker subjectively intend[ed] the speech as a threat." Ibid. Another court of appeals

reached this same result in considering a prosecution brought under an Act of Congress which criminalized the transmission in interstate commerce of "any communication containing . . . any threat to injure the person of another." United States v. Heineman, 767 F.3d 970, 972, 978-79 (10th Cir. 2014) (reading Black to require proof that the defendant "intended the recipient to feel threatened"). And a third found it unnecessary to decide the issue but stated in dictum that "[i]t is more likely . . . an entirely objective definition is no longer tenable." United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008).[6]

Closer to the issue before us, Kansas's highest court analyzed and found unconstitutionally broad K.S.A. 2018 Supp. 21-5415(a)(1), a statute similar to N.J.S.A. 2C:12-3(a) in that it proscribes threats made "in reckless disregard of causing fear." State v. Boettger, 450 P.3d 805, 818 (Kan. 2019). The Kansas Court held that a "reckless disregard" standard rendered the statute unconstitutionally overbroad, concluding that Black does not permit a conviction for speech or expression unless the speaker "possessed the subjective

[6] We are mindful that not all federal courts of appeals view Virginia v. Black as did the courts of appeals for the Seventh, Ninth and Tenth Circuits. That is, these other courts have determined that proof of an intent to make the statement is constitutionally necessary, not the intent to threaten. See United States v. Martinez, 736 F.3d 981, 986-87 (11th Cir. 2013); United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012); United States v. White, 670 F.3d 498, 508-09 (4th Cir. 2012); United States v. Mabie, 663 F.3d 322, 332 (8th Cir. 2011).

intent to both (1) utter threatening words and (2) cause another to fear the possibility of violence." Boettger, 450 P.3d at 807-10. After wading through the various decisions of the federal courts of appeals which interpreted the Black majority opinion and its invocation of the word "intent" in its definition of a true threat as merely suggesting an intent to utter the words, see, e.g., footnote 6, the Boettger court expressed its agreement with Heineman, in which the court held that Black "establish[ed] that a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened," 450 P.3d at 814 (quoting Heineman, 767 F.3d at 978), and stated its agreement with the conclusion reached by Bagdasarian as well. The Boettger court thus concluded that Black's majority "determined an intent to intimidate was constitutionally, not just statutorily, required." Id. at 815.

In stating our agreement with the Kansas Supreme Court's application of Virginia v. Black to a statute similar to N.J.S.A. 2C:12-3(a), we recognize that the matter is not entirely free from doubt. Other state courts have reached different results than the Kansas Supreme Court, see State v. Taupier, 193 A.3d 1, 18-19 (Conn. 2018); Major v. State, 800 S.E.2d 348, 352 (Ga. 2017), while another state court suggested in dictum that a subjective intent to threaten is constitutionally required, Brewington v. State, 7 N.E.3d 946, 964 (Ind. 2014).

See also State v. Carroll, 456 N.J. Super. 520, 538-43 (App. Div. 2018) (discussing these concepts in the context of a conviction for retaliation against a witness, N.J.S.A. 2C:28-5(b)). As we have already observed, there is a disagreement among the federal courts of appeals about Black's reach, and Black itself did not expressly consider a "reckless disregard" element like that contained in N.J.S.A. 2C:12-3(a).

We also recognize that the Supreme Court of the United States has been presented with opportunities to express its view of the "reckless disregard" element in this setting but has declined those invitations. For example, in Elonis v. United States, 575 U.S. 723, 740 (2015), the Court expressly chose not to say whether reckless speech could support a threat conviction under 18 U.S.C. § 875(c). That two members of the Court, for different reasons, suggested recklessness might be sufficient, 575 U.S. at 745-48 (Alito, J., concurring in part and dissenting in part); id. at 759-60 (Thomas, J., dissenting), is of no moment. Later, in Perez v. Florida, 137 S. Ct. 853 (2017), the Court denied a writ of certiorari in a case that might have settled the issue; a single Justice stated her view that both Watts and Black had already made "clear that to sustain a threat conviction without encroaching upon the First Amendment, States must prove more than the mere utterance of threatening words – some level of intent is

required" and "it is not enough that a reasonable person might have understood the words as a threat – a jury must find that the speaker actually intended to convey a threat." Id. at 855 (Sotomayor, J., concurring). More recently, the Court denied Kansas's petition for a writ of certiorari in Boettger; this time only Justice Thomas dissented from the denial of certiorari, expressing a view that none of the Court's prior decisions prohibited utilization of a reckless disregard standard in a threat case, that the Court should resolve the conflict among the federal courts of appeals and decisions rendered by state courts, that "the Constitution likely permits States to criminalize threats even in the absence of any intent to intimate," Kansas v. Boettger, 140 S. Ct. 1956, 1958-59 (2020) (Thomas, J., dissenting), and that the Kansas Supreme Court had "overread" Black, id. at 1956.

While it may be true that the views expressed in unjoined separate opinions might provide some insight into how three sitting Justices might rule when the issue eventually comes before the high Court, at present their views possess no precedential value. The dissenting opinions in Elonis, while rendered in a case the Court did hear, were minority views; no other Justice stated an agreement with either Justice Alito's or Justice Thomas's views and they, in fact, did not agree with each other. And the Court's denials of writs of certiorari in

Perez and Boettger "import[] no expression of opinion upon the merits of the case." United States v. Carver, 260 U.S. 482, 490 (1923). As Justice Frankfurter stated, the Court "has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim." Durr v. Burford, 339 U.S. 200, 226 (1950) (dissenting opinion). And, if the denial of a writ of certiorari has zero legal value, an opinion expressing an agreement or disagreement with the denial of certiorari is worth less than zero. See Singleton v. Commissioner, 439 U.S. 940, 944-46 (1978) (writing separately about a denied writ of certiorari, Justice Stevens explained "why [he has] resisted the temptation to publish opinions dissenting from denials of certiorari," noting that "if there was no need to explain the Court's action in denying the writ, there was even less reason for individual expressions of opinion about why certiorari should have been granted in particular cases").

In short, it may be that a few members of the Supreme Court have expressed their views about the issue before us, but those views are not binding on us. We are, however, bound by Virginia v. Black and, like the Kansas Supreme Court, we agree that Black strongly suggests the "reckless disregard" element in N.J.S.A. 2C:12-3(a) is unconstitutionally overbroad. To be a true threat – and, by being a true threat, falling outside the First Amendment's

protection – a speaker must "mean[] to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359. We thus agree with Justice Sotomayor's non-precedential view that "it is not enough that a reasonable person might have understood the words as a threat – a jury must find that the speaker actually intended to convey a threat." Perez, 137 S. Ct. at 855. Because N.J.S.A. 2C:12-3(a) permits a conviction for uttering a threat "in reckless disregard of the risk of causing . . . terror," it unconstitutionally encompasses speech and expression that do not constitute a "true threat" and, therefore, prohibits the right of free speech guaranteed by the First Amendment.[7]

[7] We do not overlook the possibility that even if the views of some that there is no federal constitutional infirmity in a threat statute that turns on recklessness are eventually adopted, our state constitution might nevertheless require the result we reach here. Our state constitution contains a free speech clause that has been described as being "broader than practically all others in the nation," Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000), and is understood as offering "greater protection than the First Amendment," Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012). See N.J. Const. art. I, ¶ 6 (providing that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right [and] [n]o law shall be passed to restrain or abridge the liberty of speech or of the press"). Because defendant has not argued N.J.S.A. 2C:12-3(a) violates our state constitutional free speech guarantee, we need not address that potentiality here.

II

Our First Amendment holding alone requires that defendant be given a new trial on the other charged aspects of N.J.S.A. 2C:12-3 because the jury's verdict does not reveal whether defendant was convicted on that part of the statute that requires an intent to threaten. For that reason, it is not necessary that we consider defendant's unanimity argument. Nevertheless, so that the mistake is not repeated when defendant is retried on the two remaining theories of criminal liability charged in the indictment, we address his unanimity argument and, for this additional reason, reverse and remand for a new trial.

The Supreme Court has said that our state constitution "presupposes a requirement of a unanimous jury verdict in criminal cases." State v. Parker, 124 N.J. 628, 633 (1991); see also R. 1:8-9. This principle requires that jurors "be in substantial agreement as to just what a defendant did before determining . . . guilt or innocence." State v. Frisby, 174 N.J. 583, 596 (2002) (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977)). To ensure compliance with this constitutional precept, judges must provide juries with instructions that specifically explain the need for a unanimous verdict in numerous instances when the verdict might not otherwise be clear; the Court explained in Parker when a general unanimity instruction like that given here is not sufficient:

> [F]or example, [when] "a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and [when] the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." . . . "[W]here the facts are exceptionally complex, or where the allegations in a single count are either contradictory or only marginally related to one another, or where there is a variance between the indictment and the proof at trial, or where there is a tangible indication of jury confusion. In these instances, the trial court must give an augmented unanimity instruction.
>
> [124 N.J. at 635-36 (citations omitted).]

The trial judge ably explained not only the different elements to be proven when an accused is charged under subsection (a) or subsection (b) but also the different elements depending on which part of subsection (a) is charged, i.e., purposeful conduct or reckless conduct, the last of which we have now found constitutionally infirm. In short, the judge instructed the jury that they could convict defendant if they found beyond a reasonable doubt the elements applicable to any one of three different theories.

Even though neither the prosecution nor the defense sought a specific unanimity charge, or instructions and a jury verdict sheet that would ask the jury to express what it unanimously found defendant guilty of, the jury recognized the problem and asked during their deliberations about the multi-faceted

question put to them. This question should have prompted clear guidance from the judge that the jury could not find defendant guilty via a fragmented verdict. The judge should have explained, for example, that a guilty verdict could not be rendered if only some of the jurors found a violation of subsection (a) but not (b), and the others found a violation of subsection (b) but not (a).

