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In The

Supreme Court of New Jersey

No. A-20-22 (086617)

STATE OF NEW JERSEY, *Plaintiff-Appellant*, v. **CALVIN FAIR,** *Defendant-Respondent*.	**CRIMINAL ACTION** ON APPEAL AS OF RIGHT FROM THE APPELLATE DIVISION, SUPERIOR COURT, DOCKET NO. A-0913-19 *Before:* Clarkson Fisher, Jr., P.J.A.D. Heidi Willis Currier, J.A.D. *and* Patrick DeAlmeida, J.A.D. ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE SUPERIOR COURT, LAW DIVISION, MONMOUTH COUNTY, INDICTMENT NO 15-08-1454. *Before:* Lisa P. Thornton, A.J.S.C. Vincent J. Falcetano, Jr., J.S.C. *and* Dennis R. O'Brien, J.S.C. and a jury

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

The American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of defendant Calvin Fair in this matter.

PRELIMINARY STATEMENT

This case involves a series of vitriolic comments made verbally by the defendant Calvin Fair while in his own home, and later in writing on social media, objecting to what he considered to be unjustified intrusions by local law enforcement officers into the privacy of his residence. As this and other courts have stated, a "man's home is his castle," and absent a constitutionally valid reason otherwise, police may be kept out or invited in as with any other guest. Consistent with that principle, Mr. Fair demanded that the police officers leave, and thereupon, having no basis to do otherwise, they left.

Amicus ACLU-NJ believes that as far as the law enforcement system is concerned, this matter should have been concluded at that point. Mr. Fair's manner of expression on matters of public concern was certainly emphatic, and by most prevailing norms of social discourse, vulgar. But the ensuing felony prosecution, conviction and three-year prison sentence under New Jersey's terroristic threats statute, which as the Appellate Division found, could have been based on less than a finding that Mr. Fair actually intended to put the police

officers in imminent fear of death or bodily harm, proscribes speech that is protected both by the First Amendment to the United States Constitution and Article I, ¶6 of the New Jersey Constitution. The protections of the latter are particularly triggered, given the strong history and traditions of this State of safeguarding the privacy and inviolability of a person's home against intrusion, including by law enforcement.

Amicus also urges the Court to consider the special due process and equal protection concerns that arise when criminal liability is based in part on whether the defendant is aware of how the alleged victim or a hypothetical "reasonable person" would construe the defendant's expression, rather than how the defendant subjectively intended that expression. Variances in understanding caused by different cultural and social norms, and especially the inevitable dangers of implicit bias when a jury is asked to act as a proxy for a reasonable person, who is thereby defined by jurors' own cultural and social backgrounds, require utmost caution lest a criminal defendant's fate is determined by standards that are incapable of consistent definition.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Amicus ACLU-NJ adopts the Procedural History and Statement of Facts contained in the decision of the Appellate Division in this matter that was entered on December 9, 2021.[1] *State v. Fair*, 469 N.J. Super. 538 (App. Div. 2021).

On December 29, 2021, the State filed a Notice of Appeal as of right, pursuant to R. 2:2-l(a)(l), because "this case involves a substantial question arising under the Constitution of the United States or this State." By Order dated November 1, 2022, this Court denied Defendant's motion to dismiss the State's Notice of Appeal as of right and ordered that the appeal shall proceed pursuant to Rule 2:2-1(a)(1), and further ordered that proposed amicus briefs be filed by December 22, 2022.

[1] For purposes of conciseness, the Facts and Procedural History sections are consolidated in this brief.

ARGUMENT

I. BY NOT REQUIRING THAT THE JURY FIND THAT THE DEFENDANT ACTUALLY INTENDED TO INSTILL A FEAR OF IMMINENT HARM, THE TERRORISTIC THREAT STATUTE AS APPLIED IN THIS CASE WAS OVERBROAD AND VIOLATED THE FIRST AMENDMENT.

