SUPREME COURT OF NEW JERSEY
DOCKET NO. 086617

APPELLATE DIVISION DOCKET NO. A-0913-19T1
INDICTMENT NO. 15-08-1454
CASE NO. 15001722

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

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 ON BEHALF OF THE STATE OF NEW JERSEY IN RESPONSE TO THE AMICUS CURIAE BRIEF FILED BY THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

The State relies on the Counterstatement of Procedural History and Counterstatement of Facts as set forth in its initial brief filed on May 20, 2022.

The State also notes that in an Order dated November 1, 2022 and filed on November 7, 2022, this Court denied defendant's Motion to Dismiss the State's Notice of Appeal as of right and ordered that the appeal shall proceed pursuant to R. 2:2-1(a)(1).

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[1] ACLUb refers to the amicus curiae brief filed by the American Civil Liberties Union of New Jersey (ACLU-NJ).

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

LEGAL ARGUMENT

POINT I

NEW JERSEY'S TERRORISTIC-THREATS STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

In Point I, ACLU-NJ maintains that N.J.S.A. 2C:12-3(a) violates the First Amendment because it allows a defendant to be prosecuted for making a terroristic threat without requiring that he intend to instill a fear of imminent harm. In urging this position, ACLU-NJ echoes many of the arguments raised in defendant's supplemental brief. The State disagrees with those arguments, for all the reasons stated in Point I of the State's initial brief to this Court, and for all the reasons stated in Point I of the comprehensive amicus curiae brief filed by the Attorney General of New Jersey, which the State adopts and incorporates by reference herein. The State also adds the following comments.

First, the State notes that on January 13, 2023, the United States Supreme Court granted a petition for a writ of certiorari in Counterman v. Colorado, 22-138. The issue presented in Counterman is as follows: "Whether, to establish that a statement is a 'true threat' unprotected by the First Amendment, the government must show that the speaker subjectively knew or intended the threatening nature of the statement or whether it is

enough to show that an objective 'reasonable person' would regard the statement as a threat of violence."

As discussed in Point I of the State's initial brief and Point I of the Attorney General's amicus curiae brief, the United States Supreme Court has never before addressed or decided the First Amendment issue presented in Counterman. It is anticipated that the Court's resolution of that issue will fully resolve the First Amendment issue in this case.

The State also takes issue with ACLU-NJ's claim that in order to avoid a First Amendment violation, the State must not only prove that defendant subjectively intended to convey a threat, as erroneously found by the Appellate Division, but also that the defendant intended to "instill a fear of imminent harm." (ACLUb at 4) (emphasis added). ACLU-NJ provides no legal support for this assertion. That is because there is none. In fact, the State is unaware of any federal- or state-court opinion holding that the First Amendment affords constitutional protection to threats to commit crimes of violence unless the speaker intends to "instill a fear of imminent harm." Even the Appellate Division's published opinion does not require this type of heightened showing. Thus, not only should this Court reverse the Appellate Division's opinion, for all the reasons stated in Point I of the State's initial brief, and all the reasons stated in Point I of the Attorney General's amicus curiae brief, but this Court

should not even entertain the notion that the First Amendment requires the State to prove that the speaker intended to "instill a fear of imminent harm."

Finally, the State disagrees with ACLU-NJ's statement that courts should require a subjective intent to intimidate because such a requirement "provides a clear demarcation between protected and unprotected speech." (ACLUb at 5). The State is unaware of any federal- or state-court opinion adopting a subjective-intent requirement because of a belief that such a requirement provides a clear boundary between protected and unprotected speech. The few courts that adopted a subjective-intent requirement have done so only because they mistakenly interpreted Virginia v. Black, 538 U.S. 343 (2003), to require subjective intent.

As the State and the Attorney General stated in previously-stated briefs, most courts apply a purely objective test, without regard to the speaker's subjective state of mind, in determining whether a threat qualifies as a true threat for purposes of the First Amendment. This is actually the simplest way to differentiate between protected speech and unprotected speech. But even if the First Amendment can somehow be construed to require a culpable state of mind, there is no reason why that state of mind must be purposeful state of mind, rather than a knowing or reckless state of mind. Whether the law proscribes objective threats to commit crimes of violence with a purpose to

terrorize another, or instead proscribes objective threats made in conscious disregard of the risk of causing such terror, speakers are able to conform their behavior to the dictates of the law and ensure they stay on the right side of the constitutional line.

