SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

APPELLATE DIVISION DOCKET NO.
A-0913-19
INDICTMENT NO. 15-08-1454
CASE NO. 15001722

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	ON APPEAL AS OF RIGHT PURSUANT TO RULE 2:2-1(A)(1)
v.	:	FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY,
CALVIN FAIR,	:	APPELLATE DIVISION
Defendant-Respondent.	:	

SAT BELOW: The Honorable Clarkson S. Fisher, Jr., P.J.A.D.
The Honorable Heidi Willis Currier, J.A.D.
The Honorable Patrick DeAlmeida, J.A.D.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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DEFENDANT IS NOT CONFINED

TABLE OF CONTENTS

TABLE OF APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Court Rules

PRELIMINARY STATEMENT

The Appellate Division made two critical errors in its published opinion reversing defendant's well-deserved conviction for third-degree terroristic threats. Both of those errors demand this Court's intervention and correction.

First, the Appellate Division erroneously struck the reckless-disregard prong of N.J.S.A. 2C:12-3(a) on First Amendment grounds. Although the First Amendment provides a robust defense of our right to engage in the free exchange of ideas and beliefs, it is not an impenetrable shield that allows dangerous threats to go unpunished absent proof that the defendant acted with actual purpose and intent to cause harm. Moreover, the First Amendment certainly does not protect defendants who threaten to commit crimes of violence while recklessly disregarding substantial and unjustifiable risks that their conduct will cause actual terror. Thus, states have the right - indeed, they have the duty - to protect the safety and well-being of their citizens by ensuring they will be protected from such threats, whether the defendant has acted purposely, knowingly, or with reckless disregard for the risk of causing terror. The Appellate Division's published decision, which prevents New Jersey from performing that mission, is ungrounded and unwise.

The Appellate Division also erred in reversing defendant's conviction for the additional reason that the trial judge only provided general unanimity instructions and did not supplement

those instructions, sua sponte, with specific unanimity instructions requiring the jury to render a unanimous verdict as to the particular subsection of the statute that was violated and the particular statement that qualified as a terroristic threat. The Appellate Division's decision cannot be reconciled with this Court's existing precedent. Indeed, a review of the entire record makes clear that a specific unanimity instruction was not warranted under the facts of this case, especially in the absence of a request, and that defendant suffered no prejudice anyway.

In sum, defendant's threatening conduct was not protected by the First Amendment, and the trial court's instructions to the jury, which were unobjected-to, did not sow confusion or cause the jury to return a fragmented verdict. Defendant was justly convicted of terroristic threats, and the conviction should be reinstated.

STATEMENT OF PROCEDURAL HISTORY

On August 13, 2015, a Monmouth County grand jury returned Indictment No. 15-08-1454, charging defendant, Calvin Fair, with third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a) and/or N.J.S.A. 2C:12-3(b). (Da1 to 2).[1]

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[1] Db refers to defendant's Appellate Division brief.
Da refers to the appendix to defendant's Appellate Division brief.
Pa refers to the appendix to this brief.
1T refers to transcript dated December 16, 2016.
2T refers to transcript dated September 29, 2017.
3T refers to transcript dated June 19, 2019.
4T refers to transcript dated June 20, 2019.

In October 2016, defendant filed several motions to dismiss the indictment, including a motion to dismiss the indictment on the ground that his conduct was protected speech and the statute was unconstitutional. (Da6).

On September 7, 2017, the Honorable Vincent N. Falcetano, Jr., J.S.C., issued an opinion and order denying defendant's motions to dismiss the indictment. (Da4 to 25). The judge found that N.J.S.A. 2C:12-3(a) is not unconstitutionally vague on its face, nor as applied to defendant, and that defendant's words did not qualify as constitutionally-protected speech. (Da22 to 24).

Defendant was tried before the Honorable Dennis R. O'Brien, J.S.C., and a jury on June 19, 20, 25, and 26, 2019. (3T; 4T; 5T; 6T). On June 26, the jury found defendant guilty. (6T; Da27 to 28).

On August 30, 2019, Judge O'Brien sentenced defendant to a term of three years in prison. The judge also imposed all mandatory fines and penalties. (7T; Da29 to 31).

Defendant filed a Notice of Appeal on October 30, 2019. (Pa32 to 35).

On December 8, 2021, in a published opinion authored by the Honorable Clarkson S. Fisher, Jr., P.J.A.D., the Appellate Division reversed defendant's conviction. State v. Fair, 469 N.J.

5T refers to transcript dated June 25, 2019.
6T refers to transcript dated June 26, 2019.
7T refers to transcript dated August 30, 2019.

Super. 538 (App. Div. 2021). (Pa1 to 29). The appellate panel held that 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. Id. at 548-54. (Pa14 to 23). The panel also held that the trial court erred in failing to provide a sua sponte specific unanimity instruction to the jury. Id. at 555-58. (Da24 to 29).

On December 29, 2021, the State filed a Notice of Appeal as of right, pursuant to R. 2:2-1(a)(1), because "this case involves a substantial question arising under the Constitution of the United States or this State." (Pa30).

STATEMENT OF FACTS

On February 19, 2015, the New Jersey State Police, with assistance from various local law enforcement agencies, executed a search warrant at defendant's residence, located at 8 Conover Street in Freehold Borough. They recovered several handguns, and defendant was charged with possession of those guns. Several other men who either lived in the residence or were present at the residence were also charged, but defendant's 84-year-old mother, who also lived in the residence, was not charged. (4T76-4 to 79-14; 4T117-2 to 12; 4T137-20 to 138-12; 4T156-23 to 157-11; 4T170-20 to 171-20; 4T185-13 to 20; 4T201-18 to 202-12; 4T204-14 to 205-3; 4T205-22 to 210-1; 5T20-2 to 5).

About six weeks later, on April 8, 2015, defendant referenced the raid in a post he publicly published on Facebook. In particular, he posted, "And all thm hammers they found inn my house! None of thm was mines, I still got all of mines . . ." (4T117-13 to 120-24; 4T130-10 to 135-24; 4T203-4 to 17; 4T205-6 to 9; Da38). Law enforcement officers understood the term "hammers" to refer to firearms. They interpreted defendant's comment to mean that, notwithstanding the seizure of guns from 8 Conover Street, defendant still possessed guns. (4T117-24 to 118-3; 4T135-1 to 8; 4T171-21 to 173-13; 4T161-25 to 162-9; 4T205-6 to 13).

The following day, defendant published a public Facebook post addressed to various law enforcement agencies, including the Freehold Borough Police Department, announcing his awareness that those agencies were looking at his public Facebook post. In particular, he posted, "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 doesnt show anythg about my life but only tha thgs I wanna post lol . . ." (4T120-25 to 121-7; 4T137-1 to 140-16; Da39).

On May 1, 2015, shortly after 11:00 a.m., Officer Scott Healey of the Freehold Police Department was on patrol when he and two other officers, Officer Samuel Hernandez and Officer McGraw, were dispatched to 8 Conover Street to respond to a 911 call concerning a domestic-violence incident in progress. (4T59-4 to 61-11; 4T175-19 to 176-11; 4T175-19 to 176-11; 4T190-5 to 8; 5T21-21 to 25).

At that time, Officer Healey knew about the guns recovered from defendant's house, and also knew about the content of defendant's Facebook posts, though he had not participated in the search or seen the posts. (4T76-4 to 77-19; 4T117-2 to 12; 4T158-9 to 159-3; 4T160-24 to 161-7; 4T166-7 to 167-2; 4T173-1 to 13; 5T22-1 to 24-14; 5T28-16 to 31-15; 5T33-9 to 35-19).

When the officers arrived on the scene, defendant was inside the residence, and his girlfriend, L.W., was outside the residence with her young children and some of her belongings. L.W. advised the police that she and defendant had been engaged in a verbal dispute. Defendant had thrown her out of the house, and although she was willing to leave, she wanted her television, which was still in the house. (4T60-6 to 64-8; 4T82-25 to 87-7; 4T176-12 to 177-22; 4T190-5 to 191-18; S-1).

Officers Healey and Hernandez repeatedly knocked on the door, to try to speak with defendant about the return of the television, but defendant did not answer. (4T62-22 to 65-6; 4T84-3 to 85-3; 4T147-1 to 7; 4T177-24 to 178-24; S-1). The police told L.W. that they could not force defendant to return the television, but they advised her she had a right to file a complaint against defendant and a right to seek a restraining order. (4T178-24 to 182-21; 4T87-8 to 94-6; 5T31-16 to 31-6; S-1).

L.W. did not want to file a complaint or seek a restraining order. She said she did not want any more contact with defendant, but simply wanted to report that defendant was withholding her

television. (4T64-9 to 68-18; 4T85-4 to 110-22; 4T179-11 to 182-21; S-1).

Officer Hernandez started the mandatory process of completing the required domestic-violence victim-notification form, which formally advises victims of their rights, including the right to file a complaint and a right to seek a restraining order. (4T64-9 to 68-18; 4T96-1 to 109-9; 4T179-11 to 182-21; 4T186-3 to 10; S-1). As this process was ongoing, defendant stuck his head out of a second-story window and started shouting in a loud voice, saying that the situation was not serious and that the police should not be on his property. (4T68-19 to 70-22; 4T100-2 to 102-13; 4T182-22 to 183-24; 4T192-5 to 193-3; S-1).