A. The First Amendment Protects Speech, and Particularly Political Speech, that Is Perceived as Vulgar and Offensive.

To ensure that public discussion remains "uninhibited, robust, and wide-open," the First Amendment protects speech that is "vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). While ACLU-NJ acknowledges that constitutional protection does not extend to a speaker who actually threatens another with death or serious bodily harm, it can be difficult, and often impossible, to distinguish a genuine threat from mere obloquy or vituperation solely by referring to the words used. Context is crucial to such understanding, and thus misunderstanding is also an inherent risk.

Watts concerned a prosecution under 18 U.S.C. § 871(a), which prohibits knowing and willful threats against the President, for a draft protester's statement at a rally against the Vietnam War 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 706. Despite the facial meaning of those words as indicating an intent to threaten harm against the then President, the Supreme Court found that contextual factors clearly indicated that the defendant was engaged only in "a kind of very crude offensive

method of stating a political opposition to the President," and construing § 871(a) in light of First Amendment principles, the Court concluded that the statute's use of the term "threat" excluded the defendant's political hyperbole.

> [W]hatever the "willfullness" requirement implies, the statute initially requires the Government to prove a true "threat." We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

Watts, 394 U.S. at 708 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

Requiring that the speaker subjectively intend to intimidate provides a clear demarcation between protected and unprotected speech. Any person, whether or not of "ordinary intelligence," would understand that one cannot *intend* to put another in fear of bodily harm. Such a test would provide boundaries that are "well-defined" and "narrowly limited" that are constitutionally required to circumscribe a category of speech that is not protected by the First Amendment. *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *accord United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

In contrast, a statute that requires speakers to ascertain whether their speech will be perceived by others or by a hypothetical "reasonable" person as

intimidating, or even one that asks whether they acted "in reckless disregard of the *risk* of causing such terror," N.J.S.A. 2C:12-3(a)(emphasis added), requires speakers to assess the state of mind of another in ascertaining the existence of that risk, and thus demands a spontaneous prescience that is beyond what the First Amendment permits.

A statute that proscribes allegedly threatening speech without regard to the speaker's subjectively intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or unskillfully expressed. Statutes criminalizing threatening language without requiring that the government demonstrate a culpable *mens rea* are thus likely to include within their sweep speech protected under the First Amendment, including core political, artistic, and ideological speech. To ensure adequate breathing room for such speech, this Court should make clear that subjective intent to threaten imminent bodily harm is an essential element of any constitutionally proscribable true threat.

B. Virginia v. Black *Requires an Intent to Instill Fear of Physical Harm, Not Merely an Intent to Make a Communication.*

In defining the kind of "threat" that may be proscribed by the First Amendment, the Appellate Division correctly interpreted *Virginia v. Black*, 538 U.S. 343 (2003), as requiring a subjective intent to intimidate, i.e. "the

subjective intent to both (1) utter threatening words *and (2) cause another to fear the possibility of violence*." *State v. Fair*, 469 N.J. Super. 538, 551 (App. Div. 2021) (quoting *State v. Boettger*, 310 Kan. 800, 807, 450 P.3d 805, 810 (2019) (emphasis added)). The Appellate Division thus concluded: "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.'" 469 N.J. Super. at 554.

"Intimidation in the constitutionally proscribable sense of the word is a type of true threat," *Virginia v. Black* noted, "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 360 (emphasis added). As the Appellate Division found, the prong of the terroristic threats statute (N.J.S.A. 2C:12-3(a)) that the jury below was permitted to consider, which imposes criminal liability if the defendant acts "in reckless disregard of the risk of causing such terror," does not require the constitutionally mandated subjective intent to intimidate, and is thus overbroad. As an assessment of probabilities, "risk" of what another person may believe is an inherently objective and quantitative determination, not a subjective and qualitative one.

Even when read in conjunction with N.J.S.A. 2C:2-2(b)(3), which defines "recklessness" as when the actor "consciously disregards a substantial and unjustifiable risk that the material element exists," the statute imposes liability dependent upon the mere "risk" that that the communication will be perceived as threatening by another person. This prong of the statute therefore does not require that the defendant actually *intend* that threat to be communicated; it is sufficient that there is a sufficiently high risk or probability this threat is perceived by others. *Virginia v. Black*'s clear teaching is that this intent to intimidate, i.e. the intent to instill fear of imminent bodily harm, is the prerequisite to finding speech to be constitutionally proscribable.