We previously expressed this concern in State v. Tindell, 417 N.J. Super. 530, 553-54 (App. Div. 2011). There, the defendant was charged with a single count of terroristic threats under N.J.S.A. 2C:12-3(a) for directing multiple threats at a "diverse group of individuals" at his sister's high school, including a girl that had an altercation with his sister, but also a police officer and several children and school personnel. The judge failed to give an instruction that recognized the multiplicity of alleged victims and failed to require that the jury identify the victims of the alleged threats. Id. at 551-52. We found the jury instructions erroneously opened the door to a fragmented verdict and reversed. Id. at 555-56. See also State v. Bzura, 261 N.J. Super. 602, 609 (App. Div. 1993).

We recognize that, unlike Tindell, the indictment charged defendant with threatening only Officer Healey, and the jury was instructed to determine only whether Officer Healey was threatened. But the jury was also presented with evidence of multiple statements defendant made that could have been

understood as being directed toward Healey. First, there was defendant's "head shot" comment on May 1, 2015, when defendant was arguing with Officers Healey and Hernandez from a second-story window in his Freehold home. Then, there was defendant's first Facebook post after the May 1, 2015, in-person argument; this post, among other things, went on a diatribe about Freehold police, with comments like "YU WILL PAY WHOEVA HAD ANY INVOLVEMENT" in entering his home – likely referring to the raid on his home in February – with a parting comment that "WE WILL HAVE THA LAST LAUGH! #JUSTWAITONIT – [angry emoji] feeling angry." And two hours after that: THEN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FU$K OUTTA HERE!! I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT" (emphasis added).

To be sure, the prosecution's focus throughout the trial was on the "head shot" statement, but these other statements were admitted and no limitation was placed on what the jury could find to be a terroristic threat. So, there was a potential for some jurors to conclude it was only the "head shot" statement that was the terroristic threat, while others could have found the "yu will pay" and "we will have tha last laugh . . . waitonit" postings to be the terroristic threats, or some segment of jurors could have found only the "I kno wht yu drive &

where yu motherfu$kers live at" was the terroristic threat. This is not mere conjecture. The video of the confrontation between defendant and Healey does not provide overwhelming proof that the "head shot" comment was enough to provide the "terror" required by subsection (a) or the "imminent fear of death" required by subsection (b) because the officers took no immediate action in response at the scene; they simply departed. In some jurors' minds, the head shot comment might not have been enough to terrorize or put Healey in imminent fear of death and it was only the later posted comments that suggested a true intent to threaten harm.

Even if we were to assume that any differing views jurors possessed about the content of the terroristic threats were inconsequential, the fact that the judge's instructions allowed the jury to convict even when its members may have disagreed on which of the multiple theories was sustained poses too grave a risk that they were not unanimous on at least one of those theories.

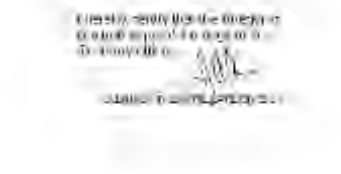
Moreover, the jury was given the option of finding a violation of either subsection (a) or subsection (b). While the judge correctly instructed the jury in response to its question that only one theory needed to be found for a guilty verdict, he did not instruct that all jurors needed to agree on which provision was violated. The jury was not entitled to render a fragmented verdict in which

one group found a violation of subsection (a) and another group, or even just a single juror, found only a violation of subsection (b). Without an instruction that would have made that clear to the jury, we can have no confidence that the jury did not produce an impermissibly fragmented verdict and we must, therefore, reverse and remand for a new trial.

* * *

The judgment under review is reversed. We remand for the dismissal of that part of the indictment that charges defendant with acting "in reckless disregard of the risk of causing such terror or inconvenience." N.J.S.A. 2C:12-3(a). We also remand for a new trial on the other charges contained in the indictment since we cannot know, from the way in which the case was presented to the jury, whether defendant was convicted for conduct that fell within those parts of N.J.S.A. 2C:12-3 that are not constitutionally overbroad and because the jury instructions did not ensure that the jury was unanimous on at least one part of the statute.

Reversed and remanded for a dismissal of part of the indictment and for a new trial on the rest in conformity with this opinion. We do not retain jurisdiction.



NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
COUNTY OF MONMOUTH
LAW DIVISION-CRIMINAL PART
Indictment No. 15-08-1454
Case No. 15001722

Decided September 7, 2017

STATE OF NEW JERSEY,

v.

CALVIN FAIR,

Defendant.

FINDINGS AND CONCLUSIONS OF THE COURT ON DEFENDANT'S MOTION TO DISMISS INDICTMENT

MICHAEL LUCIANO, Assistant Monmouth County Prosecutor
for the State of New Jersey.

PAUL ZAGER, Esq., for Defendant CALVIN FAIR.

VINCENT N. FALCETANO, JR., J.S.C.

I. INTRODUCTION

This matter comes before this Court on defendant's motions to dismiss the indictment on constitutional grounds, for insufficient evidence and for prosecutorial error. On or about May 1, 2015, officers charged defendant, Calvin Fair, on Warrant No. W 2015-000162-1315 with terroristic threats. On or about August 13, 2015,

a Monmouth County Grand Jury returned Indictment No. 15-08-1454, charging defendant, Calvin Fair, in Count One with terroristic threats, contrary to N.J.S.A. 2C:12-3a and/or (b), a third degree offense.

On or about October 11, 2016, defendant filed a motion to dismiss the indictment for insufficient evidence and prosecutorial error. On or about October 20, 2016, defendant filed a motion to dismiss the indictment on de minimus grounds, which was denied by the Assignment Judge on December 16, 2016. On or about October 24, 2016, defendant filed a motion to dismiss the indictment arguing that his conduct was protected speech and the statute is unconstitutional.

II. FACTUAL HISTORY

On May 1, 2015, at approximately 11:00 AM, Officers from Freehold Borough Police Department responded to a call of a dispute at 8 Conover Street in Freehold Borough. Once on the scene, they encountered a woman outside the residence who had been in an argument with defendant Calvin Fair, who was still inside. Officers did not enter the residence, nor did defendant come out.

Eventually defendant leaned out of a second-story window and shouted that the police were the "fucking devil," and he called Officer Sean Healey a "thirsty ass-nigga." Defendant then yelled at Officer Healey, "Watch out for a head shot."

Also on May 1, 2015, defendant posted on Facebook that he would have the "last laugh" in reference to the Freehold Borough Police Officers. He also posted, "THN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FU$KOUTTA HERE!! I KNOW WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT." The detective bureau observed the posts and informed Officer Healey.

After these incidents, the Freehold Borough Police Department charged defendant with making a terroristic threat. Further, Defendant made other posts relevant to the prosecution, although not necessary to indict defendant. On April 8, 2015, defendant posted on Facebook, "And all thm hammers they found inn my house! None of thm was mines, I still got all of mines lol..." referring to the search warrant execution and the evidence retrieved that is the subject of his prosecution on Case No. 15000687, Indictment No. 15-10-1801.

On April 9, 2015, defendant indicated he was specifically writing a post to Freehold Borough police, "This is a post for Freehold Boro poli$e, & Monmouth County Tfor$e, FBI, DEA, keep wall wat$in ur not gonna get my life from fb doesnt show anythg about my life but only tha thgs I wanna post lol..." Additionally, defendant's first post on May 1, 2015, included further references to the search warrant execution that is the subject of Case No. 15000687, Indictment No. 15-10-1801.

At the grand jury proceedings held on July 30, 2015, Officer Healey testified. The prosecutor instructed the grand jury that they were considering charges of terroristic threats from May 1, 2015, to May 15, 2015. The grand jury was informed that the two posts on May 1, 2015, were the two posts that were directed at officers in relation to their being at his home on May 1, 2015. They heard the above information about the May 1, 2015 posts. The only other post the grand jury was made aware of was the fact that defendant had "talked about guns also," but that it was not either of the two posts directed at officers. The grand jury had no questions for the witness.

III. APPLICABLE LAW

A. Dismiss Indictment

In the motions before the Court, defendant seeks to dismiss the indictment against him due to insufficient evidence, prosecutorial error, and on constitutional grounds. In all grand jury proceedings, a presumption of validity attaches unless sufficient proof is submitted in rebuttal. State v. Ciba-Geigy Corp., 222 N.J. Super. 343, 351-52 (App. Div. 1987), citing State v. Smith, 102 N.J. Super. 325, 329 (Law Div. 1968), aff'd 55 N.J. 476 (1970), cert. denied 400 U.S. 949 (1970). Thus, once the grand jury has acted, an indictment should only be disturbed on the "clearest and plainest ground" and only when the indictment is "manifestly deficient or palpably defective." State v. Triestman,

416 N.J. Super. 195, 202 (App. Div. 2010); State v. Hogan, 144 N.J. 216, 229 (1996); State v. New Jersey Trade Waste Association, 96 N.J. 8, 18-19 (1984); State v. Moscato, 253 N.J. Super. 253, 260 (App. Div. 1992), certif. den., 130 N.J. 6 (1992); State v. Dixon, 125 N.J. 223, 237 (1991). A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. United States v. Calandra, 414 U.S. 338, 343 (1974); accord State v. Hart, 139 N.J. Super. 565, 567 (App. Div. 1976).