In response, the police decided to leave defendant's property, and they escorted L.W. and her children to the public sidewalk, on the other side of a fence surrounding defendant's property. There, they continued to work with L.W. on the mandatory victim-notification form. (4T68-19 to 71-20; 4T100-2 to 109-9; 4T183-21 to 184-19).

Although the officers were no longer on defendant's property, defendant continued to scream at Officer Healey, using an array of profanities and expletives. He repeatedly called the officer a variety of names, including "the devil," "the fucking devil," a "fucking devil ass n****," "a fucking tough guy," and a "thirsty ass n****." (4T71-21 to 74-7; 4T101-20 to 115-2; 4T183-21 to 184-19; 4T193-4 to 14; S-1).

Once the victim-notification form was completed, the officers decided to vacate the premises. But as the officers were leaving, defendant yelled down to Officer Healey, "Fucking thirsty-ass n****! You thirsty! Worry about a head shot, n****!" (4T74-8 to 24; 4T115-1 to 2; 4T151-6 to 14; 4T184-8 to 12; 4T185-21 to 24; 4T193-15 to 194-21; S-1). Officer Healey interpreted the "head shot" comment to mean there "was a potential that [he] could get shot in the head," and Officer Hernandez also considered defendant's words to amount to a "serious threat." He too thought there was a "chance" that defendant could shoot them. (4T75-8 to 12; 4T184-13 to 19; 4T193-15 to 194-21). Officer Healey was concerned because he could not see defendant's hands. (4T75-13 to 76-3). He also suspected that defendant might possess firearms, based on the information he had received about defendant's recent Facebook post. (4T161-25 to 161-9; 4T171-21 to 24).

Both Officer Healey and Officer Hernandez remarked to each other that defendant had conveyed a threat. (4T115-3 to 8; S-1). It was at that point that, in their minds, defendant's behavior had escalated from disorderly conduct to a threat to kill. (4T155-5 to 11).

All three officers left the scene immediately after defendant's "head shot" threat and returned to police headquarters. There, Officers Healey and Hernandez discussed the day's events with Detective Robert Schwerthoffer. (4T116-3 to 117-1; 4T125-21 to 126-4; 4T184-20 to 185-4; 4T194-22 to 196-19;

4T210-2 to 211-10). Shortly thereafter, Detective Schwerthoffer checked defendant's public Facebook page and then brought several of defendant's Facebook posts to Officer Healey's attention: the two from April and two more from that same day. (4T126-10 to 20; 4T157-12 to 162-9; 4T186-12 to 187-11; 4T196-21 to 197-24; 4T202-13 to 204-13; 4T211-11 to 212-24; 5T31-1 to 31-15).

One of that day's posts had been published at 2:59 p.m., about three hours and 15 minutes after defendant had warned Officer Healey to watch out for a head shot. In that post, defendant said, "THN YU GOT THESE GAY ASS OFFI$ERS THINKIN THEY KNO UR LIFE!!! GET THA FU$K OUTTA HERE!! I KNOW WHT YU DRIVE $ WHERE ALL YU MOTHERFU$KERS LIVE AT." (4T123-16 to 124-4; 4T161-8 to 24; Da37). Another post had been published at 1:09 p.m. that same day. In that post, defendant ranted seemingly about the officers who had executed the search warrant at his house, saying they had disrespected his 84-year-old mother. He referred to the officers as MOTHERFU$KERS and said, "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" He concluded that post with a "feeling angry" emoji. (4T121-8 to 123-15; 4T140-17 to 141-14; Da36).

At trial, a mobile-vehicle recorder (MVR) audio-visual recording of the May 1 incident at defendant's residence was admitted into evidence and played for the jury. (4T79-17 to 116-2; 4T188-3 to 188-11; 5T24-18 to 25-4; S-1).

Based on all the evidence adduced at trial, defendant was convicted of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a) and/or N.J.S.A. 2C:12-3(b). The Appellate Division reversed that conviction in a published opinion, State v. Fair, 469 N.J. Super. 538 (App. Div. 2021), (Pa1 to 29), and the matter is now before this Court on the State's appeal as of right pursuant to R. 2:2-1(a)(1).

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION ERRONEOUSLY STRUCK THE RECKLESS-DISREGARD PRONG OF N.J.S.A. 2C:12-3(a) ON CONSTITUTIONAL GROUNDS. THE FIRST AMENDMENT DOES NOT PROTECT THOSE WHO THREATEN TO COMMIT CRIMES OF VIOLENCE WHILE CONSCIOUSLY DISREGARDING SUBSTANTIAL AND UNJUSTIFIABLE RISKS THAT THEIR ACTIONS WILL TERRORIZE OTHERS.

The Appellate Division erroneously invalidated the reckless-disregard prong of N.J.S.A. 2C:12-3(a), after siding with a small minority of courts that misinterpret Virginia v. Black, 538 U.S. 343 (2003), to require proof that the defendant had a specific intent to threaten as a prerequisite to a finding that the defendant's words qualified as a "true threat" falling outside of protections of the First Amendment. In actuality, Black did not hold that a true threat, for First Amendment purposes, requires a showing of any subjective state of mind, let alone a purposeful

state of mind, and the great majority of federal and state courts that have interpreted Black have so found.

Black merely recognizes that true threats include categories of threats whereby 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. at 359, as well as categories of threats whereby the speaker intimidates "with the intent of placing the victim in fear of bodily harm or death." Id. at 360. But the Black Court never suggested, in any way, that these "types" of threats are the only types of threats that qualify as true threats falling outside the protections of the First Amendment. Nor did the Court suggest, in any way, that threats made with conscious disregard of the risk of terrorizing others are constitutionally protected.

In actuality, the Black Court did not address, much less resolve, whether a speaker must act with a subjective purpose to threaten before his communication will be deemed a true threat. Nor did the Court consider, let alone decide, whether a State may proscribe a true threat based on a lesser state of mind, such as a reckless state of mind. These issues were not even before the Court in Black, because the Virginia statute under review in that case banned only a particular type of intimidation (itself only a subset of true threats) and expressly required an intent to intimidate.

The few courts that require a showing of specific purpose to threaten, a group that now includes our Appellate Division, have based their holdings exclusively on a misreading of Black. But when Black is properly interpreted as an opinion that is silent as to whether purpose is required, it is clear that N.J.S.A. 2C:12-3(a) does not offend the First Amendment because there is no basis to afford constitutional protection when a person threatens to commit a crime of violence while consciously disregarding a substantial and unjustifiable risk that others will be terrorized by his conduct.

Under the reckless-disregard prong of N.J.S.A. 2C:12-3(a), a defendant is guilty of terroristic threats if he threatens to commit a crime of violence in reckless disregard of the risk of terrorizing another. N.J.S.A. 2C:12-3(a). To satisfy this prong, the jury must be convinced, unanimously and beyond a reasonable doubt, that the defendant consciously disregarded a substantial and unjustifiable risk that his threat to commit a crime of violence would terrorize another. N.J.S.A. 2C:2-2(b)(3). Furthermore, 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 was a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. Ibid. Also, the jury must be satisfied that the defendant's words or actions were "of such a nature as to convey menace or fear of a crime of violence

to the ordinary person." See Model Jury Charges (Criminal): N.J.S.A 2C:12-3a ("Terroristic Threats), rev. 9/12/2016, at 2. The statute is not violated if the threat merely "expresses fleeting anger" or was "made merely to alarm." Ibid.

The key question in this appeal is thus whether the First Amendment protects a defendant who threatens to commit a crime of violence while consciously disregarding a substantial and unjustifiable risk that his words and actions will cause terror to another, where the risk of causing such terror is of such a nature and degree that, considering the nature and purpose of the defendant's conduct and the circumstances known to him, his conscious disregard of the risk of terrorizing another was a gross deviation from the standard of conduct a reasonable person would observe in the defendant's situation. The clear answer to this simple question is no: the First Amendment does not protect such dangerous, intolerable, and reprehensible conduct, which has nothing to do with the free expression of ideas the First Amendment was designed to safeguard.

It follows that the New Jersey Legislature did not violate the First Amendment when it proscribed and criminalized such conduct in N.J.S.A. 2C:12-3(a), in language that tracks the Model Penal Code almost verbatim, see Model Penal Code § 211.3 (Am Law Inst.), especially because our law contains an objective component as well as a subjective component, i.e., that defendant's threat to commit a crime of violence was "of such a nature as to cause

menace or fear of a crime of violence to the ordinary person." See Model Jury Charges (Criminal): N.J.S.A 2C:12-3a ("Terroristic Threats), rev. 9/12/2016, at 2.

It also bears noting that under the Appellate Division's flawed reasoning, the terroristic-threats statute would be similarly unconstitutional if it contained a "knowing" state-of-mind requirement as opposed to a reckless state-of-mind requirement. In other words, the Appellate Division's decision would provide full First Amendment protection to a defendant who harmed an innocent victim by threatening to commit a crime of violence while knowing, with certainty, that his conduct would cause the victim to feel actual terror, unless the State proved that the defendant had a specific purpose to cause such terror. This is a shocking, appalling, and patently absurd result that should not be countenanced by this Court or any court.

When the issues in this case are considered in light of our nation's long history of First Amendment jurisprudence, there is no doubt that the First Amendment does not -- and should not -- provide a sanctuary to those who threaten to commit crimes of violence while consciously disregarding substantial and unjustifiable risks that their actions will terrorize others. Such reprehensible conduct is no more deserving of constitutional protection than threats directed with an actual purpose to cause terror.