If anything, a subjective-intent requirement can muddy the boundary between protected and unprotected speech because it is often difficult for people to understand and explain their subjective motivations for engaging in particular courses of conduct. That is because people often act with multiple purposes and do what they do for multiple reasons.

Borrowing one of the hypotheticals in the State's initial brief will help to illuminate this point. Suppose a person calls a judge on the phone and threatens to assault the judge. And suppose that the person makes a credible claim, after the fact, that he said what he said primarily because he suspected that the judge was going to rule against a family member in a pending case, and he hoped that the judge would recuse himself from that case. But suppose there is evidence that the person had a secondary ulterior motive for calling the judge, i.e., he actually wanted the judge to feel terrorized. Should the threat be given constitutional protection in such a case, since the speaker's primary purpose was not to cause terror or harm but to avoid an adverse legal ruling for a family member? Or, alternatively, should the threat be subject to criminal

prosecution because the speaker had a secondary purpose that would pierce the veil of constitutional protection?

In other words, do secondary purposes count when determining if a threat constitutes a "true threat" that will withstand constitutional scrutiny? If the answer is yes, then speakers will have to take inventory of all their motives, not just their primary motives, in deciding whether their threats will be constitutionally protected or not. And if the answer is no, because only the primary purpose counts, then speakers will have to weigh the primacy of their various motives and assess which motive is primary and which motives are secondary.

ACLU-NJ does not address what should happen in a situation like this. Nor does defendant or ACDL-NJ. Nor did the Appellate Division. But the critical point is that mandating a rule that affords constitutional protection based on whether the actor had a subjective purpose to cause harm or terror is not an effective way to draw a clearly-understandable and easily-enforceable boundary between constitutionally-protected behavior and constitutionally-unprotected behavior. Indeed, the opposite is true.

Nonetheless, ACLU-NJ suggests that states should be allowed to prosecute for terroristic threats only if there is proof that the speaker subjectively intended to put another in fear of bodily harm because "[a]ny

person, whether or not of 'ordinary intelligence,' would understand that one cannot intend to put another in fear of bodily harm." (ACLUb at 5). That may be true, but as noted above, even a person of ordinary intelligence may not fully comprehend his true motivations in making a statement that objectively causes harm, especially when his speech simultaneously advances multiple goals or interests.

And if a speaker is aware that he subjectively intends to cause harm or terror to another person, the speaker will be just as aware if he consciously disregards a risk of causing such harm or terror. As Justice Alito emphasized in his thoughtful concurring and dissenting opinion in Elonis v, United States, 575 U.S. 723 (2015), "[t]here can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct" that is "morally culpable," because "[s]omeone 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). In other words, just as people understand they cannot threaten others with a subjective intent to cause harm or terror to others, they also understand that if they are subjectively aware of a risk that

their words will cause harm or terror to others, they may not consciously disregard that risk.

For all these reasons, and for all the reasons expressed in the State's initial brief and the Attorney General's amicus curiae brief, this Court should reject ACLU-NJ's argument that the First Amendment precludes states from criminalizing true threats absent some showing of a subjective intent to cause harm, terror, or a fear of imminent harm.

POINT II

NEW JERSEY'S TERRORISTIC-THREATS STATUTE DOES NOT VIOLATE ARTICLE I, PARAGRAPH VI OF THE NEW JERSEY CONSTITUTION.

In Point II, ACLU-NJ argues that even if defendant's statements are not protected under the First Amendment to the United States Constitution, they should be protected under Article I, Paragraph 6 of the New Jersey Constitution. The State strongly disagrees.

As noted in the State's initial brief, the Appellate Division did not address whether the reckless-disregard prong of N.J.S.A. 2C:12-3(a) is unconstitutional under New Jersey's state constitution, because the Appellate Division was convinced that defendant did not challenge the statutory subsection on state-constitutional grounds. State v. Fair, 469 N.J. Super. 538, 554 n.7 (App. Div. 2021). But whether defendant preserved a state-constitutional challenge to the reckless-disregard prong of N.J.S.A. 2C:12-3(a) or not, there is no basis for affording state constitutional protection when a defendant threatens to commit an act of violence while consciously disregarding the risk of causing terror to another person. In this regard, the State relies on Point I of its initial brief, as well as Point II of the Attorney General's amicus brief, which it adopts and incorporates by reference herein.