In determining the sufficiency of the indictment, the court must review all of the evidence presented to the jury, while giving every reasonable inference to the State. State v. Epps, 284 N.J. Super. 373, 376 (Law Div. 1995) (citing New Jersey Trade Waste Association, supra, 96 N.J. at 27). If a defendant is challenging the sufficiency of evidence, an indictment will only be dismissed where the State fails to present even a prima facie case as to the crime charged. State v. Schenkolewski, 301 N.J. Super. 115, 137 (App. Div. 1997) certif. denied. 151 N.J. 77 (1977). The burden is on the defendant challenging the indictment to "demonstrate that evidence is clearly lacking to support the charge." State v. Graham, 284 N.J. Super. 413, 417 (App. Div. 1995); (citing State v. McCrary, 97 N.J. 132, 142 (1984)). Evidence is considered sufficient as long as "some evidence" is offered as to each element of the offense charged. This relaxed standard does not necessitate

a great quantum of evidence. Schenkolewski, supra, 301 N.J. Super. at 137 (citing State v. Bennett, 194 N.J. Super. 231, 234 (App. Div. 1984)). In short, the court should evaluate whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it. State v. Morrison, 188 N.J. 2, 13 (2006).

Unless a prosecutor's conduct before a grand jury "infringes upon the jury's decision-making function, it may not be the basis of a dismissal of the indictment." State v. Vasky, 218 N.J. Super. 487, 491 (App. Div. 1987) (citing State v. Schamberg, 146 N.J. Super. 559, 564 (App. Div. 1977), certif. den. 75 N.J. 10 (1977). A prosecutor's decision on how to instruct a grand jury will constitute grounds for challenging an indictment only in exceptional cases. State v. Hogan, 336 N.J. Super. 319, 344 (App. Div.), certif. den., 167 N.J. 635 (2001). An "indictment should not be dismissed unless the prosecutor's error was clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." Hogan, supra, 336 N.J. Super. at 344. In seeking an indictment, "the prosecutor's sole evidential obligation is to present a prima facie case that the accused has committed a crime." Hogan, supra, 144 N.J. at 236.

In accordance with this, the prosecutor has a limited duty to present evidence to the grand jury which "both directly negates the guilt of the accused and is clearly exculpatory." Hogan, supra, 144 N.J. at 237; State v. Scherzer, 301 N.J. Super. 363, 426-27 (App. Div. 1997), certif. denied, 151 N.J. 466 (1997). Evidence only directly negates the guilt of the accused if it squarely refutes an element of the crime in question. State v. Hogan, 144 N.J. 216. A prosecutor has a duty to instruct a grand jury about the law relating to defenses or justifications that would totally exonerate the defendant, if the facts known to the prosecutor clearly indicate or clearly establish a basis for such a defense or justification. Hogan, supra, 336 N.J. Super. at 343. The prosecutor has, however, no obligation on his/her own to sift meticulously through the entire record of investigative files to find some combination of facts and inferences which might rationally sustain a defense or justification and then instruct the grand jury about the law relating to such a defense or justification. Ibid. If an instruction must be given, an instruction that conveys the gist of the exonerating defense of justification will suffice. Ibid. "[C]ircumstantial evidence is legal evidence." State v. Rogers, 19 N.J. 218, 234 (1955). In fact, circumstantial evidence is often more persuasive than direct evidence. State v. Muniz, 150 N.J. Super. 436, 441 (App. Div. 1977).

Accordingly, an indictment maybe returned upon circumstantial evidence, just as a conviction maybe sustained upon such evidence. See e.g., Rogers, supra, 19 N.J. at 231-234 (affirming denials of motion to dismiss indictment and motion for judgment of acquittal where the State's proofs on both included only circumstantial evidence).

B. Instructions to the Grand Jury

Because of the non-adversarial nature of grand jury proceedings, incomplete or imprecise legal interpretations will not warrant dismissal of the indictment. State v. Laws, 262 N.J. Super. 551, 562 (App. Div. 1993) certif. denied, 134 N.J. 475, (1993); State v. Ball, 268 N.J. Super. 72, 120 (App. Div. 1993) aff'd 141 N.J. 142 (1995) cert. den. Mocco v. New Jersey, 516 U.S. 1075, 116 S.Ct. 779 (1996). Rather, the instructions must be "blatantly wrong." Triestman, supra, 416 N.J. Super. at 205; Hogan supra, 336 N.J. Super. at 344. To dismiss the indictment, the Court must find the prosecutor's instructions to the grand jury were misleading or an incorrect statement of law. Triestman, supra, 416 N.J. Super. at 195. In the context of a petit jury, where an instruction follows the Model Jury Charge it is a "persuasive argument in favor of the charge as delivered." State v. Angoy, 329 N.J. Super. 79, 84 (App. Div. 2000), certif. denied, 165 N.J. 138 (2000).

Generally, when the trial court follows the Model Jury Charge and it is consistent with controlling New Jersey precedent, the reviewing court will not find a plain error in the instruction. See State v. Rodriguez, 365 N.J. Super. 38, 5354 (App. Div. 2003), certif. denied, 180 N.J. 150 (2004). That is particularly so where the jury poses no questions and expresses no confusion concerning the instruction. E.g., State v. Savage, 172 N.J. 374, 394-95 (2002).

C. N.J.S.A. 2C:12-3a & N.J.S.A. 2C:12-3b

The statute permits prosecution of the same or similar conduct under both provisions. State v. Conklin, 394 N.J. Super. 408, 413 (App. Div. 2007). Where the threat is a threat to kill, the prosecutor may seek an indictment under either subsection or both. Ibid. N.J.S.A. 2C:12-3b reads in pertinent part as follows: "[a] person is guilty of a crime … if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." The statute "requires that the threat be made under circumstances under which it carries the serious promise of death." State v. Nolan, 205 N.J. Super. 1, 4 (App. Div. 1985). Words or conduct must be of a nature that would reasonably convey menace or fear of

death to an ordinary hearer. Ibid. The State must prove the following three elements:

1. That the defendant threatened to kill another person;
2. That the threat was made with the purpose to put the person in imminent fear of death; and,
3. That the threat was made under circumstances which reasonably caused the person to believe the threat was likely to be carried out.
   See Model Criminal Jury Charge, Terroristic Threats N.J.S.A. 2C:12-3(b).

In Nolan, the Appellate Division found that the conviction for terroristic threats could be sustained where the defendant admitted he threatened to kill his brother as he was reaching for a machete during a struggle with the victim. Id. at 5. The court noted that these facts "plainly established that the intended victim reasonably feared immediate harm or death under the circumstances. The incident was pregnant with the potential for catastrophe." Ibid. The threat must be one where an ordinary individual hearing it would believe that death was seriously threatened, whether or not he actually was put in fear. State v. Kaufman, 118 N.J. Super. 472, 474 (App. Div.), certif. denied 60 N.J. 467 (1972). This is an objective test, and the threat must be the kind that would reasonably convey fear of death to an ordinary person. Nolan, supra, 205 N.J. Super. at 4.

N.J.S.A. 2C:12-3a reads, in pertinent part, that "a person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another...or in

reckless disregard of the risk of causing such terror or inconvenience." This portion of subsection A differs from subsection B in that it more broadly addresses threats of any type of crime, and it requires proof that the defendant had a purpose to terrorize another. Conklin, supra, 394 N.J. Super. at 412. A threat to kill may be prosecuted under this section where the perpetrator is physically remote from the victim, yet the threat nonetheless was for the purpose of terrorizing the victim. Ibid.

D. Statute Unconstitutionally Vague on its Face

The party challenging the constitutionality of a statute bears the burden of establishing its unconstitutionality. State v. Jones, 346 N.J. Super. 391, 406 (App. Div.), certif. denied, 172 N.J. 181 (2002). Every possible presumption favors the validity of an act of the Legislature. LaManna v. Proformance Ins. Co., 184 N.J. 214, 223 (2005); State v. Fisher, 395 N.J. Super. 533, 543 (App. Div.), certif. denied, 192 N.J. 593 (2007). "[W]hatever be the rule of construction, it is subordinate to the goal of effectuating the legislative plan as it may be gathered from the enactment when read in the full light of its history, purpose and context." State v. Lewis, 185 N.J. 363, 369 (2005) (internal quotations omitted). Courts exercise "extreme self restraint" before using "the judicial power to invalidate a legislative act[,]" and will not declare a legislative act void "unless its repugnancy to the Constitution is clear beyond a

reasonable doubt." LaManna, supra, 184 N.J. at 223; Fisher, supra, 395 N.J. Super. at 543.

The void for vagueness doctrine is a procedural due process concept "grounded in notions of fair play." State v. Lashinsky, 81 N.J. 1, 17 (1979); State v. Brady, 332 N.J. Super. 445, 450 (App. Div. 2000), certif. denied, 165 N.J. 606 (2000). Laws must enable a person of "common intelligence, in light of ordinary experience" to understand whether their conduct is lawful. State v. Cameron, 100 N.J. 586, 591 (1985). The test for vagueness "does not consist of a linguistic analysis conducted in a vacuum," but requires a reading of the statute in context with "reality." In re Suspension of De Marco, 83 N.J. 25, 37 (1980); Brady, supra, 332 N.J. Super. at 451. The determination must be made against the contextual background of the particular law and with a firm understanding of its purpose. Cameron, supra, 100 N.J. at 593-594. A precise definition of the prohibited behavior is not required to avoid "legislative paralysis." State v. Lee, 96 N.J. 156, 166 (1984); see also State v. Bond, 365 N.J. Super. 430, 438 (App. Div. 2003).

To succeed on a facial challenge of vagueness, the complainant must demonstrate that the law is impermissibly vague in all its applications. State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007), certif. denied, 195 N.J. 421 (2008); Binkowski v. State, 322 N.J. Super. 359, 380-81 (App. Div. 1999).