The alternative interpretation of intent adopted in some other jurisdictions, i.e. intent merely to engage in the act of communication rather than intent to instill a fear of bodily harm, was rightly rejected by the Appellate Division. *See State v. Fair,* 469 N.J. Super. at 551 n.6 (citing but declining to follow four federal courts of appeals that found that only "proof of an intent to make the statement is constitutionally necessary, not the intent to threaten"). While it is possible to conjure examples of accidental rather than intentional communications, such as typographical errors or a neurological disorder such as Tourette syndrome that cause the speaker to blurt out involuntarily unusual sounds or offensive words, it is hard to believe that prohibiting criminal liability

in these somewhat improbable situations is the extent of the constitutional protections envisaged by the intent requirement.[2]

The speaker's own subjective intentions are of course known to the speaker and therefore provides a fair and reliable metric for accountability. The intent requirement provides the cautionary effect and clear notice to the speaker that speech actually intended to instill fear of bodily harm is beyond constitutional protection. That cautionary effect is absent however when the speaker does not subjectively intend to instill such fear, and interpreting the intent requirement as merely protecting against criminal liability for accidentally hitting the "Send" key or similar events would trivialize the underlying constitutional principle.[3] The very purpose of the First Amendment is to protect intentional speech.

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[2] Even for purposes of ordinary civil tort liability, "intent" refers to the consequences of an act rather than merely the act itself. *See* RESTATEMENT (SECOND) OF TORTS § 8A (1965) (comment a); *see also Mahoney v. Carus Chem. Co.*, 102 N.J. 564, 574 (1986) (drawing distinction between intentional act where actor must intend the harm and willful and wanton misconduct where the act must be intended, but not the resulting harm).

[3] Although in *Watts* there was no occasion for the Court to resolve whether intent to threaten is an essential element of a constitutionally proscribed "true threat," it expressed "grave doubts" about the lower court's conclusion that the statute's mens rea component required only general intent to utter the charged words. 394 U.S. at 707–08 (internal quotation marks omitted) (citing *Watts v. United States*, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Skelly Wright, J., dissenting)).

II. THE NEW JERSEY CONSTITUTION EXTENDS SPECIAL PROTECTIONS TO EXPRESSION THAT PROTECTS AN INDIVIDUAL'S PRIVACY INTEREST.

A. Article I, Paragraph 6 of the New Jersey Constitution Recognizes a Right to Freedom of Expression that Is Independent of the First Amendment of The United States Constitution.

The New Jersey Constitution's free speech clause 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). The New Jersey Constitution, Article I, ¶¶ 6, 18, in language more "sweeping in scope than the language of the First Amendment," recognizes broad and affirmative rights of speech, assembly and petition for the redress of grievances. *State v. Schmid*, 84 N.J. 535, 557 (1980). These guarantees are stated as an *affirmative* right of the people, not merely a limitation on government action as is contained in the First Amendment to the Federal Constitution.

It is true that in cases challenging restrictions on speech by a government actor, this Court normally interprets the state constitution's free speech clause to be no more restrictive than the First Amendment to the United States Constitution, and therefore relies on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution. *E.g.*,

Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264 (1998). Amicus ACLU-NJ believes, however, that the facts and context of this case present special reasons why the New Jersey Constitution is of particular relevance and potential application.[4]

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[4] The Appellate Division expressly noted the more expansive breadth of the New Jersey Constitution's free speech provisions, and did "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." *State v. Fair*, 469 N.J. Super. 538, 554 n.7, (App. Div. 2021). But because the defendant did not raise the state constitution before the Appellate Division, and having found that federal constitutional principles required reversal of the conviction, the lower court did not need to further address possible application of the state constitution.