The First Amendment, which is applicable to the States through the Fourteenth Amendment, provides that Congress shall make no law . . . abridging the freedom of speech." "The hallmark of the protection of free speech is to allow free trade in ideas - even ideas that the overwhelming majority of people might find distasteful or discomforting." Black, 538 U.S. at 358 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); see also Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

The First Amendment "ordinarily" deprives state governments of "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." Black, 538 U.S. at 358 (quoting Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., dissenting)); see also Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 573 (2002) (noting that as a general principle, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

But it is well-established that the protections afforded by the First Amendment are "not absolute at all times and under all circumstances," and it is also well-established that the

government "may regulate certain categories of expression consistent with the Constitution." Black, 538 U.S. at 358. Indeed, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). In these areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality," limitations on the content of speech are allowable. Black, 538 U.S. at 358-59 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (quoting Chaplinsky, 315 U.S. at 572)).

More than 100 years ago, the United States Supreme Court recognized that the right to speak one's mind at any time was not the intent of the First Amendment. Justice Holmes wisely observed that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic." Schenck v. United States, 249 U.S. 47, 53 (1919). The Court has since given greater scope to this doctrine by excerpting a number of categories of speech from First Amendment protection, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance or tend to incite an immediate breach of the peace." Chaplinsky, 315 U.S. at 571-72. Also falling outside the protections of the First Amendment are "true threats."

The United States Supreme Court first used the term "true threat" in Watts v. United States, 394 U.S. 705 (1969), which involved a conviction under a federal statute prohibiting "knowingly and willfully" making a threat "to take the life of or to inflict bodily harm upon the President of the United States.'" Id. at 705. The defendant in Watts, speaking at a political meeting, said he had just received a draft notice to report for military service, and that "'[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J. [U.S. President Lyndon B. Johnson].'" Id. at 706. The United States Supreme Court reversed the conviction, deeming the defendant's statement to be mere "political hyperbole," id. at 708, and thus insufficient to support a conviction under the statute. Id. at 706-07. The Court stressed that any statute that "makes criminal a form of pure speech . . . must be interpreted with the commands of the First Amendment clearly in mind," and that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Id. at 707. Applying that distinction in Watts, the Court concluded that Watts's statement about shooting President Johnson was not a "true threat." Id. at 708. But the Court did not define the term "true threat" in Watts. Nor did the Court suggest that the statute would only be constitutional if it were limited to threats conveyed with a purpose to threaten.

Following Watts, federal and state courts universally applied an objective reasonable-person standard to determine whether a

statement was a true threat. Those courts did not insist on any showing that the actor specifically intended to cause the victim to feel threatened. See Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (noting that "[a]ll the [federal circuit courts of appeals] to have reached the issue have consistently adopted an objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm").

Thirty-four years after Watts made clear that "true threats" fall outside the First Amendment's sphere of protection, the United States again discussed the term "true threat" in Black. At issue there was a state criminal statute making it unlawful "for any person or persons with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place." 538 U.S. at 348. The statute also provided that burning a cross would be prima facie evidence of an intent to intimidate. Ibid.

The Court in Black observed that a state could, without violating the First Amendment's free-speech guarantee, "outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." Id. at 363. But the Court struck down the statute at issue because of its provision that burning a cross "shall be prima facie evidence of an intent to intimidate." Id. at 363. Given that language, the Court found that the statute allowed for a conviction "based

solely on the fact of cross burning itself," thus creating "an unacceptable risk of the suppression of ideas." Id. at 365.

As Justice O'Connor explained in the Court's plurality opinion in Black, a cross burner might well be engaging in "constitutionally proscribable intimidation." Ibid. But the same conduct might also indicate "that the person is engaged in core political speech" protected by the First Amendment. Ibid. Nevertheless, the plurality emphasized that the statute was not unconstitutional merely because it proscribed cross burning done for the purpose of threatening or intimidating a victim, because such a proscription does not run afoul of the First Amendment. Id. at 366. The plurality emphasized that, whatever the definition of a true threat, it was certainly broad enough to "encompass" statements where the speaker means to communicate a serious expression of an intent to commit unlawful violence:

> True 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. The 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.'"
>
> [Id. at 359 (emphasis added).]

Notably, the Watts Court did not have occasion to consider whether specific intent to threaten is a necessary prerequisite to a finding of guilt. After all, the statute at issue in Black actually required specific intent to threaten. The only issue was whether the provision about flag burning being prima facie evidence of an intent to threaten rendered the statute unconstitutional because it had the effect of proscribing protected speech as well as unprotected threats.

In the aftermath of Black, the vast majority of federal and state courts have continued to apply an objective, reasonable-person standard to determine whether a statement is an unprotected "true threat," without additionally requiring that the speaker have a particular purpose or intent.[2] A minority of courts have misread Black to mean that the standard is purely subjective, and

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[2] See, e.g., United States v. White, 810 F.3d 212, 221 (4th Cir. 2016); State v. Clemens, 738 F.3d 1, 9-12 (1st Cir. 2013); United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013), rev'd on other grounds, 135 S. Ct. 2001 (2015); United States v. Martinez, 736 F.3d 981, 986-88 (11th Cir. 2013), vacated and remanded for further consideration on other grounds, 575 U.S. 723 (2015); United States v. Nicklas, 713 F.3d 435, 438-40 (8th Cir. 2013); United States v. Jeffries, 692 F.3d 473, 479-81 (6th Cir. 2012); United States v. Stewart, 411 F.3d 825, 828 (7th Cir.), cert. denied, 546 U.S. 980 (2005); Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 615-16 (5th Cir. 2004), cert. denied, 544 U.S. 1062 (2005); United States v. Sovie, 122 F.3d 122, 125 (2d Cir. 1997); but see United States v. Parr, 545 F.3d 491, 499-500 (7th Cir. 2008) (questioning but not overruling Stewart), cert. denied, 556 U.S. 1181 (2009); see also, e.g., State v. Trey M., 383 P.3d 474, 478, 481 (Wash. 2016), cert. denied, 138 S. Ct. 313 (2017); People v. Lowery, 257 P.3d 72, 77 (Cal. 2011); Hearn v. State, 3 So.3d 722, 739 n.22 (Miss. 2008).

that the government must show that the speaker had a subjective purpose and intent to threaten.[3]

The few courts comprising the minority have relied exclusively on two sentences in Black. These courts have interpreted those two sentences to "[e]mbrace not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim." Cassel, 408 F.3d at 631; see also Heineman, 767 F.3d at 978. However, when the two statements are viewed in their proper context, and when the opinion is considered as a whole, it is clear that Black does not actually require a finding of subjective intent.

The first sentence relied upon by the minority of courts is the following: "'True 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." Black, 538 F.3d at 359. The minority of courts focus on the words "means to communicate," noting that the word "means" is generally synonymous with the word "intends." But as the Sixth Circuit has noted, a speaker "'means to communicate' when she knowingly says the words." Jeffries, 692

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[3] See, e.g., United States v. Heineman, 767 F.3d 970, 978 (10th Cir. 2014); United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011); United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005); State v. Boettger, 450 P.3d 805 (Kan. 2019), cert. denied, 140 S. Ct. 1956 (2020).

F.3d at 480. Thus, most courts do not interpret this sentence to require a specific intent to threaten, especially since the question of whether a specific intent to threaten is constitutionally required was not before the Court in that case.

But even if the above quote is interpreted to refer to a specific intent to threaten, the United States Supreme Court merely said that true threats "encompass" (i.e., include) those statements, 538 U.S. at 359, not that true threats are limited to those statements. As the Supreme Court of California explained in People v. Lowery, 257 P.3d at 77:

> In [Black], . . . the high court did not hold that, to pass muster under the First Amendment, a statute such as the one at issue here must limit the prohibited threats to those made with the specific intent to intimidate a particular victim. Our conclusion finds support in the high court's description of 'true threats' in that case: "'True threats,'" the high court said, "encompass those statements where the speaker means to communicate a serious expression of an extent to commit an act of unlawful violence to a particular individual or group of individuals." . . . . Thus, the category of threats that can be punished by the criminal law without violating the First Amendment includes but is not limited to threatening statements made with the specific intent to intimidate.

The second of Black's statements relied upon by the minority is the following: "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 360. But like the preceding sentence, the majority of courts interpret this sentence as describing one "type of true threat," not the only type. See, e.g., Jeffries, 692 F.3d at 480.

The United States Supreme Court is aware of the divergence of opinions among our federal and state courts, but the Court has not yet addressed whether, to satisfy the First Amendment, the prosecution must prove that a defendant charged with conveying a threat had a particular purpose. In Elonis v. United States, 575 U.S. 723 (2015), the Court granted certiorari to address the issue but ultimately resolved that case on narrow statutory grounds without considering any constitutional claims. Id. at 740.

In two opinions separately filed in Elonis, Justices Alito and Thomas criticized the majority for leaving open the question of whether a showing of recklessness could support a conviction for a true threat. Justice Alito argued that the Court should have clarified that a mens rea of recklessness was sufficient under the First Amendment. Justice Alito emphasized that "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct" that is "morally culpable." Id. at 745 (Alito, J., concurring in part and dissenting in part). Justice Alito further explained, "Someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers

them anyway." Id. at 745-46 (Alito, J., concurring in part and dissenting in part).