In other words, the challenger must demonstrate that there is no conduct that the statute proscribes with sufficient certainty. Cameron, supra, 100 N.J. at 593. Furthermore, a contention that a statute is facially vague fails where the statute contains a specific intent requirement. State v. Cardell, 318 N.J. Super. 175, 186, (App. Div.), certif. denied, 158 N.J. 687 (1999); State v. Saunders, 302 N.J. Super. 509, 522 (App. Div.), certif. denied, 151 N.J. 470 (1997). Both sections A and B of N.J.S.A. 2C:12-3 have specific intent requirements. Section B requires the defendant had a purpose to put the victim in imminent fear of death. Nolan, supra, 205 N.J. Super. at 4. Section A requires the defendant had a purpose to terrorize another. Conklin, supra, 394 N.J. Super. at 412.

E. Statute Unconstitutionally Vague as Applied

To prove that a statute is vague as applied, a defendant must show that "the law does not with sufficient clarity prohibit the conduct again at which it is sought to be enforced." Cameron, supra, 100 N.J. at 593. The analysis asks whether the statute is "a trap for a person of ordinary intelligence acting in good faith," or if it gives fair notice that the defendant's conduct is forbidden. See Lee, supra, 96 N.J. at 166.

In the "as applied" analysis, defendant must show the statute is unclear in the context of his particular case; in other words, defendant may only challenge the statute with respect to his

conduct, not hypothetical situations involving other people or other situations. Cameron, supra, 100 N.J. at 593; State v. Walker, 385 N.J. Super. 388, 406 (App. Div.), certif. denied, 187 N.J. 83 (2006). An as-applied challenge fails where a person of ordinary intelligence would understand that the words of the statute encompass their actions. See, e.g., Saunders, supra, 302 N.J. Super. at 522.

When evaluating a defendant's as-applied constitutional challenge, the courts accept as true the State's evidence concerning defendant's actions, viewing that evidence in the light most beneficial to the State's position. State v. Afanador, 134 N.J. 162, 165 (1993). If a statute is not vague as applied to the challenging defendant, it may be enforced against him even though it might be too vague as applied to others. Cameron, supra, 100 N.J. at 593.

IV. LEGAL ANALYSIS

In the instant case, defendant was indicted on one count of making terroristic threats in violation of N.J.S.A. 2C:12-3a and N.J.S.A. 2C:12-3b. N.J.S.A. 2C:12-3a reads, in pertinent part, that "a person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another...or in reckless disregard of the risk of causing such terror or inconvenience." N.J.S.A. 2C:12-3b reads in pertinent part as follows: "[a] person is guilty of a crime ... if

he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out."

Defendant argues that (1) that the prosecutor failed to present the context of the various statements made by the defendant, (2) that the prosecutor improperly instructed the grand jury regarding the proper mens rea for the offense of terroristic threats, (3) that these errors misled the grand jury to improperly indict the defendant, (4) that the defendant's statements were protected speech under the First Amendment, and (5) that N.J.S.A. 2C:12-3 is impermissibly overbroad and unconstitutionally vague on its face and as applied to the defendant.

The State argues that (1) sufficient evidence was presented to warrant an indictment, (2) that no clearly exculpatory evidence existed that needed to be presented to the Grand Jury, (3) that the Prosecutors instructions to the grand jury were proper and that he did not mislead the grand jury, (4) that the defendant's statements were not protected speech, and (5) that N.J.S.A. 2C:12-3 is not impermissibly overbroad or unconstitutionally vague on its face or as applied to the defendant.

Having considered the applicable law and evidence with respect to the charges in the indictment, this Court reaches the following conclusions.

Defendant argues that Elonis v. United States clearly holds that threats can only be criminalized if they are based on more than a general mens rea, i.e. a defendant cannot be prosecuted for negligently threatening or having only a general intent to threaten. Elonis v. United States, ___ U.S. ___, 135 S. Ct. 2001, 2003, 192 L. Ed. 2d 1 (2015). However, in Elonis the Court was concerned because the jury had been instructed that their finding of whether a crime occurred "turn[ed] solely on the results of an act without considering the defendant's mental state." Ibid.

Moreover, the Court clearly noted (in evaluating 18 U.S.C.S. § 875 - Extortion and Threats) that the mental state "is satisfied if the defendant transmits a communication for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat." Ibid. Defendant uses the Elonis holding in his argument to reject recklessness as an acceptable mental state. However, the Supreme Court made no such ruling. In fact, the Court specifically declined to decide whether a defendant's recklessness would be insufficient. Ibid.

Defendant also cites State v. Burkert, 444 N.J. Super. 591 (App. Div. 2016), in which the Appellate Division reviewed a conviction for harassment and the requirement that there be proof that the defendant had a purpose to harass an intended victim. The court reversed the conviction because the evidence did not support a finding that the conduct was directed to the victim, nor that it

invaded the privacy rights of the victim, nor that it was a direct attempt to alarm or seriously annoy the victim. Id. at 601-02. The court noted that speech is protected, unless it presents a clear and present danger of some serious substantive evil, at which point it may be criminalized. Id. at 603.

Here, the defendant made a clear threat directly to the officer in person to "watch out for a head shot" and followed this statement up by posting on Facebook, which he knew the police were monitoring, that he knew what cars the officers drove and where they lived. Accordingly, this Court finds that the holdings in Elonis and Burkert are inapplicable to this case.

A. The Grand Jury was Presented Sufficient Evidence to Warrant an Indictment

Further, this Court finds that the State has presented sufficient evidence to the grand jury to warrant an indictment on count one, terroristic threats, a crime in the third degree. There is no evidence before this court that any prosecutorial error occurred in reference to the grand jury proceedings and there was no clearly exculpatory evidence that the prosecutor failed to present to the grand jury. The fact that the defendant had anger towards the officers from previous incidents is not evidence that directly negates the guilt of the accused nor is it clearly exculpatory. Therefore, State v. Hogan, 144 N.J. 216 clearly indicates that the prosecutor was not required to present this

evidence to the grand jury. Moreover, any contextual explanation is an issue reserved for trial for a jury to decide, not an issue for grand jury consideration.

This Court finds that the Prosecutor's instructions used the statutory language of N.J.S.A. 2C:12-3a and N.J.S.A. 2C:12-3b and mirrored the model jury charge for these offenses. The defendant has neither demonstrated that these instructions were inconsistent with precedent nor that the jury instructions were "blatantly wrong" under Triestman. Accordingly, this Court finds that the instructions were not misleading or an incorrect statement of law and that the grand jury was presented with sufficient evidence to warrant an indictment.

B. Defendants Statements were not Protected Speech

This Court finds that defendant's statements were not protected speech. Defendant made several threatening statements to law enforcement officers on Facebook and in person. Intimidation 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 or victims in fear of bodily harm or death. Virginia v. Black, 538 U.S. 343, 358, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003). Further, First Amendment free speech rights are not absolute.

In this case, this Court finds that defendant's statements constituted a "true threat" and therefore do not fall within the realm of protected speech. Further, under the circumstances,

defendant's statements towards Officer Healey to "watch out for a head shot" coupled with his Facebook posts that he knows what cars the officers drive and where they live constituted a verbal act of intimidation with the intent to place the officer in fear of bodily harm or death by a "head shot." Therefore, these statements fall squarely within the confines of N.J.S.A. 2C:12-3 (Terroristic Threats). Defendant's statements were not political and were not made in a political context. He made the statement during his personal interaction with law enforcement while they lawfully responded to a call for assistance at his residence and on Facebook where he knew the police would see the statements.

As previously stated, the holding in Burkert is inapplicable in this case insofar as the defendant spoke directly to his audience. The threat to "watch out for a headshot" was made directly to the officer in person and the defendant's previous Facebook posts reflect his knowledge that the statements on Facebook would be seen by the Freehold officers monitoring his Facebook profile. Therefore, the defendant clearly directed his statements to the victim.

C. N.J.S.A. 2C:12-3 is Not Unconstitutionally Vague on Its Face or as Applied to the Defendant

The First Amendment permits a State to ban a "true threat." Watts v. United States, 394 U.S. 705, 708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969). In order to prevail in challenging a statute

as unconstitutionally vague, the challenger must demonstrate that there is no conduct that the statute proscribes with sufficient certainty. Cameron, supra, 100 N.J. at 593. However, this is not the case here. N.J.S.A. 2C:12-3 (Terroristic Threats) is narrowly tailored to apply only to the conduct of purposely or recklessly putting someone in imminent fear of death or terrorizing them. The only restricted content of the speech is a threat to commit a crime or threatening to kill i.e. a "true threat." Such statements do not qualify as protected speech under the First Amendment and the statute properly proscribes such statements to be unlawful.

Moreover, defendant has not shown that protected speech is substantially chilled by the statute as it properly exists to protect members of the public from death threats or threats of harm. Defendant has not shown that the court should employ the method of last resort and declare this statute that prohibits non-protected speech to be impermissibly broad.

This Court finds that, in the instant case, defendant's speech is properly categorized as a threat to kill or to harm the officer. Further, defendant has not met his burden under State v. Cameron in that he has not demonstrated how the statute is unclear as applied to his particular case. Defendant made specific threats to the officer and was properly indicted under the relevant terroristic threats statue, N.J.S.A. 2C:12-3.

V. CONCLUSION

Accordingly, for the foregoing reasons and authorities cited above, this Court finds that the grand jury appropriately exercised their decision-making function in returning an indictment against defendant, Calvin Fair. Accordingly, this Court will not disturb the indictment and defendant's motions to dismiss the indictment are hereby **DENIED.**

PAUL E. ZAGER
ATTORNEY AT LAW
157 BROAD STREET, SUITE 322
RED BANK, NEW JERSEY 07701

ROCCO RAVASCHIERE
Of Counsel
(1918-2004)

TELEPHONE: (732) 741-5000
FAX: (732) 741-9403
Email: paulzager@verizon.net

October 20, 2016

Hon. Ronald L. Reisner, J.S.C.
Monmouth County Superior Court
Civil Law Division
Courthouse, 71 Monument Park
Freehold, NJ 07728

Re: State v. Calvin Fair
Indictment No.: 15-08-1454

Dear Judge Reisner:

Please accept this letter memorandum in support of Calvin Fair's motion to dismiss Indictment No. 15-08-1454 on constitutional grounds.