Significantly, ACLU-NJ concedes that "in cases challenging restrictions on speech by a government actor, this Court normally interprets the state constitution's free speech clause to be no more restrictive than the First Amendment to the United States Constitution." (ACLUb at 10). Also, ACLU-NJ concedes that this Court "relies on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution." (Ibid.). Nonetheless, ACLU-NJ claims that New Jersey should give greater constitutional protection to true threats that are political in nature and relate to the person's interest in protecting his home from unwarranted intrusions from law enforcement. (ACLUb at 12-15). This argument is without merit.

Preliminarily, the State notes that the police officers did not enter defendant's home on the day in question. Instead, they briefly stepped onto the property outside defendant's home while investigating a 9-1-1 call from defendant's former girlfriend. And when defendant refused to come out or allow them to enter his home, the officers dutifully accepted defendant's refusal and walked off defendant's property to complete their investigation.

Further, although defendant certainly had the right to tell the officers that he wanted them to leave, he did not have any right, under the First Amendment or the New Jersey Constitution, to threaten to commit a crime of violence against the officers. After all, "the home is not above the law," and

the home "is not a sanctuary for crime." Commonwealth v. Carey, 25 A. 140, 141 (Pa. 1892). Thus, "if the penal code is violated, the commission of the offence in the home of the wrongdoer does not shield him from punishment." Ibid.; see also Poe v. Ullman, 367 U.S. 497, 552 (1961) (noting that "it would be an absurdity to suggest either that offense may not be omitted in the bosom of the family or that the home can be made a sanctuary for crime") (Harlan, J., dissenting); McDonald v. United States, 335 U.S. 451, 455 (1948) (noting that Fourth Amendment protections are afforded "not to shield criminals nor to make the home a safe haven for illegal activities").

If defendant had shot Officer Healey or any other officer from his home, no one can seriously doubt he could be prosecuted for homicide. It would not matter that he fired his shot from inside his home. Nor would it matter if defendant said he was making a "political statement" or taking action to keep the officers off his property. And just as the State could prosecute defendant for committing a killing while inside his home, so too could the State prosecute defendant for threatening to kill while inside his home. The fact that defendant was inside his home and telling the officers to leave his home at the time he threatened them is irrelevant. Defendant may have had a right to refuse police entry into his home, absent a warrant or other legal justification,

but his presence inside his home did not shield him from criminal prosecution for criminal activity.

Article I, paragraph VI of the New Jersey Constitution "guarantees individuals a broad, affirmative right to free speech." Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012). And although it is "well settled" that our Constitution "may provide greater protections than" the Federal Constitution, State v. Stever, 107 N.J. 543, 556-57 (1985), "it is equally settled that such enhanced protections should be extended only when justified by '[s]ound policy reasons.'" Id. at 557 (alteration in original) (quoting State v. Hunt, 91 N.J. 338, 345 (1982)). But there are no "sound policy reasons," and 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 giving 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 State v. Taupier, 193 A.3d 1, 19-20 (Conn. 2018) (conducting a Hunt-type analysis to find that "reckless" threats are not protected under Connecticut's state constitution).

Similarly unavailing is ACLU-NJ's assertion that, as a matter of state constitutional law, "the State should be required to prove not only that the speaker subjectively intended to cause terror, but also that the speaker subjectively believed that harm was "likely to occur beyond the insult of the speech itself." (ACLUb at 17). The State is not aware of any federal- or state-court opinion affording constitutional protection to any terroristic threat absent proof that the speaker subjectively believed that his speech was likely to cause harm beyond the insult of the speech itself. Indeed, it is well recognized that states may prosecute for criminal threats even if the speaker had no actual intent to carry out the threat because, As the United States Supreme Court has recognized that in order for a threat to qualify as a "true threat" that is outside the protection of the First Amendment, "the speaker need not actually intend to carry out the threat." Virginia v. Black, 538 U.S. 343, 359-60 (2003). After all, a prohibition on true threats recognizes the State's compelling interest in protecting its citizens not just from actual violence, but also "the fear of violence" and "the disruption that fear engenders," as well as the "possibility that the threatened violence will occur." Id. at 360 (citations omitted).