Amicus presents these arguments, however, as an alternative way to affirm the judgment below, and it is a commonplace aspect of appellate review that a reviewing court may affirm a judgment on any basis supported by the record, even if not addressed or even rejected by the lower court. *See*, *Isko v. Planning Bd. of Livingston*, 51 N.J. 162, 175 (1968); *Marchitto v. Cent. R. Co.*, 9 N.J. 456, 463 (1952); *State v. Heisler*, 422 N.J. Super. 399, 416 (App. Div. 2011). Although ACLU-NJ firmly believes that federal constitutional principles require the reversal of defendant's criminal conviction, even if that were not the case, the interests of justice would then require this Court to consider whether state constitutional principles would nevertheless require reversal of Mr. Fair's conviction.

B. The New Jersey Constitution Has Also Been Construed as Granting Special Protections Regarding the Privacy of The Home.

Among the criteria this Court has used in determining whether to interpret the New Jersey Constitution more expansively than its federal counterpart are the "history and traditions" of the State. *State v. Hunt*, 91 N.J. 338, 366 (1982) (Handler J., concurring); *see State v. Williams*, 93 N.J. 39, 57 (1983) (opinion of the Court adopting Justice Handler's criteria for applying the state constitution). There are few traditions more deeply engrained in New Jersey's constitutional history and legal traditions than protecting the rights and prerogatives of residents to protect the inviolability of their homes.

This Court has cited the adage that "a man's home is his castle," and thus "police may be kept out or invited in as informally as any other guest." *State v. Domicz*, 188 N.J. 285, 306 (2006) (quoting *United States v. Carter*, 378 F.3d 584, 589 (6th Cir. 2004)). In *Domicz*, this Court declined to extend the independent reasonable suspicion requirement as a prerequisite to a valid consent search, as it had done with respect to a consent search of an automobile in *State v. Carty*, 170 N.J. 632 (2002), *modified on other grounds,* 174 N.J. 351 (2002). The reason it did so, however, was that when a person is in the familiar surroundings of their own home, they are not in an inherently coercive setting since they "can send the police away without fear of immediate repercussions."

Domicz, 188 N.J. at 306. Mr. Fair's diatribe, however vitriolic, was an attempt to do exactly that.

Previously established norms of state law may also suggest distinctive state constitutional rights, since state law is often responsive to concerns long before they are addressed by constitutional claims. *State v. Hunt*, 91 N.J. at 365.

Clear evidence of the extreme deference the law has long paid since medieval times to persons who are asserting their rights to be the rulers within their own households can be found in the substantive criminal law. "The home is accorded special treatment within the justification of self-defense." *State v. Montalvo*, 229 N.J. 300, 319 (2020). Thus, under the well-known castle doctrine inherited from the English common law, there is no duty to retreat and the use of deadly force is authorized when the actor is in their own dwelling. E.g., *State v. Gartland*, 149 N.J. 456 (1997); see also *People v. Tomlins*, 213 N.Y. 240, 243, 107 N.E. 496, 497 (1914) (Cardozo, J.) (noting ancient English rule that "In case a man is assailed in his own house, he "need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight."). This venerable principle is now codified in statute. N.J.S.A. § 2C:3-4b(2)(b)(i) ("The actor is not obliged to retreat from his dwelling, unless he was the initial aggressor"). The fact that the common law

has historically extended to the inhabitants of the home such extraordinary prerogatives, including under some circumstances the use of deadly force, provides relevant background in interpreting the scope of free speech rights under the state constitution which are exercised in furtherance of those prerogatives.

C. Calvin Fair's Political Speech Criticizing Unwarranted Law Enforcement Intrusions into his own Home Should Be Afforded Particular Protection Under the State Constitution.

Recently, this Court has also made clear under state constitutional law principles that the right to free speech is violated when a private homeowner's association attempted to prohibit residents from posting political signs in the windows of their own homes. *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 210 N.J. 482, 492 (2012). This Court examined the three factors described in *State v. Schmid* in determining whether the state constitutional protections of free speech had independent application:

> (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Mazdabrook, 210 N.J. at 494 (quoting *Schmid*, 84 N.J. at 563).