TABLE OF CONTENTS

PROCEDURAL HISTORY

On August 13, 2015, a Monmouth County Grand Jury indicted Calvin Fair on a single count of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3 "a and/or b."

Mr. Fair herewith moves to dismiss the indictment on constitutional grounds.

STATEMENT OF FACTS

Based on discovery obtained from the State (appended to the

certification of counsel [1]), law enforcement (including members of the New Jersey State Police) searched the Freehold (Borough) home of Calvin Fair on February 19, 2015, pursuant to a search warrant. See Freehold Borough Police Patrolman Sean Healey's narrative report (Exhibit A). The residence (8 Conover Street) is owned by his mother, Leneva Fair, who was in her 80s, and who also resided there.

According to Patrolman Healey's report (dated May 1, 2015), at 11:07 a.m. he and other Freehold Borough officers were dispatched to 8 Conover Street to respond to a domestic disturbance on May 1, 2015. Another report by a Patrolman Hernandez (Zager certification, Exhibit B) describes the incident:

> Upon arrival, I observed the victim, Laquanda A. Washington, who I'm familiar with from previous incidents, standing on the front porch of the house. I asked Ms. Washington if she had been physically assaulted, same stated that she was not. The victim advised that her boyfriend/accused, Calvin Fair, was kicking her out of the house, but was refusing to give her the 32 inch flat screen T.V.

---

[1] None of the documents should be deemed adoptive admissions by Mr. Fair. State v. Briggs, 279 N.J. Super. 555, 562-63 (App. Div.), certif. denied, 141 N.J. 99 (1995). The documents are submitted to establish that, even if the State's proffered evidence were accepted, the prosecution of Mr. Fair for terroristic threats cannot pass constitutional muster.

None of the house occupants answered the door to speak with the officers. Ms. Washington declined to apply for a TRO [2] or otherwise file a complaint, and the police never entered the premises or otherwise retrieved the T.V. As the police were wrapping up, Officer Healey

> heard Mr. Fair calling my name from the side of the house. I acknowledged Mr. Fair at which time he began to ask for everyone to leave his property. He seemed agitated but calm and in control of his actions as he pleaded from a 2nd story window for everyone to leave his property. In an effort to keep him calm everyone was moved from the property onto the public sidewalk as patrols were nearly complete the [sic] investigation.

Apparently, Mr. Fair was upset with how the police conducted the search of his mother's home (ten weeks prior), and in particular how he felt they had disrespected his mother.

> Mr. Fair then began to become more agitated and became enraged while yelling at this officer. From his 22nd story window he he yelled that the police are the "fucking devil." He made mention of us losing our jobs, threating a lawsuit and continually calling me a "fucking devil ass nigga". Mr. Fair was now in a rage yelling about how long he lived in the house and other insignificant facts while calling me "crazy" and "nigga" repeatedly.
>
> I advised Mr. Fair that I was going to sign a warrant against him for his actions. He stated that he was going to turn himself in but screamed about taking care

[2] "Temporary Restraining Order," under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -33.

> of his grandmother [sic [3]] . He continued in his rage asking why I wanted to keep him in the justice system. Eventually patrols were complete and leaving the area when Mr. Fair stated that I was "a thirsty ass nigga" [4] and then stated "Watch out for a head shot".

Officer Hernandez also reported hearing Mr. Fair say: "Watch out for a head shot." But while Hernandez referred to this as a "terroristic threat," neither he, nor Healey, nor any officer present reported having any belief that Mr. Fair presented any immediate of harm. Nor for that matter was there any sense of 'terror,' either intended by Mr. Fair or understood by the officers. The alleged statement was in the context of Mr. Fair's criticism of perceived police misconduct and (to use Healey's words) "insignificant facts," and Patrolman Healey responded to the 'headshot' statement with "[i]nvest[igation] pending, no arrest at this time." The officers left without incident.

ALLEGED FACEBOOK POSTINGS

Later on May 1, 2015, a Detective Schwerthoffer apparently

---

[3] Mother.

[4] A vulgar epithet, the term refers to a person (usually of subordinate rank) eager to impress another person (usually of superior rank).

went on the internet and "located" Mr. Fair's alleged Facebook profile [5] .

> [There] were 2 separate facebook postings by Mr. Fair where he references the police taking several guns from his home but that he still has other guns.
>
> Patrolman Healey's narrative report.

The State actually produced three "print-outs" of alleged Facebook postings: one bearing the date April 8, 2015 (almost two months after the search warrant); the other, April 9, and the last, May 1 (the date of the incident with Ms. Washington). It should be noted that the State apparently did not produce all of the postings on April 8, April 9 and May 1, and thus it is not entirely clear whether there are prior or subsequent postings that would place the print-outs in context.

APRIL 8

The alleged April 8 postings (Zager certification, Exhibit C is apparently in reference to a "youtube" video for a song by

---

[5] "Facebook is a social networking service and website that allows registered users—among many things—to create a personal profile, add other registered users as "friends," join interest groups, and "tag" photographs with names and descriptions. The scope of personal information that can be part of a registered user's personal profile is virtually limitless—including contact information, lists of personal interests, photographs, and videos." United States v. Meregildo, 883 F. Supp. 2d 523, 525 (S.D.N.Y. 2011).

Kountry Kash Kill ("Why the Good Gotta Die Young"). The undersigned reviewed the music video -- the lyrics and visual imagery of which appear to be a lamentation over the death of a young person in the singer's community. The Facebook "post" attributed to Mr. Fair appears to be commenting on the video, approving of its message, and criticizing elements responsible for deaths among youths in his own community.

> Yall niggas gonna fu$kin [6] morn!!! R yall tryin take another life, its probably sumbdy yu growup with righ!! Smh [7] Whts it gonna take! To see another life go right Smh for all yu niggas tht wanna be on ur bs at times like this! Im take ur fu$kin soul!! And all thm hammers they found inn my house! None of thm was mines. I still got all of mines [8] lol Im askin yu freehold niggss ri$e. PIZ DON'T DO THIS BEEFIN SHIT AT A TIME LIKE THIS
>
>  feeling mad

The language -- however crude -- is not a call for violence but unity. If anything, this post is decrying violence, and it was

---

[6] The posts tend to substitute the dollar sign ("$") for the letter "c" (and, occasionally, the letter "s").

[7] Shaking my head.

[8] The undersigned assumes that Patrolman Healy understood "hammers" to mean firearms.

obviously recognized as such by "Karina Reldar," "Gigi Reivera," "Daniel Cancel" and "48 others" who "like[d]" the post. If "hammers" is a reference to guns, the alleged post does not announce any intention to use them.

APRIL 9

The alleged April 9 postings (Exhibit C) expressly refer to the poster as "feeling silly." Although the alleged poster is critical of law enforcement, the message itself appears to be political (translation: Police should not spy on citizens' Facebook pages), and references to violence ('joining ISIS') are not intended to be taken seriously and are in the context of "feeling silly" ("lol" [9]).

> [Alleged Post]: This is a post for Freehold Boro poli$e, Holmdel State poli$e, & Monmouth County Tfor$e [10] , FBI, DEA. keep wall wat$chin ur not gonna get my life from fb. [ ] doesn't show anything about my life but only tha thgs I wanna post lol Oh yea [ ] does show I TAKE VERY GOOD $ARE OF MY MOTHER & KIDS

---

[9] "Laughing out loud."

[10] Unclear (possibly "task force").

[ ] FAO [11] KEEP TRYING . 

Gigi Rivera and "11 others" had "like[d]" the post, prompting a following up:

> I hope after everything is done!! I hope they burn freehold down. [happy-faced emoticon [12]]. & yu if look my way again im joining ISIS. Lol

ALLEGED MAY 1 POSTING

The alleged May 1 print-out (Exhibit C) bears the posting-time of 1:09 p.m. Assuming the police narratives are accurate, the officers arrived at shortly after 11 a.m. and thus the alleged post would have been shortly after they left. Assuming the post is Mr. Fair's, it is apparent that the "insignificant facts" referred to by Mr. Healey -- the perceived disrespect shown by police toward his 80-year-old mother [13] -- were still bothering him when they arrived regarding Ms. Washington's 911 call (the latter event is mentioned only indirectly, if at all). The post refers to the possibility of complaints to the police internal affairs unit, political protesting, a lawsuit against

---

[11] Margin of photocopied print-out is cropped. It is probably "LMFAO" (laughing my f----g a--- off).

[12] The photocopy is blurry, but it appears to be a smiling face.

[13] And, apparently, an earlier law enforcement matter involving Mr. Fair's son.

the police, and -- insofar as can be seen -- no suggestion of violence.