Justice Thomas observed that neither Watts nor Black had come to any conclusion on a constitutional requirement to consider the subjective intent behind a threat, and that in his opinion, an objective reasonable-person test conferred sufficient protection by "forc[ing] jurors to examine the circumstances in which a statement is made." Id. at 766 (Thomas, J., dissenting) (quoting Jeffries, 692 F.3d at 479-80). Justice Thomas also observed that other forms of "historically unprotected categories of speech" have not been subject to a "heightened mental state under the First Amendment," and that adopting such a standard in this context "would make threats one of the most protected categories of unprotected speech, thereby sowing tension throughout our First Amendment doctrine." Id. at 766-67 (Thomas, J., dissenting). Such a result would be incongruous, in Justice Thomas's view, for he saw "no reason why we should give threats pride of place among protected speech." Id. at 767 (Thomas, J., dissenting).

In Perez v. Florida, 580 U.S. ___, 137 S. Ct. 853 (2017), Justice Sotomayor concurred in the denial of a writ of certiorari but wrote separately to express her opinion that "Watts and Black together make 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." Id. at ___, 137 S. Ct. at 855 (Sotomayor, J.,

concurring). Justice Sotomayor also opined that those two cases "strongly suggest 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." Ibid.

In Kansas v. Boettger, 140 S. Ct. 1956 (2020), Justice Thomas wrote a dissent from the denial of a writ of certiorari in which he stated, "In my view, the Constitution likely permits States to criminalize threats in the absence of any intent to intimidate. It appears to follow that threats of violence made in reckless disregard of the risk of causing fear may be prohibited." Id. at 1956 (Thomas, J., dissenting). Justice Thomas explained that in Boettger, the Kansas Supreme Court had "overread" Black, "which did not answer the constitutional question at issue." Ibid. Justice Thomas also discussed the historical underpinnings of the First Amendment, dating back to English law, and concluded that the "ratifiers of the First or Fourteenth Amendments" did not envision that our freedom-of-speech guarantee would ever apply to reckless threats. Id. at 1957 (Thomas, J., dissenting).

The bottom line is that the United States Supreme Court has not yet addressed whether recklessness is a sufficiently high bar to support a conviction for a "true threat," or whether instead the Constitution requires a showing of a subjective purpose to threaten. Three Justices have expressed an interest in resolving the issue, with two of those Justices conveying the view that a

subjective purpose is not required under Black or Watts, and that recklessness is sufficient.

Because the issues in this case are purely legal, this Court should consider them de novo and give no deference to the opinions below. However, it should also be recognized that in rendering its decision below, the Appellate Division overlooked or misstated certain basic legal precepts. For one thing, the panel failed to note that all statutes are presumed to be constitutional, and that any party challenging the constitutionality of a statute bears the burden of establishing otherwise, beyond a reasonable doubt. State v. Lenihan, 219 N.J. 251, 265-66 (2014).

Equally important, the Appellate Division wrongly stated that a statute is unconstitutionally overbroad if it has the mere "capacity" to criminalize protected speech. Fair, 469 N.J. at 521. (Pa2). In actuality, a statute is constitutionally overbroad under the First Amendment only if it "reaches a substantial amount of constitutionally protected conduct," City of Houston v. Hill, 482 U.S. 451, 458 (1987) (emphasis added) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982), "judged in relation to the statute's plainly legitimate sweep." Broderick v. Oklahoma, 413 U.S. 601, 615 (1973); accord United States v. Williams, 553 U.S. 285, 292 (2008); State v. Burkert, 231 N.J. 257, 276 (2017). Also, the overbreadth doctrine is to be used sparingly and only as a last resort. Los Angeles Police Dep't v. United Reporting Publ. Corp., 528 U.S. 32, 39 (1999).

Thus, it is defendant's burden to establish, beyond a reasonable doubt, that N.J.S.A. 2C:12-3(a) proscribes a substantial amount of constitutionally protected speech. It is not the State's burden to disprove that N.J.S.A. 2C:12-3(a) has any capacity to affect even some protected speech.

Here, defendant cannot meet his heavy burden. Recklessness is a significant culpability level in its own right, and several state courts of last resort have rightly upheld statutes forbidding threats communicated in reckless disregard of the risk of causing terror. See State v. Taupier, 193 A.3d 1 (Conn. 2018); Major v. State, 800 S.E.2d 348 (2017). The issue in Taupier and Major was whether Black adopted a specific-intent-to-threaten standard. The courts in both cases held that Black did not adopt such a standard, and further held that a conviction based on recklessness does not contravene the First Amendment. Taupier, 193 A.3d at 14-19; Major, 800 S.E.2d at 350-52.

In Major, the Georgia Supreme Court quoted extensively from Justice Alito's separate opinion in Elonis, emphasizing the moral culpability of reckless acts committed with "conscious disregard for the safety of others," and concluding that recklessness "clearly requires an analysis of the accused's state of mind at the time of the crime alleged." 800 S.E.2d at 351-52. The court further concluded that communicating a threat of violence in a reckless manner "fits within the definition of a true threat"

noting that recklessness "requires a knowing act – i.e., conscious disregard of a substantial risk." Id. at 352.

The Connecticut Supreme Court in Taupier similarly held that the First Amendment does not require the prosecution to prove that the defendant had a specific intent to terrorize before he may be punished for threatening speech. 193 A.2d at 18-19. The court further observed that even if the First Amendment requires proof that the defendant subjectively knew that his threat would be interpreted as serious, a statute proscribing reckless threats "satisfies that requirement" because it requires a finding that the defendant "was aware of and consciously disregarded a substantial and unjustifiable risk that the target of the threat would be terrorized." Id. at 19.

Requiring the speaker to have a heightened mens rea runs counter to the United States Supreme Court's teachings over the past century that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." Schenck v. United States, 249 U.S. 47, 52 (1919). Indeed, in other First Amendment contexts, the United States Supreme Court has sanctioned proscriptions of unprotected categories of speech without requiring a showing of purpose or intent. See Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (holding that "false statements made with reckless disregard of the truth [] do not enjoy constitutional protection" in criminal-libel cases); New York Times Co. v. Sullivan, 376 U.S. 254, 279-

80 (1964) (reaching the same result in civil-libel cases); Osborne v. Ohio, 495 U.S. 103, 115 n.9 (1990) (allowing punishment for reckless possession of visual depictions of child pornography); White, 670 F.3d at 511-12 (noting that in "incitement" cases, the prosecution need only show that the speaker "use[d] specific words advocating unlawful conduct," not that the speaker had a "specific intent to incite unlawful conduct"); see also State v. Cardell, 318 N.J. Super. 175, 182-84 (App. Div.) (rejecting First Amendment challenge to N.J.S.A. 2C:12-10, which prohibits stalking by threats and other means, after statute was amended to remove subjective intent requirement in favor of standard focusing on whether defendant's conduct would cause fear in objective reasonable person), certif. denied, 158 N.J. 687 (1999).

The State is unaware of any case where the United States Supreme Court or this Court has held that recklessness is an insufficient mens rea to separate constitutionally protected speech from that which is proscribable, and there is no reason to so hold with respect to true threats. Indeed, there is no reason why this category of unprotected speech should carry a specific-intent requirement when that same requirement does not apply for any other category of unprotected speech.

Not only that, but States have strong reasons to proscribe reckless threats. It does not matter to a victim terrorized by a threat whether the speaker acted with a subjective purpose to cause terror or consciously disregarded a substantial and unjustifiable

risk of causing that same result; in either instance, the victim feels the same degree of fear, as a result of the speaker's voluntarily-made threat. Thus, regardless of the speaker's purpose, the State has a compelling interest in protecting its citizens "from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." Black, 538 U.S. at 360 (quoting R.A.V., 505 U.S. at 388)). A standard that proscribes threats with purpose to terrorize while allowing threats in reckless disregard of such a risk is "dangerously underinclusive" with respect to the "rationales [in Black] for the exemption of threats from protected speech." New York ex. rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006).

The danger in affording constitutional protection to threats conveyed in reckless disregard of the risk of harm is obvious and not subject to mere conjecture. In fact, shortly after the Kansas Supreme Court ruled in Boettger that purpose to threaten is constitutionally required to prove a charge of terroristic threats, a Kansas trial judge dismissed charges against a defendant who admitted he had "sought to get the attention of three friends by telling them he was going to shoot up a school" at a particular time on a particular day. Tim Hrenchir, Charges Dismissed Against Man Accused of Threatening School, Topeka Capital-Journal (Nov. 26, 2019), https://www.cjonline.com/news/20191126/charge-dismissed-against-man-accused-of-threatening-school. The judge

dismissed the charge because the prosecution could not prove that the defendant specifically intended to place others in fear or to cause evacuation, lockdown, or disruption. Ibid.

This is the kind of absurd result that should not be tolerated here in New Jersey, especially since our Legislature has enacted a reasonable statute that furthers our collective interest in protecting our citizens from the scourge of terroristic threats by proscribing threats to commit crimes of violence in reckless disregard of the risks of causing terror, irrespective of the actor's purpose. But if the Appellate Division's decision is allowed to stand, we can expect unjust results in terroristic-threats prosecutions and other prosecutions involving threatening behavior. In fact, unjust results may become the norm.

As just one example of the type of unjust result that would flow from the Appellate Division's flawed decision, suppose a person were to threaten to assault a judge. And suppose the person were to claim, after the fact, that he said he would assault the judge only because he suspected the judge would rule against a family member in a pending case and hoped that the judge would recuse himself. Should the threat be given constitutional protection because the speaker's purpose was to avoid an adverse legal ruling, even if he consciously disregarded a substantial and unjustifiable risk that the judge would actually feel terrorized as a result of his behavior? Under the Appellate Division decision, the answer would be yes.