The "normal use" of the property in this case was as a private residence, which would normally weigh against its use as a public forum for expressive

activity. *See Murray v. Lawson*, 138 N.J. 206 (1994)(residential privacy is an important government interest that can justify some limitations on ability to picket on adjoining public sidewalks). But here, of course, the speaker *is* the resident of the home, and thus one of its normal uses would be to serve as a forum for his expression. It reinforces the normal use of the property to allow Mr. Fair to use it as the location from which to assert his right to privacy and what he viewed as unwarranted intrusion by law enforcement.

Similarly, the logical corollary of the second *Schmid* factor, the extent and nature of the public's invitation to use the property, weighs in favor of Mr. Fair as the resident of the home in asserting the quintessentially private nature of premises and rebutting any inference that the public or the police are implicitly invited to engage in its use.

Finally, the third *Schmid* factor, the purpose of the expressional activity, weighs heavily in favor of protection under the New Jersey Constitution. The purpose of Mr. Fair's expression was to assert his rights to residential privacy that are themselves given protection by the state constitution. Moreover, Mr. Fair's purpose was also to express political speech, in that he was complaining about government policies that led to intrusion into his home by law enforcement, and thus petitioning for redress of grievances under N.J. Const., Art. I, ¶18.

D. Pursuant to the Independent Protections Afforded by the New Jersey Constitution, Mr. Fair's Speech Cannot Be Prosecuted Under the Terroristic Threats Statute as a Matter of Law.

As the previous sections describe, the historic protections given to homeowners or residents to exercise dominion within their curtilage also imply among other things the use of direct and forceful language to assert that dominion, which language might in other circumstances be deemed a threat, and which in fact might well, in the heat of the moment, be intended to instill fear. As a result of the independent application of the New Jersey Constitution, Amicus ACLU-NJ suggests the following consequences.

First, as suggested by the Appellate Division (see *supra* note 4), if there were any doubt as to whether the "intent" requirement described in *Virginia v. Black* referred to an intent to intimidate, i.e. a subjective intent to instill fear of bodily harm, or rather mere intent to engage in the actual act of communication, then the New Jersey Constitution should quickly resolve the uncertainty in favor of the former.

But Amicus ACLU-NJ also respectfully suggests that because of the special protections given to expression by residents enforcing their privacy interests in their own home and the pervasive legal traditions that permit a resident to protect those privacy interests even to the point of physical force, the New Jersey Constitution should be construed to require a realistic assessment of

whether the speech involved in fact presents a risk of any actual harm that the State has a substantial interest in preventing, in order to fall outside the protections of the free speech clause of Article I, ¶6. Rather than over-reliance on formulaic rules, it is often this Court's tradition in applying the state constitution, where an "important personal right is affected by governmental action, . . .[to] require[] the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." *Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp.*, 80 N.J. 6, 43 (1976).

As a matter of federal constitutional law, *Virginia v. Black* made clear that while the speaker must have the intent to intimidate through a threat, the "speaker need not actually intend to carry out the threat." *Virginia v. Black*, 538 U.S. at 359-60. While ACLU-NJ does not argue that this Court should simply impose that requirement as a matter of state constitutional law, the State should be required to make an evidentiary showing that, even if the speaker subjectively intended to intimidate through threat, that the speaker believe that *some* harm is actually likely to occur beyond the insult of the speech itself.

Thus hypothetically, even if a speaker, believing that a person is so engrossed in the Harry Potter mythology that he believes and intends that the person would be intimidated through use of the *Avada Kedavra* curse, it should not be constitutional plausible to prosecute for terroristic threat, when no one,

including the speaker could rationally believe that any actual harm would result. And under the less fantastic facts on this case,[5] the State's interest in proscribing the "head shot" comment or the "I KNO WHT YU DRIVE & WHERE E ALL YU MOTHERFU$KERS LIVE AT" comment is questionable when no one, including the police officers, appeared to treat them as anything more than rhetorical hyperbole or take seriously the possibility that they indicated that Mr. Fair actually knew where they lived or would engage in any further action that presented any actual danger. Absent a palpable state interest in preventing

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[5] As recounted in the Appellate Division's opinion, the State offered the following statements by Mr. Fair as arguably directed towards Officer Healey that could be the basis for a terroristic threat conviction under N.J.S.A. 2C:12-3:

- The "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.