> I think its about tht time to give Mr Al Sharpton and Mr Rev. Jackson, internal affairs & my lawyery a $all, one thg yu wont do is disrespe$t me or my 84 year old mother kause yu $arry a badge & another thg yu not doin is tryin to keep me inn system with patty fines & $omplaints whn im not ur job, I don't rob, I don't steal, yu don't see me & im dam sure not sellin any drugs!!! My 84 year old mother didn't deserves her door bein ki$k inn by 30 armed offi$ers with aks & shields drawn. Who tha fu$k was yall komin for Ben Latin [14] smfh [15] My mom has always been a respe$tful lady to ever one & she didn't deserve wht they did. WHY Kause just 2years ago whn my son was out inn freehold runnin with tha bad kids robbin people I was impli$ated inn on one of tha robberis tht happened on my street komin home from work. So thts how my sons wrong doins kame to a end. So wht tht bein sad me & his mother agreed to have the freehold boro poli$e kome get my son from 8 $onover st inn my basement!!! So to make ths very short, IF I ALLOW YU MOTHER FU$KERS WITH OPEN ARMS OPEN DOORS TO KOME GET MY OWN SON! WHY THAT FU$K WOULDNT I ALLOW YU WITH OPEN DOORS TO KOME GET A FU$KIN STRANGER OUT OF MY HOUSE!! YES SUMBDY THTS JUST RENTIN A ROOM!! YU DISRESPE$TED THA ONLY PERSON I HAVE LEFT ON THIS EARTH. YU WILL PAY, WHEVA HAD ANY INVOLVEMENT, WASTIN TAX PAYERS MONEY! BRINING ALL THM OFFI$CERS OUT FOR A 84 YEAR OLD WOMEN! SO SAD BYT WE WILL HAVE THA LAST LAUGH! #JUST WAIT FOR IT.
>
>  feeling angry

"Gigi Rivera," "Saga GoGetta," "Q.s B Rule" and "24 others" had "like[d]" this post, presumably recognizing it as criticism of

---

[14] Probably referring to Osama Bin Laden.

[15] "Shaking my f------g head."

law enforcement methods (albeit with some swearing and hyperbole).

> THN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FUCK OUTTA HERE!! I KNO WHT YU DRIVE & WHERE ALL YU MOTHERFU$KERS LIVE AT

The responses to these posts for the most part expressed disbelief at the "crazy" manner in which the police had acted, and expressed concern over the well-being of the alleged poster's mother ("Smh its mom okay," "I hope your mom is ok . . . that's crazy") [16] .

THE CHARGE AND THE INDICTMENT

Calvin Fair was indicted on a single count of terroristic threats. Whereas both police narrative reports refer to "watch out for a head shot" as the terroristic threat, the language of the indictment is (whether intentionally or unintentionally) nonspecific. Indeed, when he testified before the Grand Jury, Officer Healey (and the Prosecutor) appeared to refer to the Facebook postings as the terroristic threats.

> Q. Okay. Later that day [May 1] Mr. Fair made a couple of posts on Facebook about Officers coming to his house, correct?
>
> A. That's correct.

---

[16] The sole exception ("Do whatever it is that you have do!! They gone learn today") is hardly a 'call to arms' in any legal sense.

Q, Okay. When they were originally posted on Facebook you didn't see them yourself?

A. I did not see it.

Q. Another Officer discovered them on Facebook and printed them

A. Our Detective Bureau found them.

Q. Okay. On one of the posts he was talking about the fact that he will have the last laugh, correct?

A. That was one of his comments, yes.

Q. And then the second post he stated then you got these gay-ass Officers thinking they know your life. Get the fuck out of here. I know what you drive and where you motherfuckers live at. That was the second post?

A. That's correct.

Q. And those were the two posts, correct?

A. Those are two. There was one that talked about guns also, bu

Q. Okay. But those were the two distinct directly at point with the Officers being at the house, correct

A. That's correct.

Q. Okay. And again those were posted on Facebook and eventually shown to you later on, correct?

A. That's correct.

Zager certification, Exhibit D (T5-11 to T6-15).

The indictment indicates that the date of the terroristic threat was "on or about May 1, 2015." The specific threat is not identified, and it is unclear which subsection of N.J.S.A. 2C:12-3 is at actually at issue.

> The Grand Jurors of the State of New Jersey, for the County of Monmouth, upon their oaths present that CALVIN FAIR, on or about May 1, 2015, in or about the Borough of Freehold, County of Monmouth, and within the jurisdiction of this Court, did commit the crime of Terroristic Threats, by threatening to commit a crime of violence with the purpose to terrorize S.H., or in reckless disregard of the risk of causing such terror, or by threatening to kill S.H., with the purpose to put him in imminent fear of death under circumstances reasonably causing S.H., to believe the immediacy of the threat and the likelihood that it would be carried out, contrary to the provisions of N.J.S.A. 2C:12-3a and/or b, and against the peace of this State, the Government, and dignity of the same.

Mr. Fair moves to dismiss the indictment.

LEGAL ARGUMENT

OVERVIEW

Defendants may challenge the constitutionality of their prosecution, by way of a pre-trial motion to dismiss the indictment, see State v. Vawter, 136 N.J. 56, 60, 77 (1994) (portions of indictment dismissed where movants established that "hate-crime" law violated their free-speech rights), by way of a pre-trial motion pursuant to R. 3:10-2(d) [17] .

In the present case, the charges against Calvin are murky due to the lack of specificity in the indictment (which is the

[17] The challenge may also be post-trial, by way a motion for acquittal. See State v. Saunders, 75 N.J. 200, 208-09 (1977) (defendant entitled to acquittal, where application of "fornication" law violated right to privacy).

subject of a separate motion). From the discovery materials, it appears that the State claims that Mr. Fair violated N.J.S.A. 2C:12-3 (subsection a or b) when he allegedly told Patrolman Healey to "watch out for a head shot" on May 1, 2015, and/or when he supposedly made the Facebook postings about the police on April 8 and April 9 (before the encounter with Officer Healey) and on May 1 (shortly after the encounter with Healey).

Assuming the State could prove all of its allegations, the indictment should be dismissed since the statements cannot be prosecuted as "terroristic threats" without violating Mr. Fair's federal First Amendment right to free speech [18]. These arguments are set forth in Point I.

In Point II, the undersigned will explain how the wording of N.J.S.A. 2C:12-3a is so vague that it violates Mr. Fair's due-process right to have fair notice of the difference between engaging in constitutionally-protected speech with the purpose of criticizing (or even insulting) law enforcement, and speaking with a "purpose to terrorize."

I. ASSUMING MR. FAIR SAID EVERYTHING THE STATE ATTRIBUTES TO HIM, HE IS BEING PROSECUTED FOR EXERCISING HIS FIRST

---

[18] Moreover, N.J. Const. art. 1, para. 6 "provides even broader [free-speech] protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club, L.L.C., 208 N.J. 491, 494 (2012).

AMENDMENT RIGHTS; THE STATEMENTS, HOWEVER OFFENSIVE, DO NOT FALL WITHIN ANY OF THE NARROW FREE-SPEECH EXCEPTIONS.

"The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I." The federal and state constitutions prohibit the government from criminalizing any speech, unless it falls into one of the "well-defined and narrowly limited classes of speech," such as obscenity, defamation, fraud, incitement, and "speech integral to criminal conduct." U.S. v. Stevens, 559 U.S. 460, 468-69, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (citations omitted) [19].

The present case involves the increasingly-documented tension between members of law enforcement, and members of the African-American community being 'policed.' It is irrelevant whether one thinks one 'side' or the other is 'right' or 'wrong,' either in a general sense or as it relates to a specific police interaction (e.g., Ferguson, MO); the point is that the issue is political, even though the 'debate' is often expressed in words and formats that are not traditionally associated with political speech [20].

---

[19] The Stevens Court is quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031 (1942), which recognized the so-called "fighting words" exception.

[20] The controversial "Super Bowl 50 Halftime Show" featuring Beyonce is one example of political speech in a typically non-political format.

> The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.
>
> Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 790, 131 S. Ct. 2729, 2733, 180 L. Ed. 2d 708 (2011).

Inflammatory anti-police rhetoric -- including insults directed at the officers -- must be recognized as political speech.

The undersigned cited all of Mr. Fair's alleged utterances provided by the State during pre-trial discovery. The undersigned will analyze those statements under all free-speech exceptions which the State is presumably relying on: (a) "fighting words"; (b) inciting a "clear and present danger"; and (c) words constituting a crime (the "true threat").

A. MR. FAIR'S STATEMENTS DID NOT CONSTITUTE "FIGHTING WORDS."

In Chaplinsky, supra, a Jehova's Witness confronted by law enforcement shouted that the arresting marshal was "a damned racketeer" and "a damned fascist." The Court held that such speech was not constitutionally protected but constituted mere "'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." 315 U.S. at 572, 62 S. Ct. at 769, 86 L. Ed. 1031. While never abrogated, the Supreme Court's decisions since Chaplinsky have

continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression. Gooding v. Wilson, 405 U.S. 518, 523, 92 S. Ct. 1103, 1106, 31 L. Ed. 2d 408 (1972).

Despite Justice Alito's citation to Chaplinsky in a vigorous dissent, the Court in Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011), upheld the right of Westboro Baptist Church members to public rejoice in the death of a soldier at his funeral. What Phelps and his followers said to the grieving relatives were 'fighting words' by anyone's definition, but their issue -- whether homosexuals should be allowed to serve in the military -- was an expression of their view on a political matter, and it was therefore protected.

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here— inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

562 U.S. at 460-61, 131 S. Ct. at 1220, 179 L. Ed. 2d 172.

Since Westboro could not be held civilly liable for their 'protest,' it is axiomatic that their 'speech' could not be criminalized.

When Marine Lance Corporal Matthew Snyder was boarding an airplane to leave the United States to serve his country in Iraq, the last thing he would have needed (or deserved) was for Mr. Phelps to shout to him, "Watch out for a headshot." It also would not have helped if Cpl. Snyder then went on Westboro's Facebook page and saw references to the marines as "gay-asses," "I'm joining ISIS (lol)" and the like. All of this notwithstanding, Westboro's and Phelps' so-called 'fighting words' are constitutionally protected speech.