Not only that, but ACLU-NJ's concerns should be alleviated by the knowledge that under the express terms of New Jersey's terroristic-threats

statute, a defendant will not be guilty of terroristic threats if he is unaware that his speech may cause actual harm. Indeed, under New Jersey law, a person cannot be convicted of N.J.S.A. 2C:12-3(a) unless, at a minimum, he threatened to commit a crime of violence in reckless disregard of the risk of causing terror to another person. This means that in order to violate the statute, the person must consciously disregard a substantial and unjustifiable risk that his conduct will terrorize another, and such disregard must be a gross deviation from the standard of conduct a reasonable person would observed in the actor's situation. If there is no substantial and unjustifiable risk that the person will be terrorized, or the person does not consciously disregard that substantial and unjustifiable risk, then there is no crime. Also, the defendant's words or actions must be of such a nature as to convey menace or fear of a crime of violence to the ordinary person. See Model Jury Charges (Criminal) ("Terroristic Threats") (N.J.S.A. 2C:12-3(a)) (Rev. 9/12/2016), at 2. It is not a violation of New Jersey's terroristic-threats statute if the threat merely expresses fleeting anger or was made merely to alarm.

The State emphasizes that a defendant cannot be convicted under the reckless-disregard prong of N.J.S.A. 2C:12-3(b) unless the State proves the following: (a) that defendant threatened to commit a crime of violence; (b) that defendant acted in reckless disregard of the risk of terrorizing another; (c)

that defendant consciously disregarded a substantial and unjustifiable risk that his words and actions would terrorize another; (d) that defendant's conduct was a gross deviation from the standard of conduct a reasonable person would observe in the actor's situation; (e) that defendant's words or actions were of such a nature as to convey menace or fear of a crime of violence to an ordinary person; and (f) that defendant's words did not express or convey "fleeting anger" and were not "made merely to alarm." As such, the reckless-disregard prong of N.J.S.A. 2C:12-3(a) goes far beyond what is minimally required to pierce the veil of constitutional protection under the First Amendment to the United States Constitution and Article I, Paragraph VI of the New Jersey Constitution.

This Court should also reject ACLU-NJ's suggestion that the State had only a "questionable" interest in proscribing defendant's behavior because, according to ACLU-NJ, "no one, including the police officers, appeared to treat [defendant's statements] as anything more than rhetorical hyperbole or take seriously the possibility" that defendant "actually knew where they lived or would engage in any further action that presented any actual danger." (ACLU at 18). In the first place, under N.J.S.A. 2C:12-3(a), defendant's culpability did not turn on whether Officer Healey or other officers actually and personally felt terrorized by defendant's behavior. If defendant threatened

to commit a crime of violence, and if defendant was aware of a substantial and unjustifiable risk that his actions would terrorize another person, and if defendant consciously disregarded that substantial and unjustifiable risk, and if defendant's conduct was a gross deviation from the standard of conduct of a reasonable person in defendant's situation, and if defendant's words or actions were of such a nature as to cause menace or fear of a crime of violence to an ordinary person, then defendant is subject to prosecution under N.J.S.A. 2C:12-3(a), whether the person or persons to whom the threats were directed actually felt terror or not.

In any event, the record confirms that Officers Healey and Hernandez did take defendants' words seriously and did view defendant as an actual threat. Officer Healey testified that he interpreted defendant's "head shot" comment to mean there "was a potential that [he] could get shot in the head," and Officer Hernandez testified that he considered defendant's words to amount to a "serious threat" that defendant would shoot them. (4T75-8 to 12; 4T184-13 to 19; 4T193-15 to 194-21). Also, Officer Healey was concerned that he could not see defendant's hands, (4T75-13 to 76-3), and he suspected that defendant might have firearms based on information he had received about defendant's recent Facebook post. (4T161-25 to 162-9; 4T171-21 to 24). Both he and Officer Hernandez remarked to each other, immediately before

leaving the premises, that defendant had conveyed a threat. (4T115-3 to 8; S-1). In their minds, defendant's behavior had escalated from disorderly conduct to a threat to kill. (4T155-5 to 11).

There is a compelling interest in proscribing threats to terrorize another, and it does not matter whether the defendant actually carries out the threat. Nor does it matter whether the defendant actually intends to carry out the threat. The threat, by itself, causes tangible harm, and the State has a compelling interest in proscribing such threats so that innocent victims do not suffer therefrom.