- The first Facebook post after the May 1, 2015, in-person argument when defendant 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"

State v. Fair, 469 N.J. Super. at 556-57.

tangible harm, under state constitutional law principles there is insufficient justification in criminalizing such rhetoric.

III. THE JURY CHARGE WAS UNCONSTITUTIONALLY VAGUE BECAUSE IT DEFINES AN ELEMENT OF THE CRIME NOT BY A DEFENDANT'S INTENT BUT BY HOW DEFENDANT'S EXPRESSION MIGHT BE UNDERSTOOD BY OTHERS.

The jury in this case was permitted to base its verdict on three different theories:

- defendant threatened to commit a crime of violence with the purpose to terrorize another (2C:12-3(a)),
- defendant threatened to commit a crime of violence with reckless disregard of the risk of causing such terror (2C:12-3(a)), or
- defendant 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 (2C:12-3(b)).

469 N.J. Super. at 546. The Appellate Division found the second theory ("reckless disregard") to be unconstitutional and for that reason remanded the case for trial on the remaining counts, since from the way in which the case was presented to the jury, it could not be determined whether defendant was convicted for conduct that fell within those parts of N.J.S.A. 2C:12-3 that were

not unconstitutional, and for the additional reason that the jury instructions did not ensure that the jury was unanimous on at least one part of the statute. 469 N.J. Super. at 558.

Although the following constitutional argument was not addressed by Appellate Division or raised by parties in the course of the original trial, because the Appellate Division has remanded the matter for a new trial on those parts of the indictment that it did not strike down as unconstitutional, in the interests of judicial economy Amicus ACLU-NJ expresses an additional constitutional concern about a surviving count of the indictment that would be retried.

A. Under State v. Pomianek, Defendant's Conviction Under the Terroristic Threats Statute Must Be Reversed.

N.J.S.A. 2C:12-3(b), under which Defendant Fair would be retried if the Appellate Division's judgment is affirmed, makes it 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."

Because the statute defines an element of the crime not in terms of the defendant's intent or perceptions, but rather what the victim reasonably believed, it raises the same constitutional problems addressed by this Court in *State v. Pomianek*, 221 N.J. 66 (2015). In *Pomianek*, the defendant, in an

apparent attempt at a practical joke, induced an African American coworker, Mr. Brodie, to enter a storage cage at their workplace, a public works garage, and by closing the sliding door, locked Brodie in the cage for three to five minutes. During time in which he was confined, Brodie and other coworkers heard the defendant say "Oh, you see, you throw a banana in the cage and he goes right in," by which Brodie concluded that defendant's conduct was "racial" in nature. Pomianek and another defendant were charged with various offences, including counts of bias intimidation, but were acquitted of all charges alleging that he falsely imprisoned or harassed Brodie either with the *purpose* to intimidate him or *knowing* that his conduct who do so.

Pomianek was convicted, however, under a provision of the bias intimidation statute that did not require *scienter*. Rather, N.J.S.A. 2C:16-1(a)(3) provided in pertinent part that a person who engages in enumerated predicate offenses commits the additional offense of bias intimidation:

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

N.J.S.A. 2C:16-1(a)(3) (emphasis added). Thus, like the statute at issue here, the defendant's criminal liability depended not only on his actual motive in engaging in the challenged conduct, but also on how the victim perceived his motive in doing so. Writing for a unanimous court, Justice Albin's opinion struck down the relevant portion of the statute as unconstitutional.

> [B]ecause N.J.S.A. 2C:16-1(a)(3) fails to give adequate notice of conduct that it proscribes, the statute is unconstitutionally vague and violates notions of due process protected by the Fourteenth Amendment. Defendant was convicted not based on what he was thinking but rather on his failure to appreciate what the victim was thinking.