The same is true in the present case. Neither Patrolman Healey nor the other officers believed that Mr. Fair was challenging them to a gunfight and announcing his intention to deliver a 'head shot' -- the alleged statement was an expression of hope that the officer receive a 'head shot,' which the officers understood since they all left the scene without incident. Was the statement hurtful? Yes. But can the statement be criminalized as 'fighting words'? No. As ugly as the statement was, Mr. Fair had as much right to direct it at Officer Healey as Reverend Phelps would have had the right to direct it at Corporal Snyder.

The Facebook postings are similarly protected as the statements (even if some of them could be 'fighting words' in another context) do not (per Chaplinsky) "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Quite the opposite, the Facebook postings 'incited' a discussion of police conduct in Mr. Fair's community -- and many individuals, whether 'liking' the posts or not, responded by engaging in dialogue over an important issue. If the internet had existed back in the 1940s, Mr. Chaplinsky's post-arrest 'blogs' or Facebook postings about how he was treated by the 'fascists' and 'racketeers' would not have been actionable as 'fighting words.'

B. THERE WAS NO THREAT OF "IMMINENT UNLAWFUL ACTION."

Just as 'fighting words' may provoke the target of the speech to commit unlawful acts against the speaker, other forms of speech may 'incite' the speaker (or a listener) to engage in unlawful conduct directed at a third-party. And, as with 'fighting words,' the doctrine of 'incitement' has evolved to safeguard political speech. In Schenck v. United States, 249 U.S. 47, 52, 39 S. Ct. 247, 249, 63 L. Ed. 470 (1919) [21], the Court upheld the criminalization of illegal advocacy (draft-

[21] Justice Holmes's majority opinion contains the famous "shouting fire in a theatre" illustration on the limits of First Amendment free-speech protections.

dodging) during a time of war, under the "clear and present danger" test. To the extent Schenck remains 'good law,' its applicability to political speech was substantially restricted in Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 420 (1969), involving a speech by a Ku Klux Klan leader advocating violent "revengeance."

> [T}he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
>
> 395 U.S. at ___, 89 S. Ct. at ____, 23 L. Ed. 2d 430.
>
> It is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot. And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime."
>
> Bible Believers v. Wayne County, Mich., 805 F. 3d 228 (6th Cir. 2015) (quoting Eugene Volokh, Crime-Facilitating Speech, 57 Stan. L. Rev. 1095, 1190 (2005)).

"The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253, 122 S. Ct. 1389, 1403, 152 L. Ed. 2d 403 (2002). "In protecting against the propensity of expression to cause violence, states may only regulate that

speech which is *"directed to inciting or producing imminent* lawless action and *is likely to incite* or produce such action." James v. Meow Media, Inc., 300 F. 3d 683, 698 (6th Cir. 2002) (quoting Brandenburg, supra, 395 U.S. at 447).

In Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1972), the police were attempting to clear the street of an out-of-control antiwar protest. One of the protesters. facing the crowd as a sheriff's officer passed by, stated that "We'll take the fucking street later (or again)." While this constituted illegal advocacy, the Supreme Court held that the protester could not be prosecuted because the threat lacked the required immediacy.

> [A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech.
>
> 414 U.S. at ___, 94 S. Ct. at ____, 38 L. Ed. 2d 303 (1972).

In United States v. Bagdsarian, 652 F. 3d 1113 (9th Cir. 2011), the defendant posted comments on the internet -- in the context of the 2008 Presidential Election -- which are so alarming that the undersigned hesitates to repeat them. Suffice it to say, they were several statements -- two of which were

rather specific, threatening, racially-charged utterances vis-à-vis one of the candidates. The Secret Service located the internet poster, and he was charged with and convicted of threatening harm to another person under 18 U.S.C.A. Sec. 879. Citing such cases as Hess and Brandenburg, the Ninth Circuit Court of Appeals held that the politically-charged utterances lacked the immediacy required for criminal prosecution.

> These statements are particularly repugnant because they directly encourage violence. [ ]. We nevertheless hold that neither of them constitutes an offense within the meaning of the threat statute under which Bagdasarian was convicted.
>
> Id. at 1115 (footnote omitted).

In the present case, the State alleges that Mr. Fair told Officer Healey to 'watch out for a head shot.' The plain meaning of the words, and the officers' interpretation of the words in their narrative reports, demonstrate that there was no communication of an immediate threat -- indeed, it does not appear that the communication was even a threat of harm from Mr. Fair himself, but rather his expression of hope that someone someday harms the officer. If Mr. Fair said that, the undersigned acknowledges that it was an ugly thing to say, and 99.9% of us have the sense to refrain from saying such things 99.9% of the time -- but State and Federal free-speech provisions

guaranty the right to say such things, except in limited circumstances involving the incitement of immediate criminal activity. There being no such incitement, and in any event no immediacy, Mr. Fair cannot be prosecuted without stripping him of the constitutional rights the rest of us enjoy.

C. THERE WAS NO "TRUE THREAT," AND THERE CERTAINLY WAS NO INTENTION TO DO ANYTHING MORE THAN THAN CONVEY DISLIKE FOR POLICE; U.S. CONST. AM. I AND N.J. CONST. ART. I, PARA. 6 PROTECT THE SPEECH IN QUESTION.

As suggested from the discussion in Sub-Points A and B, the so-called 'categories' of unprotected speech have exceptions when public-speech issues are implicated. That is why the Westboro Church protesters may utter "fighting words" without civil liability, and why Klansman Clarence Brandenburg and antiwar protester Gregory Hess were allowed to advocate criminal acts without criminal punishment. The same applies with the so-called "true threat" exception: While 'true threats' are not constitutionally protected, it must be understood that when public issues are involved, certain utterances can only be 'true threats' under limited circumstances.

On one hand, it has been stated that "[t]hreats of violence are outside the First Amendment," Madsen v. Women's Health Center, Inc., 512 U.S. 753, 774, 114 S. Ct. 2516, ____, 129 L. Ed. 2d 593 (1994), and that a "true threat" is made when the

speaker "means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individual." Virginia v. Black, 538 U.S. 343, 359, 123 S. Ct. 1536, 1548, 155 L. Ed. 2d 535 (2003). Moreover,

> [t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." [ ]. Intimidation 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.
>
> 538 U.S. at 359-60, 123 S. Ct. at 1548, 155 L. Ed. 2d 535 (quoting R.A.V. v. St. Paul, 505 U.S. 377, 388, 112 S. Ct. 2538, 2546, 120 L. Ed. 2d 305 (1992)).

However, the so-called "true threat" category cannot extend into the realm political hyperbole. In Watts v. United States, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1967), the defendant was discussing police brutality, race and the Vietnam War when he made the following comment:

> 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. They are not going to make me kill my black brothers.

394 U.S. at 706, 89 S. Ct. at ____, 22 L. Ed. 2d 664.

While this would appear to meet the Virginia v. Black definition of "true threat" [22] , the Supreme Court held that it was protected by the First Amendment because public debate "may well include vehement, caustic and sometimes unpleasantly sharp attacks" on authority figures. 394 U.S. at 708, 89 S. Ct. at _____, 22 L. Ed. 2d 664. Because of these considerations, the Court emphasized the need to view the threat in its context -- the crowd at the rally laughed when the defendant made the statement, which was itself conditional and without specificity.

> The language of the political arena . . .is often vituperative, abusive, and inexact. We agree with petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.
>
> 394 U.S. at ___, 90 S. Ct. at 1401-02, 22 L. Ed. 2d 664.

In Commonwealth v. Beasley, ___ A. 3d ___, 2016 WL 1719408 (Pa. April 28, 2016), the defendant's rap song ("F--- the Police") posted on social media, was not protected because it contained

---

[22] Indeed, it was an even 'truer' threat than what the defendant in Bagdasarian had posted -- in the sense that Mr. Bagdasrian advised his internet 'audience' that he was posting while highly intoxicated.

unconditional threats against specifically named officers. By contrast, in State v. Metzinger, 456 S.W. 3d 84 (Mo. App. 2015), the internet poster's reference to pressure cookers and marathon races (alluding to the Boston Marathon bombings) was protected speech; the threats were nonspecific and they were made in the context of an argument involving a sports contest. In State v. Roach, 457 S.W. 3d 815 (Mo. App. 2014), the police obtained a search warrant for guns because the internet poster expressed his belief that he would likely climb a bell tower with a gun during the school semester (referring to Charles Whitman); the Court held that the search warrant should not have issued because the 'threat' was nonspecific and the context was obviously in jest.

It should also be noted that the Federal and State free-speech protections require the defendant to have a certain level of scienter regarding their intention to threaten (as opposed to a mere intention to annoy or insult). In Elonis v. United States, 575 U.S. ___, 135 S. Ct. 2001, 192 L. Ed. 2d (2015), the defendant used Facebook to post threats to injure his soon-to-be ex-wife, employees at the amusement park where he had been fired, police officers, an FBI agent, and a certain classroom of schoolchildren. The defendant argued that the First Amendment required a specific intent to threaten, while the Third Circuit Court of Appeals held that only a general intent was required. While the majority of the Supreme Court elected not to resolve

whether the scienter should be specific intent as opposed to a lesser standard (such as recklessness), the Justices held that a general or negligence standard was insufficient -- there had to be a higher level of intent to threaten [23] .

As previously stated, New Jersey "provides even broader [free-speech] protections than the familiar ones found in its federal counterpart." Borough of Sayreville v. 35 Club, L.L.C., supra, 208 N.J. at 494. Four years before the Elonis opinion, and in E.M.B. v. R.F.B., 419 N.J. Super. 177 (App. Div. 2011), an FRO issued because of statements which the trial court deemed to be harassing. In reversing, the Appellate Division held that the First Amendment required that scienter -- a specific intent to harass -- had to be established.