As another example, suppose a defendant were charged with making an anonymous call to school officials threatening to blow up the school with a bomb. And suppose the defendant claimed, at trial, that he only made the call because he was unprepared for a scheduled exam and hoped it would be postponed. If the jury were to have a reasonable doubt as to whether postponing the exam was the defendant's actual purpose, would the jury be required to acquit, even if the defendant was aware that his words would cause people in the school to feel terrorized and lead to a mass evacuation? Again, under the Appellate Division decision, the answer would be yes.

It strains credulity that these types of dangerous threats will now be protected under the First Amendment unless the State can disprove the speaker's professed explanation concerning his motivations and convince a jury, beyond a reasonable doubt, that the speaker's actual purpose was to cause terror. If the State can at least prove that the speaker threatened to commit a crime of violence while consciously disregarding a substantial and unjustifiable risk that others would feel terror, that should be enough to withstand First Amendment scrutiny, irrespective of the speaker's actual purpose.

Not only does the Appellate Division's decision strip victims of protections from dangerous threatening speech, except in the rare case where the State can prove an actual subjective purpose to terrorize, but the decision also invites disparate results that

would confound lawyers and laypersons alike. If two people were to publish the exact same Facebook post under identical circumstances, and the content and context of the posts were such that a reasonable person would feel terrorized in both instances, the considerations that justify governmental intervention would be the same even if one speaker privately intended the post to cause terror whereas the other privately intended it as a joke but consciously disregarded the risk it would cause terror. Yet under a "test focused on the speaker's intent," the same post would be treated as "protected speech for one speaker, while leading to criminal penalties for another." FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 468 (2007). Such a "bizarre result," ibid., cannot be squared with the reasons why true threats are banned in the first place.

Furthermore, this Court should not even consider whether the analysis should be different under our State Constitution. For one thing, the Appellate Division stated, in a footnote, "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[.]" Fair, 469 N.J. Super. at 554 n.7. (Pa23 n.7). Thus, the Appellate Division did not address whether the reckless-disregard prong of N.J.S.A. 2C:12-3(a) violates Article I, ¶ 6 of the New Jersey Constitution. Nor should this Court. Defendant did not properly preserve any claim that his speech was protected under the New Jersey Constitution. And even if defendant had

raised a state-constitutional issue before the Appellate Division, it would not have been proper because he did not urge dismissal of the charge on state-constitutional grounds before the trial court. See Jones v. State, 64 S.W.2d 728, 733 (Ark. 2002) (declining to consider defendant's contention that his rap song was protected speech under the Arkansas Constitution because defendant raised only a First-Amendment challenge below).

In any event, our courts have always interpreted Article I, ¶ 6 of the New Jersey Constitution in a manner that is coextensive, coterminous, and consistent with the First Amendment, see Anderson v. Sills, 143 N.J. Super. 432, 442 (Ch. Div. 1976) (collecting cases), and there is no reason to break tradition and afford greater protection under our State Constitution here. Indeed, there is nothing about the textual language of our State Constitution, or its legislative history, or our preexisting state law, or our local interests, concerns, traditions, or attitudes that would justify a departure from federal law to afford state-constitutional protection to threats to commit crimes of violence in reckless disregard of the risk of terrorizing others. See State v. Hunt, 91 N.J. 338, 363-67 (1982) (Hunt, J., concurring) (discussing the factors that should be considered before diverging from federal constitutional standards on state-constitutional grounds); see also Taupier, 193 A.2d at 174-75 (conducting a Hunt-type analysis to find that "reckless" threats are not protected under Connecticut's state constitution).

Defendant also argued before the Appellate Division that the First Amendment requires proof that an objectively reasonable listener would have understood the alleged threat to be real. (Db40). This argument, which was not even addressed by the Appellate Division, is similarly unavailing.

Neither this Court nor the United States Supreme Court has ever required proof that an objectively reasonable listener would have understood a defendant's threat to be real. But even if there were such a requirement, it was satisfied here. The trial judge instructed the jury, consistent with the Model Jury Charge, that "[t]he words or actions of the defendant must have been of such a nature as to convey fear or menace of a crime of violence to the ordinary person." (5T95-14 to 16). The judge also told the jury, consistent with the Model Jury Charge, that "[i]t is not a violation of [the] statute if the threat expresses fleeting anger or was made merely to alarm." (5T95-15 to 18). These instructions made clear that defendant could not be convicted if an objectively reasonable listener would not have understood the defendant's threat as real.

The court's instructions on recklessness further cemented the point that the jury could not convict unless the threat was one that a reasonable person would have interpreted as real. The judge told the jury that a defendant acts with reckless disregard of the risk of causing terror if he consciously disregards a substantial and unjustifiable risk that another person will be terrorized as

a result of his conduct. And the judge also said the risk must be of such a nature and degree that its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. (5T96-10 to 21).

In sum, defendant's First Amendment rights were not violated because he may have been convicted based on a finding that he threatened to commit a crime of violence in reckless disregard of the risk of causing terror. Such threats are not constitutionally protected. This Court should reverse the Appellate Division decision, which wrongly held otherwise.

POINT II

THE TRIAL COURT DID NOT COMMIT ERROR, LET ALONE PLAIN ERROR, IN FAILING TO PROVIDE A SPECIFIC UNANIMITY INSTRUCTION SUA SPONTE.[4]

The Appellate Division erroneously held that the trial judge's general instructions on jury unanimity were insufficient, and that the judge was required to provide more specific instructions on jury unanimity sua sponte. The panel mistakenly believed that, even in the absence of a request, the judge was obligated to tell the jurors they could not convict defendant of

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[4] This second issue is properly before this Court because the State filed an appropriate Notice of Appeal as of right pursuant to R. 2:2-1(a)(1). This Court has made clear, on multiple occasions, that if there is a proper basis for an appeal as of right due to the existence of a substantial constitutional issue, the Court will consider all issues raised in the case, including all non-constitutional issues. See, e.g., State v. Barnes, 54 N.J. 1, 4 (1969); Kligman v. Lautman, 53 N.J. 517, 523 (1969).

terroristic threats unless they unanimously agreed defendant was guilty under N.J.S.A. 2C:12-3(a) or unanimously agreed he was guilty under N.J.S.A. 2C:12-3(b). The panel also incorrectly opined that, even in the absence of a request, the judge was required to tell the jurors they could not convict defendant of terroristic threats unless they unanimously agreed as to the particular statement that qualified as a terroristic threat.

The Appellate Division's holding cannot be reconciled with this Court's published precedent and must be reversed. There 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. And the Appellate Division compounded its mistake by failing to consider whether defendant had satisfied his burden of demonstrating plain error. 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 . . . ." N.J.S.A. 2C:12-3(b) provides that a person is guilty of that same 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 indictment charged that defendant, on or about May 1, 2015, committed terroristic threats by 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 N.J.S.A. 2C:12-3(a) and/or (b). (Da1 to 2).

When the court conducted a charge conference, the prosecutor asked the judge to instruct the jury that defendant was charged under N.J.S.A. 2C:12-3(a) and/or N.J.S.A. 2C:12-3(b), and that defendant could be convicted if the jury found him guilty under either subsection. Defense counsel did not object or request an instruction advising the jurors they had to agree whether defendant was guilty under 2C:12-3(b), 2C:12-3(b), or both. Nor did defense counsel request an instruction advising the jurors they had to agree that a particular statement qualified as a terroristic threat. (5T11-11 to 18-20).

In the final charge to the jury, Judge O'Brien read the indictment, (5T93-24 to 94-19), and then instructed the jury as to the law applicable to N.J.S.A. 2C:12-3(a). The judge read the statutory subsection word-for-word, (6T93-22 to 94-25), and told the jurors that in order to convict defendant under that subsection, the State had to prove the following elements beyond

a reasonable doubt: (1) that defendant threatened to commit a crime of violence; and (2) that the threat was made with the purpose to terrorize another or in reckless disregard of the risk of causing such terror. (5T95-1 to 8). The judge also explained the two elements, in accordance with the applicable Model Jury Charge. (5T95-9 to 97-17).

Next, the judge said there was another form of terroristic threats that applied to the case: threats to kill under N.J.S.A. 2C:12-3(b). (5T97-18 to 20). The judge read that statutory subsection word-for-word, (5T97-23 to 98-5), and told the jurors that in order to convict defendant under that subsection, the State had to prove the following elements beyond a reasonable doubt: (1) that 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 that the threat was likely to be carried out." (5T98-6 to 15). The judge also explained the three elements, again following the applicable Model Jury Charge. (5T98-16 to 100-12).

After instructing the jury as to the law, the judge told the jurors that their verdict had to be unanimous: "You may return on each crime charged a verdict of either not guilty or guilty. Your verdict, whatever it . . . may be as to each crime charged must be unanimous. Each of the 12 deliberating jurors must agree as to the verdict." (6T103-25 to 104-4).

The judge then provided the jury with a verdict sheet, which asked the jurors to decide whether defendant committed 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." (5T104-5 to 105-8; Da27 to 28). The judge told the jurors they had to answer the question "not guilty" or "guilty," and their verdict had to be unanimous. (5T105-6 to 8).

Upon completion of the charge, both the prosecutor and defense counsel indicated they had no objections. (5T109-24 to 110-3).

During jury deliberations the following day, the jury sent out a note that read: "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?" (6T3-3 to 10.)