For all these reasons, and for all the reasons expressed in the State's initial brief and the Attorney General's amicus curiae brief, this Court should reject ACLU-NJ's argument that Article I, Paragraph VI of the New Jersey Constitution affords constitutional protection to defendants who threaten to commit acts of violence in reckless disregard of the risk of terrorizing others.

POINT III

THIS COURT SHOULD NOT CONSIDER ACLU-NJ'S CONSTITUTIONAL CHALLENGE TO N.J.S.A. 2C:12-3(b) BECAUSE THE CONSTITUTIONALITY OF N.J.S.A. 2C:12-3(b) IS NOT BEFORE THE COURT.

As this Court is aware, the Appellate Division held that the reckless-disregard prong of N.J.S.A. 2C:12-3(a) violates the First Amendment to the United States Constitution. Defendant never argued, before the Appellate Division or the Law Division, that N.J.S.A. 2C:12-3(b) is unconstitutional. And those courts did not consider, much less decide, whether N.J.S.A. 2C:12-3(b) is unconstitutional. Also, just as the parties did not raise or address any issues related to the constitutionality of N.J.S.A. 2C:12-3(b) before the Appellate Division or the Law Division, they have not done so before this Court, either.

Nonetheless, an amicus curiae (ACLU-NJ) is now urging this Court to hold that N.J.S.A. 2C:12-3(b) is unconstitutionally vague. (ACLU at 19-29). This Court should decline to address ACLU-NJ's argument because the constitutionality of N.J.S.A. 2C:12-3(b) is not before this Court. Again, the issue was never raised, addressed, or briefed by the parties. Nor was it considered by the courts below.

"'[A]s a general rule, an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties.'" State v. O'Driscoll, 215 N.J. 461, 479 (2013) (quoting State v. Lazo, 209 N.J 9, 25 (2012) (quoting Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 48-49 (1982)); see also State v. Gandhi, 201 N.J. 161, 191 (2010) ("[A]n amicus must take the case on appeal as they find it."); accord State v. Dangcil, 248 N.J. 114, 135 n.3 (2021); State v. McQueen, 248 N.J. 26, 39 n.9 (2021); State v. J.R., 227 N.J. 393, 421 (2017); State v. Nance, 148 N.J. 376, 385 (1997); Tice v. Cramer, 133 N.J. 347, 355 (1993).

In accordance with past practice, this Court should not allow an amicus curiae to inject an entirely new issue into this litigation. Thus, this Court should not entertain or consider ACLU-NJ's claim that N.J.S.A. 2C:12-3(b) is unconstitutional. Nonetheless, for the sake of completeness, the State will address the merits of ACLU-NJ's argument because it is substantively groundless.

N.J.S.A. 2C:12-3(b) provides that a person commits a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." ACLU-NJ claims that this statutory subsection is unconstitutional because, according

to ACLU-NJ, the statute defines an element of the crime not in terms of the defendants' intent or perceptions, but rather what the victim reasonably believed." (ACLUb at 20). In support of this argument, ACLU relies on this Court's decision in State v. Pomianek, 221 N.J. 66 (2015), which addressed the constitutionality of N.J.S.A. 2C:16-1(a))(3), "a bias-crime statute that allows a jury to convict a defendant even when bias did not motivate the commission of the offense." Id. at 69. But the reasoning of Pomianek has no applicability here because the language in N.J.S.A. 2C:12-3(b) is markedly different from the language of N.J.S.A. 2C:16-1(a)(3).

N.J.S.A. 2C:16-1(a)(3) provides as follows:

> A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; N.J.S. 2C:33-4; N.J.S. 2C:39-3; N.J.S. 2C:39-4 or N.J.S. 2C:39-5,
>
> . . . . .
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the

> victim or the victim's property was selected to be the target of the offense because of the victim's race, color religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

This Court explained, in Pomianek, that under N.J.S.A. 2C:16-1(a)(3), a defendant may be "convicted of bias intimidation if the victim 'reasonably believed' that the defendant committed the crime on account of the victim's race" or other class characteristic. Id. at 69. This Court felt that this statutory subsection violated the Due Process Clause of the Fourteenth Amendment by "focusing on the victim's perception and not the defendant's intent." Id. at 70. This Court also explained that the statutory subsection does not "give a defendant sufficient guidance or notice on how to conform to the law." Ibid. "That is so because a defendant may be convicted of a bias crime even though the jury may conclude that the defendant had no intent to commit such a crime." Ibid.