> The harassment statute was not enacted to "proscribe mere speech, use of language, or other forms of expression." Ibid.; *see also* State v. Fin. American Corp., 182 *N.J.Super.* 33, 36-38, 440 *A.*2d 28 (App.Div.1981). Because the First Amendment to the United States Constitution "permits regulation of conduct, not mere expression[,]" the speech punished by the harassment statute "must be uttered with the specific intention of harassing the listener." L.C., supra, 283 *N.J.Super.* at 450, 662 *A.*2d 577.
>
> 419 N.J. Super. at 182.

---

[23] In his concurring/dissenting opinion, Justice Alito urged the Court to articulate the standard. Dissenting, Justice Thomas essentially shared the view of the Third Circuit (and most of the other Circuit Courts of Appeal) that a general intent or negligence standard was sufficient.

One year after Elonis, in State v. Buckert, 444 N.J. Super. 591 (App. Div. 2016), the defendant was charged with harassment for distributing a vulgar flyer regarding his employer. The Appellate Division stated:

> [P[roscribed speech must be uttered with the specific intention of harassing the listener.
> Id. at 601.

Synthesizing the case law, the "true threat" doctrine is subject to several caveats. First, when a public matter is being discussed, a so-called "true threat" cannot be criminalized if it is merely hyperbolic (Watts) -- hyperbole is not a "true threat" unless it is unconditional (Beasley), specific (Roach), and considered a threat in its context and given its effect on its audience (Metzinger). Second, there has to be an intention to threaten -- not a general intention, but a specific intention. Federal law would require at minimum a showing of recklessness (Elonis), and New Jersey law would require that the defendant specifically intend to threaten (Burkert).

In the present case, none of the statements attributed to Mr. Fair qualify as "true threats." It should initially be noted that the statements were all made in the context of the public issue of police conduct -- whether as a general matter, or as it relates to the actions of the police officers who searched the home of Mr. Fair's mother.

The April 8, 2015 internet posting does not contain any threat of violence; on the contrary, it is agreeing with Kountry Kash Kill's message in "Why the Good Gotta Die Young" in denouncing those forces causing tragic deaths among today's youth. Assuming the reference to "hammers" means "guns," there is no threat directed at anyone and it is unreasonable for the State to boot-strap this statement to something said months later in order to create a 'terroristic threat.' If that were the standard, then the defendant in Watts could be prosecuted if he had said "I have a gun" at another rally, months earlier and 500 miles away. The April 8 post was "like[d]" by so many people because the message -- the context -- was about social problems affecting our youth.

The April 9, 2015 posts are in the context of smiling faces, a "silly" mood, and obvious hyperbole. No rational person could understand the comment as reflecting a serious threat to 'join ISIS' (a statement followed by "lol" (laughing out loud)).

On May 1, 2015, Patrolman Healey alleges that Mr. Fair was saying "irrelevant things." The 'things' were not irrelevant to Mr. Fair; police interactions appear to have been generally hostile, and he appeared genuinely upset over how the officers had treated his mother (not his grandmother -- Officer Healey obviously was not listening, which may well be the root of the underlying problem between the police and 'the policed'). In

that context, Mr. Fair is alleged to have said, "Watch out for a head shot." The statement was not that Mr. Fair was going to do anything to anyone, the statement was that he (Mr. Fair) hopes that something bad happens to the 'thirsty devil.' The comment was hyperbolic, and his audience (the officers) knew it was hyperbolic because otherwise they would never have left the area. The officer said he was going to 'sign a warrant' before the alleged statement -- and sign it he did, after the alleged statement. Healey would have had the right to be offended by the alleged statement -- but Fair would have had the constitutional right to make such a statement. The speech was in the context of a public matter, the content and context of the speech was hyperbolic, and there is no suggestion of a specific intent to threaten. And this is true when reviewing the factual contentions in the light most favorable to the State.

Finally, there are alleged Facebook postings on May 1, 2015, shortly after the police left. Far from constituting terroristic threats, the posts demonstrate beyond question the public-speech nature of Mr. Fair's alleged verbal utterances directed at Patrolman Healy. The overwhelming reaction of the Facebook participants was one of shock over how Leneva Fair had been treated by the police when they came to the house 10 weeks prior -- they were not being incited. Indeed, the posts mention contacting Rev. Al Sharpton and Rev. Jesse Jackson (presumably as

part of a free-speech exercising), contacting Internal Affairs (petitioning for the redress of grievances), and a civil lawsuit. This is followed by:

> YU WILL PAY, WHEVA HAD ANY INVOLVEMENT, WASTIN TAX PAYERS MONEY! BRINING ALL THM OFFI$CERS OUT FOR A 84 YEAR OLD WOMEN! SO SAD BYT WE WILL HAVE THA LAST LAUGH! #JUST WAIT FOR IT.

You cannot say this without going to prison for terroristic threats? Where is the threat? Where is the specific intent to threaten? What about the context?

D. N.J.S.A. 2C:12-3 IS UNCONSTITUTIONALLY OVERBROAD.

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. *Virginia v. Hicks*, 539 U.S. 113, 119-120, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003). On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep.
>
> U.S. v. Williams, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838, 170 L. Ed. 2d 650 (2008).

"An overbreadth challenge to a statute may be successful where there is a strong showing that the statute's deterrent effect on legitimate expression is real and substantial and that the sweep of the legislation will impermissibly hobble the exercise of protected First Amendment rights." State v. Hoffman, 149 N.J. 564, ___ (1997).

In the present case, N.J.S.A. 2C:12-3 contains two subsections, both of which are set forth in the indictment.

> a. A person is guilty of a crime of the third degree if he [sic] threatens to commit any crime of violence with the purpose to terrorize each other . . . .
>
> b. A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.

As previously stated, the United States Supreme Court has held that, in order to safeguard free-speech rights, a threat statute must contain scienter -- beyond general intent or negligence regarding the threat. Elonis. Both subsections "a" and "b" violate the rule in Elonis, as they refer to 'threatening' without identifying the requisite mens rea. Moreover, in Burkert, the Appellate Division held that free-speech requires specific intent, not merely a reckless disregard, when speech is to be criminalized.

In the present case, the unconstitutional overbreadth appears on the face of the statute, and also as applied to Mr. Fair. As a general proposition, the statute would criminalize someone for threatening without the speaker knowing whether s/he could be prosecuted for negligently threatening another in the context of speaking on a public issue. Even if one could assume that the statute requires "knowing" scienter pursuant to N.J.S.A. 2C:2-2(c)(3), see State v. Demarest, 252 N.J. Super. 323, 326-27 (App. Div. 1991), Mr. Fair is being accused of acting "with the purpose to terrorize . . . or in reckless disregard of the risk." Reckless disregard is insufficient where, as here, free speech is implicated. Elonis.

The ordinary citizen thus cannot participate in the proverbial "marketplace of ideas" if s/he cannot make controversial statements without fear of accidentally or 'recklessly' threatening someone. Mr. Fair's own prosecution herein is an example of the chilling effect of an overly broad, improperly tailored 'terroristic threat' statute. The amorphous, 'purposely and/or recklessly' nature of the indictment is a testament to that threat to our free-speech rights.

II. N.J.S.A. 2C:12-3a IS VOID FOR VAGUENESS BOTH ON ITS FACE AND AS APPLIED TO MR. FAIR; THE TERM "TERRORIZE" MUST BE DEFINED SO THAT FREE SPEECH IS NOT CHILLED.

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fourteenth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.
>
> Williams, supra, 553 U.S. at 304, 128 S. Ct. at 1845, 170 L. Ed. 2d 650.

"A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution." Hoffman, supra, 149 N.J. at ___. While subsection "b" of the statute is not vague regarding the purpose to "kill," subsection "a" is unconstitutionally vague for its failure to define the term "terrorize."

In State v. Conklin, 394 N.J. Super. 408 (App. Div. 2007), the Court held that a person could be prosecuted under subsection "a" for private speech that does not involve the immediate risk of death (phone caller states that people 'tend to disappear'). Assuming Conklin remains 'good law,' it does not apply to public speech since (for the previously mentioned reasons) there is a distinction between true threats and mere hyperbole. In the course of a heated debate on an important public issue, what is the difference between 'terrorizing' and to 'hyperbolizing'?

N.J.S.A. 2C:12 is absolutely silent on the term, and the only definition of "terrorize" in the Criminal Code is as follows:

> "Terrorize" means to convey the menace or fear of death or serious bodily injury by words or actions.
>
> N.J.S.A. 2C:38-2d.

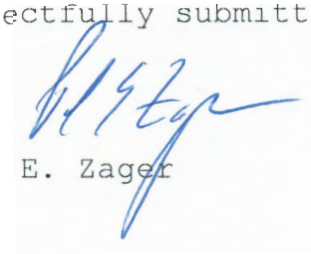
This definition would effectively make N.J.S.A. 2C:12-3 "a" and "b" identical.

Public speech on hot-button topics -- police conduct is certainly one such topic -- requires a delicate balance between what is merely offensive, and what rises (or descends) to the level of 'terrorism.' In that respect, N.J.S.A. 2C:12-3a is essentially standard-less and it allows the police to decide what 'terrorizes' based on whether or not the speech is something they wanted to hear. The average citizen's free-speech rights are child due to this vagueness, and Mr. Fair's prosecution is a tangible example of how ad hoc criminalization of speech can be misused.

CONCLUSION

For the foregoing reasons, the Court should grant Calvin Fair's motion; the indictment should be dismissed as the prosecution violates Mr. Fair's right to freedom of speech as well as his due-process rights.

Respectfully submitted,



Paul E. Zager

PEZ/gia

cc: Carey Huff, Esq., Assistant Prosecutor