When the judge discussed the note with counsel, outside the presence of the jury, the prosecutor took the position that in order to convict defendant of terroristic threats, the State had to prove that defendant was guilty under either N.J.S.A. 2C:12-3(a) or N.J.S.A. 2C:12-3(b), beyond a reasonable doubt, but did not have to prove that defendant was guilty under both N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b). (6T3-11 to 5-3). Judge O'Brien asked defense counsel if he agreed, and defense counsel

conceded that the prosecutor's representation of the law was accurate. (6T5-4 to 6).

When the jurors re-entered the courtroom, the judge re-instructed the jurors as to the elements of N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b). (6T5-20 to 7-2). The judge then advised the jurors that a verdict of guilt could be based on N.J.S.A. 2C:12-3(a) or (b), but that "in either event," the charge had to be proven beyond a reasonable doubt. (6T7-3 to 5).

Judge O'Brien said he hoped he had answered the jury's question satisfactorily. Several jurors verbally responded affirmatively, and no jurors asked for further clarification. (6T7-6 to 11). Later that afternoon, the jury returned a verdict of guilty. (6T7-13 to 9-2).

On appeal, the Appellate Division recognized that 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 . . . ." Fair, 469 N.J. Super. at 555-56. (Pa25). The Appellate Division also acknowledged that the judge "correctly instructed the jury in response to its question that only one theory needed to be found for a guilty verdict," meaning that the judge accurately advised the jury that they could convict defendant under N.J.S.A. 2C:12-3(a) or N.J.S.A. 2C:12-3(b), and did not have to find defendant guilty of both subsections. Id. at 558. (Pa28).

But the Appellate Division nonetheless found that the judge should have told the jurors that they "needed to agree on which provision [of the statute] was violated." Ibid. In other words, in the Appellate Division's view, "[t]he 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)." Id. at 558. (Pa28 to 29). The panel felt that the judge "should have made clear that the jury "could not find defendant guilty via a fragmented verdict." Id. at 556. (Pa26). The panel also felt that 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) without (a)." Ibid. Without such instructions, the panel found there was a possibility of an "impermissibly fragmented verdict[.]" Id. at 558. (Pa29).

Also, the Appellate Division said that the jury was "presented with evidence of multiple statements defendant made that could have been understood as being directed toward [Officer] Healey." Id. at 556. (Pa26 to 27). And, because "no limitation was placed on what the jury could find to be a terroristic threat[,]" id. at 557, (Pa27), the Appellate Division expressed concern that the jurors could have convicted defendant of terroristic threats despite disagreeing as to the particular statement or statements that constituted the threat. Id. at 557. (Pa27 to 28). The panel

further found that even assuming that "any different 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 pose[d] too grave a risk that they were not unanimous on at least one of those theories." Id. at 557-58. (Pa28).

The Appellate Division's decision was wrong in all respects. There was no need for any type of specific unanimity instruction in this case, especially in the absence of a request, and defendant suffered no prejudice whatsoever in light of the evidence presented and the arguments of counsel.

Preliminarily, applying the proper standard of review is critical. Because defendant did not object to the trial judge's general instructions on jury unanimity, or ask the judge to provide any supplemental specific unanimity instructions, he now bears the burden of demonstrating plain error, i.e., error that was "clearly capable of producing an unjust result." R. 2:10-2. Not every possibility of an unjust result will suffice. The possibility of injustice must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Jordan, 147 N.J. 409, 422 (1997) (quoting State v. Macon, 57 N.J. 325, 336 (1971)).

In the context of a jury charge that is challenged for the first time on appeal, the plain-error rule requires a demonstration

of "legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." State v. Chapland, 187 N.J. 275 (2006) (quoting State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930 (1970)); accord State v. Burns, 192 N.J. 312, 341 (2007) (quoting Jordan, 147 N.J. at 422). To evaluate whether an alleged error meets this high standard, an appellate court must assess the degree of actual harm within the context of the entire trial, under the totality of the circumstances, by considering the weight of the State's evidence, the arguments of counsel, and any other relevant information gleaned from the record as a whole. See State v. Marshall, 123 N.J. 1, 145 (1991).

At bottom, an appellate court reviewing a record for plain error should not be concerned with technical errors or merely prejudicial errors. Rather, an appellate court may correct for plain error only in exceptional cases when there is error "affecting substantial rights" that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," and only when the failure to act would result in a "miscarriage of justice" such as the conviction of an actually innocent defendant. United States v. Olano, 507 U.S. 725, 731-37 (1993) (quotations omitted). In other words, appellate relief under the plain-error standard is reserved for "blockbusters": those errors "so shocking

that they seriously affect the fundamental fairness and basic integrity of the proceedings below." United States v. Griffin, 818 F.2d 97, 100 (1st Cir.), cert. denied, 484 U.S. 844 (1987).

Here, the Appellate Division did not even mention, much less apply, the plain-error rule. Also, the panel overlooked critical principles of law in reaching the erroneous conclusion that a specific unanimity instruction was required. When this Court's precedent is applied to the facts of this case, and when defendant's complaints are considered in the context of the entire trial, as is necessary under the plain-error rule, it is clear there was no error, let alone plain error.

Both Article I, ¶ 9 of the New Jersey Constitution and Rule 1:8-9 require unanimous jury verdicts in criminal cases. State v. Frisby, 174 N.J. 583, 596 (2002); State v. Parker, 124 N.J. 628, 633 (1991), cert. denied, 503 U.S. 939 (1992). The principle of juror unanimity is "deeply ingrained in our jurisprudence," Frisby, 174 N.J. at 596, and "requires 'jurors to be in substantial agreement as to just what a defendant did' before determining his or her guilt or innocence." State v. Cagno, 211 N.J. 488, 516 (2012), cert. denied, 568 U.S. 1104 (2013) (quoting Frisby, 174 N.J. at 596 (quoting United States v. Gipson, 553 F.2d 453, 457 (5th Cir. 1977))). Put differently, "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'"

Frisby, 174 N.J. at 596 (quoting Gipson, 553 F.2d at 457) (quoting In re Winship, 397 U.S. 358, 364 (1970))).

"Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict." Cagno, 211 N.J. at 516 (quoting Parker, 124 N.J. at 641. Thus, in most instances, there is no need for any special instructions beyond the general instructions on juror unanimity. Frisby, 174 N.J. at 597; Parker, 124 N.J. at 638.

Nevertheless, "[t]here may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Cagno, 211 N.J. at 516-17 (quoting Parker, 124 N.J. at 641)). Such circumstances may include cases where: (1) a single crime can be proven by different theories supported by different evidence, and there is a reasonable likelihood that all jurors will not unanimously agree that the defendant's guilt was proven by the same theory; (2) the underlying facts are very complex; (3) the allegations of one count are either contradictory or only marginally related to each other; (4) there is a variance between the indictment and the proofs at trial; or (5) there is strong evidence of jury confusion. Cagno, 211 N.J. at 517; Frisby, 174 N.J. at 597; Parker, 124 N.J. at 635-36.

"The fundamental issue is whether a more specific instruction [is] required in order to avert the possibility of a fragmented verdict." Frisby, 174 N.J. at 598. Generally, a fragmented verdict results when there exists "a genuine possibility of jury confusion . . . or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts." Cagno, 211 N.J. at 517 (quoting Parker, 124 N.J. at 641).

"The general rule is that 'in cases where there is a danger of a fragmented verdict[,] the trial court must upon request offer a specific unanimity instruction." Cagno, 211 N.J. at 517 (quoting Frisby, 174 N.J. at 597-98) (emphasis added). But in the absence of a request, the failure to provide such an instruction "will not necessarily constitute reversible error." Parker, 124 N.J. at 637; accord State v. Gandhi, 201 N.J. 161, 192 (2010).

When there is an allegation on appeal that a specific unanimity charge should have been given, this Court applies a two-prong test to evaluate the allegation. The first inquiry is "whether the allegations in the . . . count were contradictory or only marginally related to each other . . . ." Cagno, 211 N.J. at 517 (quoting Parker, 124 N.J. at 639). The second inquiry is "whether there was any tangible evidence of jury confusion." Ibid. Our courts have had occasion to apply these principles in a variety of contexts. For example, this Court has recognized that juries need not unanimously agree on whether a defendant's role was that

of a principal or an accomplice. Parker, 124 N.J. at 633. Nor is unanimity required when "a statute embodies a single offense that may be committed in a number of cognate ways[.]" Frisby, 174 N.J. at 597.

Here, the trial judge provided a general charge on jury unanimity. That charge, which was undeniably accurate and not objected-to below, "cannot be read as sanctioning a non-unanimous verdict." Parker, 124 N.J. at 638 (quoting State v. Jennings, 583 A.2d 915, 924 (Conn. 1990)). Indeed, the charge did not state or suggest that the jurors had discretion to find guilt if there was disagreement as to the specific theory underlying the verdict or the facts upon which the verdict was based.

And when the jury asked whether "both N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b) had to be proven beyond a reasonable doubt or just one or the other," the judge accurately advised the jurors, again without objection, that they could convict based on "one or the other," so long as they were convinced of guilt beyond a reasonable doubt. And in answering the jury's question, the judge did not state or suggest that the jurors could convict if one or more jurors were convinced of guilt under subsection (a) and the rest were convinced of guilt under subsection (b). In fact, the judge did not say anything to undermine his previous instruction that any verdict had to be unanimous. The jurors are presumed to have followed the general unanimity instructions that were given

to them, see State v. Winder, 200 N.J. 231, 256 (2009), and there is no reason to doubt that they did so here.