Pomianek, 221 N.J. at 91. The same reasoning leads to the same result in this case. Mr. Fair may be held criminally liable because he failed to appreciate that under the circumstances Officer Healey—whose perceptional, cognitive and experiential background were unknown and unknowable to Mr. Fair—might believe the immediacy of the threat. No person of common intelligence and experience could perform this feat of mental translocation, and criminalizing Mr. Fair's inability to do so violates basic tenets of due process.

B. Defining Culpable Conduct in Terms of the Perceptions Of "Reasonable Persons" Risks Injecting Implicit Bias Into the Definition Of Criminal Conduct.

Like the statute involved in *Pomianek,* N.J.S.A. 2C:16-1(a)(3), the terroristic threats statute here upon which Mr. Fair is to be retried, N.J.S.A.

2C:12-3(b), asks whether the victim "reasonably . . . to believe" in the immediacy of the threat and the likelihood that it will be carried out by the defendant. The statute therefore demands that Mr. Fair predict whether another person would believe that he intended to carry out a threat to kill with sufficient immediacy and likelihood. It thus requires that the defendant conjure the state of mind of Officer Healey, whose personal cognitive and deductive processes are unknown to Mr. Fair, moreover as filtered by the perceptions and understanding of a hypothetical "reasonable" person.

Pomianek discusses at length the dangers inherent when a jury is asked to reconstruct the deductive and evaluative mental processes by which a victim might conclude whether the defendant acted with a particular subjective intent.

> [A] victim's reasonable belief about whether he has been subjected to bias may well depend on the victim's personal experiences, cultural or religious upbringing and heritage, and reaction to language that is a flashpoint to persons of his race, religion, or nationality. A tone-deaf defendant may intend no bias in the use of crude or insensitive language, and yet a victim may reasonably perceive animus. The defendant may be wholly unaware of the victim's perspective, due to a lack of understanding of the emotional triggers to which a reasonable person of that race, religion, or nationality would react.

Pomianek, 221 N.J. at 89.

From Mr. Fair's perspective, Officer Healey is a police officer, trained and hardened to deal with violent and dangerous criminal suspects, but who in

this case was responding to a trivial domestic relations dispute. Relatively early in their interaction, Officer Healey had already indicated that the police officers had found nothing warranting their further attention and were leaving. ("Hey, all right. We're going to go. Have a good day, Calvin. Thank you for your cooperation.") Mr. Fair was speaking from his second floor balcony to three police officers, presumably armed with their service weapons, standing outside his property boundary at some considerable distance away. Standing alone, these circumstances would make implausible any contention that Officer Healey could believe that the defendant intended to leap from his balcony and attempt an immediate attack on armed police officers.

The remaining circumstances center on Mr. Fair's verbal diatribe objecting to the unnecessary intervention of the police in the dispute with his girlfriend over possessory interest of a portable used television set. Mr. Fair's comments were laced with profanity, crude rhetoric and racially charged epithets, including frequent occurrence of the N--- word. Certainly use of that word directed to an African American by a non-African American could be predicted to evoke fierce and in some cases even violent reactions. Yet in other circumstances when the word is used by one African American regarding another, it does not have any derogatory meaning. But the record here indicates that Mr. Fair is himself African-American while Officer Healey is white. The

anticipated reaction caused by use of the N--- word in this posture may be the source of conjecture, and to a jury perhaps confusion.

Similarly, the use of the slang term "head shot" may have dramatically different meanings depending on the cultural and social setting. The term typically refers to photographic images on social media, online dating profiles, and promotional pictures of actors, models, and authors. The correctness of the assumption that it has a malign and violent meaning when used by an African American man in a verbal confrontation with police officers, during a facially minor incident that ended uneventfully with the police officers' departure with no arrests, depends upon the depth of understanding by the victim, and by a juror acting as a proxy for a reasonable person, about the usages of language in Mr. Fair's community of which they may have little understanding. In deciding whether Officer Healey, the only victim named in the indictment, would "*reasonably*" believe that the defendant's speech indicated that it was likely that he intended to carry out a threat to kill immediately, a jury would be required to construct an amalgam of "personal experiences, cultural or religious upbringing and heritage, and reaction to language" of the community as a whole, which in turn leads to the unique repository of assumptions, generalizations, and mental algorithms by which every human being processes information and thereby draws conclusions, makes deductions, and takes decisions.