Furthermore, a specific unanimity instruction would not have been appropriate. As noted above, jury unanimity is not required where, as here, a statute "embodies a single offense that may be committed in a number of cognate ways[.]" Frisby, 174 N.J. at 597. In other words, "unanimity is not required when a statute states a single offense but provides for various modes of commission of the offense." Parker, 124 N.J. at 634-35. As the United States Supreme Court has recognized, a jury need not be unanimous if a single offense may be committed by different means and those means are "so disparate as to exemplify two inherently different offenses." Schad v. Arizona, 501 U.S. 624, 643 (1991) (Souter, J., plurality opinion).

N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b) are not "so disparate as to exemplify two inherently different offenses." Ibid. In fact, the two subsections are not disparate at all. This is a classic case of a statute that "embodies a single offense that may be committed in a number of cognate ways[.]" Frisby, 174 N.J. at 597. Indeed, N.J.S.A. 2C:12-3 clearly proscribes a "single offense" and "provides for various modes of commission of [that] offense." Parker, 124 N.J. at 634-35. Thus, the jurors did not have to unanimously agree whether defendant was guilty of terroristic threats under N.J.S.A. 2C:12-3(a) or N.J.S.A. 2C:12-3(b), so long as they were all convinced, unanimously and beyond

a reasonable doubt, that defendant was guilty under N.J.S.A. 2C:12-3(a), N.J.S.A. 2C:12-3(b), or both.

In his Appellate Division brief, defendant mistakenly referred to N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b) as two separate statutes, and argued that jurors cannot be unanimous if they disagree about the statute that is the basis for a conviction. (Db10; Db11; Db19). But N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b) are not two separate statutes; they are two subsections of the same statute. And a defendant will be guilty of that same crime, in contravention of the same statute, whether a jury bases its verdict on subsection (a) or subsection (b).

If the Legislature had combined subsection (a) and subsection (b) into a single statutory subsection, it is doubtful that anyone would ever suggest that all 12 jurors would have to agree on the portion of the subsection underlying the conviction because jury unanimity is generally not required in such circumstances. The result should be no different where, as here, the Legislature has separated two similar theories of liability into two statutory subsections, for ease of application. Indeed, the question whether a specific unanimity instruction is appropriate should not turn on whether alternate definitions of culpability are included in a single statutory subsection or separated into multiple subsections. What matters is whether the alternate bases of liability are "so disparate as to exemplify two inherently

different offenses," not whether they happen to be set forth in one statutory subsection or two. Schad, 501 U.S. at 643.

In any event, there was no possibility of prejudice under the particular facts of this case. The State did not allege that defendant committed one act that qualified as a terroristic threat under subsection (b) and a separate and distinct act that qualified as a terroristic threat under subsection (b). In other words, the State did not present wholly different and divergent evidence to establish violations of subsections (a) and (b), such that a single verdict would have created ambiguity as to whether the jurors actually agreed on the specific act underlying the finding of guilt. Rather, the State presented the exact same evidence based on the exact same facts in support of both N.J.S.A. 2C:12-3(a) and N.J.S.A. 2C:12-3(b).

Moreover, in the context of the facts presented in this case, the elements of N.J.S.A. 2C:12-3(a) were subsumed within the elements of N.J.S.A. 2C:12-3(b). If one or more jurors were convinced, beyond a reasonable doubt, that defendant threatened to kill Officer Healey with the purpose to put him in imminent fear of death under circumstances reasonably causing the officer to believe the immediacy of the threat and the likelihood that it would be carried out, see N.J.S.A. 2C:12-3(b), then they necessarily were convinced, beyond a reasonable doubt, that defendant threatened to commit a crime of violence with a purpose

to terrorize another or in reckless disregard of the risk of causing such terror, see N.J.S.A. 2C:12-3(a).

The converse is also true. Any juror who felt that the State had failed to prove its case under N.J.S.A. 2C:12-3(a) would certainly have reached the same conclusion as to N.J.S.A. 2C:12-3(b).

Thus, it is not possible that one or more jurors were convinced that defendant was guilty under subsection (b) but not guilty under subsection (a), whereas the remaining jurors were convinced that defendant was guilty under subsection (a) but not subsection (b). Again, on these facts, no juror could have found guilt under subsection (b) but not subsection (a). Thus, we should have no concerns that the jurors were fragmented as to the legal underpinnings of their verdict. Any juror who voted to convict defendant must have been convinced that, at the very least, defendant was guilty under N.J.S.A. 2C:12-3(a).

The prosecutor acknowledged as much when he said, at the close of his summation, that if the jurors were not convinced of defendant's guilt under subsection (a), they need not consider subsection (b) because they would never find guilt under subsection (a) if they were not convinced about guilt under subsection (b). (5T79-1 to 13). Given the prosecutor's comments, it is hardly surprising that defense counsel did not ask for a specific unanimity instruction. The prosecutor's comments obviated any need for the judge to instruct the jurors that they could not

convict without unanimous agreement as to whether defendant was guilty under subsection (a) or guilty under subsection (b). See State v. Ingram, 196 N.J. 23, 42 (2008) (noting that the failure to object signifies that "'in the context of the trial[,] the alleged error was actually of no moment'") (quoting State v. Nelson, 173 N.J. 417, 471 (2002) (quoting Macon, 57 N.J. at 333))).

Furthermore, although the jury heard evidence that defendant made multiple statements, the prosecutor made clear in both his opening statement and his summation that the alleged terroristic threat was the "watch out for a headshot" comment. (4T44-8 to 47-12; 5T53-24 to 79-13). The other comments were admitted because they gave context to the "head shot" comment. They supported the State's theory that defendant made the "head shot" comment with the purpose to terrorize Officer Healey or in reckless disregard of the risk of causing such terror. See N.J.S.A. 2C:12-3(a). They also supported the State's theory that when defendant uttered the "head shot" comment, he was acting with a 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 that it would be carried out. See N.J.S.A. 2C:12-3(b). They also were necessary to help establish that defendant's words and actions were "of such a nature as to convey menace or fear of a crime of violence to the ordinary person," since it is not a violation of the statute if a threat "expresses fleeing anger" or is "made merely to alarm." See Model Jury Charges

(Criminal): N.J.S.A. 2C:12-3(a) (Terroristic Threats), at 2 (rev. 9/12/2016). It is not possible that only some of the jurors convicted defendant based on the "head shot" comment whereas the rest of the jurors convicted defendant based on some other comment or comments.

It should be noted, in this regard, that the defense never disputed that defendant actually made all the statements attributed to him. The statements made at the scene, including the statement alleged to be the terroristic threat (the "headshot" comment) was captured on an MVR recording that was admitted at trial and played for the jury. The rest of the statements, which provided context to the "headshot" comment, were recovered from defendant's public Facebook page. Defense counsel conceded that defendant made all these statements but argued that defendant did not utter a genuine threat that satisfied all the elements of N.J.S.A. 2C:12-3(a) or N.J.S.A. 2C:12-3(b). (4T48-11 to 57-5; 5T36-17 to 50-21).

Just as significant, all of defendant's statements were conceptually similar and neither contradictory nor only marginally related to each other. The statements were made close in time -- all on the same date of May 1, 2015 -- and they all reflected defendant's state of rage towards local law enforcement in general and Officer Healey in particular. This was not a case where the State presented evidence of conceptually distinct and dissimilar acts triggering the potentiality of guilt based on two wholly

different and divergent theories of liability. Rather, the State presented only evidence of conceptually similar and interrelated acts that supported criminal liability under a unified theory of liability, where the two statutory subsections presented to the jury overlapped to such an extent that the jury could not find guilt under the second without also finding guilt under the first. A specific unanimity instruction was not appropriate under these circumstances, especially in the absence of a request, and would not have made a difference anyway.

What is more, if the judge had told the jurors they had to separately consider each statement allegedly made by defendant, and come to a unanimous agreement as to which of those statements constituted a terroristic threat, the jurors may have mistakenly believed they had to interpret each statement in isolation and could convict only if a particular statement, viewed in isolation, satisfied the elements of terroristic threats. In actuality, the jury was expected to consider all the testimony and all the evidence, focusing on how each proven fact related to every other proven fact, in deciding whether, under the totality of the circumstances, defendant acted with a purpose to terrorize Officer Healey, see N.J.S.A. 2C:12-3(a), or consciously disregarded a substantial and unjustifiable risk of causing such terror, see ibid. and N.J.S.A. 2C:2-2(b)(3), or threatened to kill Officer Healey with a purpose to put the officer in imminent fear of death under circumstances reasonably causing the officer to believe the

immediacy of the threat and the likelihood that it would be carried out, see N.J.S.A. 2C:12-3(b).

Given the foregoing, it is clear that the first prong of the Parker test was satisfied here. The second prong was also satisfied because there was no indication of jury confusion. The mere fact that the jury posed a question in a note does not mean they were confused as to their responsibility to render a unanimous verdict. Indeed, the jurors simply asked a reasonable question as to their task, and the judge accurately answered that question. In belatedly complaining about the absence of specific-unanimity instruction before the Appellate Division, defendant relied on Frisby, supra, State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011), and State v. Bzura, 261 N.J. Super. 602 (App. Div. 1993). Those cases are distinguishable from this case.

In Frisby, the State offered two distinct theories, based on "two entirely distinct factual scenarios," to support a single charge of endangering the welfare of a child. 174 N.J. at 598. The first theory was that the defendant directly injured her child or caused injury by failing to provide adequate supervision. The second theory was that the defendant abandoned the child. Ibid. These two different theories were "based on different acts and entirely different evidence." Id. at 599. This Court therefore held that a specific unanimity instruction was required because the State's alternative theories were "contradictory, conceptually distinct, and not even marginally related to each other." Id. at

600 (internal quotation marks omitted). Without more detailed instructions, the jurors may have thought they could convict defendant even though "they completely disagreed regarding contradictory and conceptually distinct theories and the evidence underlying them." Ibid.

Here, the State's allegations were neither "contradictory" nor "conceptually distinct." See Parker, 124 N.J. at 639. The State advanced only a single theory: that defendant threatened to kill Officer Healey by shouting, "Watch out for a head shot!," and thereby threatened to commit a crime of violence with a purpose to terrorize another or in reckless disregard of the risk of causing such terror, and also acted with a purpose to put Officer Healey in imminent fear of death under circumstances reasonably causing the officer to believe the immediacy of the threat and the likelihood that it would be carried out. On these facts, the omission of a sua sponte specific unanimity charge was not error, much less plain error.

In Tindell, 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, a police officer, several other children, and various school employees. But 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. Based on these facts, the Appellate Division found that the jury instruction erroneously allowed a fragmented verdict. Id. at 555-56.

Here, unlike Tindell, the indictment charged defendant with threatening only Officer Healey, and the jury was instructed to determine only whether Officer Healey was threatened. Also, as noted above, the prosecutor made clear to the jury that the alleged terroristic threat was a particular comment directed at Officer Healey: the "headshot" comment. Other statements made by the defendant were admitted only to give context to the "headshot" comment. Thus, unlike Tindell, no specific-unanimity instruction was not required to prevent a fragmented verdict.

Finally, in Bzura, the defendant was indicted for false swearing, contrary to N.J.S.A. 2C:28-2(a) (proscribing the making of a false statement under oath or equivalent affirmation), but the indictment alleged a form of false searing proscribed by N.J.S.A. 2C:28-2(c) (proscribing the making of inconsistent statements under oath or equivalent affirmation). 261 N.J. Super. at 653. During trial, the trial court granted the State's motion to amend the false-swearing count to allege a violation of N.J.S.A. 2C:28-2(c), rather than N.J.S.A. 2C:28-2(a). Id. at 649, 653. But ultimately, the trial court in Bzura hopelessly commingled the elements of the two subsections in its final charge. The judge started by reading the statutory language from N.J.S.A. 2C:28-2(a), but then shifted to N.J.S.A. 2C:28-2(c), telling the jurors

they could convict defendant of false swearing if they found he made "inconsistent statements, both of which were alleged to have been made under oath." Id. at 613-14. Then the judge told the jurors: "It is not necessary that you all agree that the same statement or statements were false in order to convict the defendant of false swearing[,] provided that each of you is satisfied that at least one of these statements was false when it was made and believed by the defendant to be false at the time he made that statement, and you may consider any of [the six] statements that I read to you[.]" Id. at 614.

The Appellate Division found that "[t]hese instructions did not ensure a unanimous jury verdict." Ibid. The court noted that the trial judge "did not instruct the jury to determine whether the two sets of defendant's statements were inconsistent and thus one or the other had to be false and known by the defendant to be false, but rather whether any one of defendant's six statements was false and not believed by him." Id. at 654. The court also noted that the judge "told the jurors that its members did not have to agree as to which of defendant's statements was false, so long as each juror found that one of defendant's statements was false and not believed by him." Ibid. As a result, "some jurors could have found that the two sets of statements made by defendant were not 'inconsistent' with each other, but that one of the statements within one of the sets of statements was false and not

believed by defendant to be true, and that defendant therefore was guilty of false swearing." Ibid.

Thus, in Bzura, "the jury instruction . . . permitted some jurors to vote for a guilty verdict based on the form of false swearing proscribed by N.J.S.A. 2C:28-2(a), by finding that one of defendant's six statements was false," while also permitting other jurors to find guilt based on the form of false searing proscribed by N.J.S.A. 2C:28-2(c), by finding the kind of inconsistency between the two sets of statements which establishes that one of the two sets of statements was false and believed by defendant to be false." Id. at 614-15. Accordingly, the court in Bzura felt that reversal was required, because permitting "individual jurors to agree on a guilty verdict based on such different factual predicates would countenance a non-unanimous jury verdict either under the 'conceptually distinct' acts test of United States v. Gipson, supra, or the 'separate offenses' test of Schad v. Arizona, supra." Id. at 615.

Here, defendant was not alleged to have committed separate acts that were "conceptually distinct" under Gipson. Nor was he charged under a statute that allowed for a conviction by different means that were "so disparate as to exemplify two inherently different offenses" under Schad. Also, the judge did not commingle two different subsections in his final charge, and there was no divergence or discrepancy between the allegations in the indictment and the proofs presented at trial.

All in all, the facts and circumstances of this case are much more akin to those of Parker, where a schoolteacher was charged with official misconduct based on a series of acts whereby defendant endangered the welfare of her students in a variety of ways. Id. at 631-32, 639. The evidence included allegations that Parker touched schoolchildren in their "private parts," showed them pornographic magazines, directed them to cut pictures from those magazines and create "collages," discussed her desires to have sex with the school administrator, used foul language, and told the class that a child was menstruating. Ibid. Despite the variety of acts potentially satisfying the official-misconduct charge, this Court held that the trial judge's general unanimity instructions were sufficient, and that the judge did not have to tell the jurors they could not convict unless they unanimously agreed as to the specific act or acts that satisfied the statute. Id. at 639-40. The Court explained that specific unanimity instructions were unnecessary because the allegations were not contradictory or only marginally related to each other, but instead "formed a core of conceptually similar acts." Id. at 639. See also State v. T.C., 347 N.J. Super. 219, 243-44 (App. Div. 2002) (finding no need for a specific unanimity instruction because "[t]here was but one theory of ongoing emotional and physical abuse over a period of time, which consisted of a number of conceptually similar acts committed by the defendant"), certif. denied, 177 N.J. 222 (2003); State v. Scherzer, 301 N.J. Super. 363, 479 (App.

Div.) (multiple acts of sexual penetration were conceptually similar and did not necessitate specific unanimity instructions), certif. denied, 151 N.J. 466 (1997).

If all the various forms of sexual and non-sexual abuse and humiliation presented to the jury in Parker "formed a core of conceptually-similar acts," ibid., the same is certainly true of the intrinsically-related statements in this case. Although the only statement presented to the jury as an alleged terroristic threat was the "headshot" comment, the other statements were conceptually similar because they were also directed towards law enforcement and were made that same day, within a few hours of the "headshot" comment. All the statements reflected and revealed defendant's continuing sense of anger and rage towards Officer Healey and his fellow officers. And all the statements revealed a purpose to terrorize Officer Healey, or at least a conscious disregard of the risk of causing such terror.

Moreover, the facts of this case are stronger than the facts of Parker for an additional reason. In Parker, the State did not focus the jury's attention only on a single act, arguing that the jury should convict because of that single act. Instead, in Parker, the State relied upon all the evidence, and argued that any of Parker's acts could support a conviction. Here, the prosecutor made clear that the only statement alleged to constitute a terroristic threat was the "headshot" comment, and the jury was

well aware that the other statements were only admitted to provide context to that comment.

In sum, the trial court's instructions on general unanimity were sufficient, and the court's omission of a specific unanimity charge, without an objection or a request for such a charge, was not error, let alone plain error that had "a clear capacity to bring about an unjust result." State v. Adams, 194 N.J. 186, 207 (2008) (quoting Jordan, 147 N.J. at 422). This Court should reject defendant's argument and reverse the Appellate Division's decision.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court reverse the Appellate Division's decision and reinstate defendant's conviction and sentence.

Respectfully submitted,

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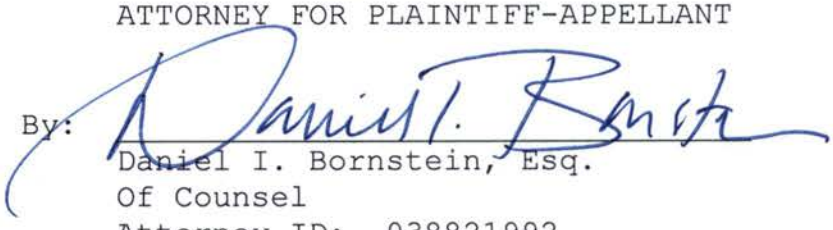
ATTORNEY FOR PLAINTIFF-APPELLANT

By: 
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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.

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[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]

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[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

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[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

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[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

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[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]

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[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.

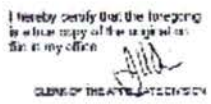
Moreover, the jury was given the option of finding a violation of either subsection (a) or subsection (b). While the judge correctly instructed the jury in response to its question that only one theory needed to be found for a guilty verdict, he did not instruct that all jurors needed to agree on which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



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SUPREME COURT OF NEW JERSEY
APP. DIV. # **A-000913-19**
SUPREME COURT #

STATE OF NEW JERSEY

V

CALVIN FAIR

ACTION

NOTICE OF APPEAL

The State appeals as of right from the Appellate Division's December 9, 2021, published decision, under Rule 2:2-1(a)(1), in light of the majority opinion of the Honorable Clarkson S. Fisher, Jr., P.J.A.D, striking down the "reckless disregard" element of the crime of Terroristic Threats, N.J.S.A. 2C:12-3a, as unconstitutionally overbroad, as this case involves a substantial question arising under the Constitution of the United States or this State.

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Dated: **12/29/2021**

S/ MONICA LUCINDA DO OUTEIRO