But it is exactly this set of peculiar mental processes and deductions, which each of us engage in every day, that is susceptible to the problems of implicit bias. The New Jersey judiciary has, for at least the past year, been making concerted efforts to address the effect of implicit bias on the legal system. Implicit bias and the additional phenomenon of racial anxiety have been the topic of intense discussion in academic and scholarly literature. *See, e.g.*, L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 Ohio St. J. Crim. L. 73 (2017) (unconscious racial biases linking Black individuals with criminality create the risk that officers will be more likely to judge the ambiguous behaviors of Blacks as suspicious while ignoring or not even noticing the identical ambiguous behaviors of Whites); Rachel D. Godsil & Hao Yang (Carl) Jiang, *Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat*, 40 CDAA Prosecutor's Brief 142 (2018) (many people of color experience "racial anxiety" through an expectation they will receive discrimination, hostility, or distant treatment, and white people may experience a "mirror anxiety" that they will be assumed to be racist by people of color and face corresponding feelings of hostility).

In *State v. Andujar*, 247 N.J. 275 (2021), the Supreme Court defined the problem:

> Implicit bias refers to . . . attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. Such biases "encompass both favorable and unfavorable assessments, [and] are activated involuntarily and without an individual's awareness or intentional control." In other words, a lawyer or self-represented party might remove a juror based on an unconscious racial stereotype yet think their intentions are proper.

Id. at 302-03 (internal quotation marks and citations omitted).

Thus, "[p]ersons who belong to specific ethnic, religious, or racial groups that have been historically exposed to bigotry will be particularly sensitive to language that is deemed offensive, based on their communal and individual experiences." *Pomianek*, 221 N.J at 90. Some victims or jurors therefore may be quicker to believe that defendant was motivated by hatred, or intended to carry out facially implausible threats of violence, based on imbedded preconceptions on how to process information.

These perceptional phenomena are not the result of conscious bias, but are simply a result of the mental shortcuts that everyone necessarily adopts to cope with the mass of cognitive data that we must process in daily life. But those mental shortcuts carry the risk that conduct or expression is subjectively perceived by the victim very differently than how they were intended. Defendants such as Mr. Fair do not possess the communal and individual experiences of Officer Healey, whether actual or hypothetically reasonable, and

thus cannot be held criminally liable for "failure to apprehend the reaction that his words would have on another." *See id.*

Even if *Pomianek* did not directly determine the unconstitutionality of N.J.S.A. 2C:12-3(b) as a matter of binding precedent, the frailties it describes of making criminal liability depend not on the defendant's intent, but upon the particular mental and perceptional processes of the victim, make it impossible for any person of common intelligence to determine what conduct is proscribed. The concerns raised by the inevitable effect of implicit bias on victims and juries in conducting such a quixotic inquiry strengthen the conclusion that the statute as written does not comport with due process.

Amicus ACLU-NJ does not believe that any judicial surgery is possible to rehabilitate N.J.S.A. 2C:12-3b. The Legislature clearly intended the phrase "under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out" to require a lesser showing of mens rea when the threat is to kill than that required under N.J.S.A. 2C:12-3a when the threat is merely to commit a crime of violence, since otherwise it would be wholly contained within, and thus duplicative of the preceding section. But since that is the phrase which ACLU-NJ contends creates the constitutional infirmity, there is no method by which the Legislature's intent can be salvaged by the courts. It would be up to the Legislature to see if it can

devise a provision Dealing with a threat to kill that meets the constitutional concern.

CONCLUSION

For the reasons expressed herein, Amicus ACLU-NJ respectfully urges this Court to affirm the judgment of the Appellate Division which reversed the conviction of defendant Calvin Fair based on N.J.S.A. 2C:12-3a and/or b. Any remand for a new trial should be solely on 2C:12-3a based on a purposeful threat only.

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