This Court observed that N.J.S.A. 2C:16-1(a)(3) is "[u]nlike any other bias-crime statute in the country" because N.J.S.A. 2C:16-1(a)(3) focuses on the victim's, not the defendant's, state of mind." Id. at 69. As such, "[t]he defendant's fate depends not on whether bias was the purpose for the commission of the crime but on whether the victim 'reasonably believed' that was the purpose." Ibid. This is problematic because, as this Court explained,

"[w]hether a victim reasonably believes he was targeted for a bias crime will necessarily be informed by the victim's individual experiences and distinctive cultural, historical, and familial heritage – all of which may be unknown or unknowable to the defendant." Id. at 69-70. As a consequence, "an innocent state of mind is not a defense to a [prosecution under N.J.S.A. 2C:16-1(a)(3); the defendant is culpable for his words or conduct that led to the victim's reasonable perception even if that perception is mistaken." Id. at 82.

This Court concluded that N.J.S.A. 2C:16-1(a)(3) offended the Due Process Clause of the Fourteenth Amendment, which guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." Id. at 84. That is because "[a] fundamental element of due process is that a law 'must give fair notice of conduct that is forbidden or required.'" Ibid. (quoting FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012)). This Court noted that Pomianek "could not readily inform himself of a fact and, armed with that knowledge, take measures to avoid criminal liability. " Id. at 88. He was convicted under N.J.S.A. 2C:16-1(a)(3) even if he had no intent to commit bias intimidation, so long as the victim reasonably believed that [Pomianek] targeted him on account of his race or color." Id. at 88-89.

Finally, this Court took note of how, under N.J.S.A. 2C:16-1(a)(3), a defendant may be unjustly convicted if he happens to be unaware that others may reasonably believe he is targeting them based on their race or other class characteristics, because he does not share the same experiences and sensitivities. As this Court explained:

> Subsection (a)(3) required defendant to predict that the reasonable African-American would consider defendant's words as constituting the motive for a crime, even though he had no such motive. Persons who belong to specific ethnic, religious, or racial groups that have been historically exposed to bigotry will be particularly sensitive to language that is deemed offensive, based on their communal and individual experiences. But defendant did not possess the communal and individual experiences of the reasonable victim in this case. Subsection (a)(3) criminalizes defendant's failure to apprehend the reaction that his words would have on another. Here, subsection (a)(3) penalizes, as a bias crime, course and insensitive language that may have been uttered as part of a terrible prank.
>
> [Id. at 90.]

N.J.S.A. 2C:12-3(b) contrasts sharply with N.J.S.A. 2C:16-1(a)(3) because N.J.S.A. 2C:12-3(b) has a mens rea component. Indeed, guilt under N.J.S.A. 2C:12-3(b) is not dependent on the victim's belief and perceptions concerning the defendant's motivations. And the statute does not require the defendant to "predict whether another person would believe that he intended to

carry out a threat to kill with sufficient immediacy and likelihood." (ACLUb at 23). Rather, N.J.S.A. 2C:12-3(b) not only requires proof beyond a reasonable doubt that the defendant threatened to kill another person, but it also requires proof beyond a reasonable doubt that the defendant's threat to kill was conveyed with the purpose to put the other person in imminent fear of death. In other words, the defendant must act with the subjective purpose of putting the victim in imminent fear of death. See Model Jury Charges (Criminal), Terroristic Threats ("Threats to Kill") (N.J.S.A. 2C:12-3(b)) (Rev. 6/14/04), at 1-2. Also, N.J.S.A. 2C:12-3(b) has an objective component: the threat must have been made "under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." This means that the State must also prove, again beyond a reasonable doubt, that the threat would reasonably convey a fear of death to an ordinary person. Ibid.

Given the inherent differences between N.J.S.A. 2C:12-3(b) and N.J.S.A. 2C:16-1(a)(3), Pomianek is irrelevant here. Unlike N.J.S.A. 2C:16-1(a)(3), guilt under N.J.S.A. 2C:12-3(b) is not solely dependent on the victim's beliefs and perceptions concerning the speaker's motivations, and thus criminal liability is not affected by any implicit biases the victim may have. Rather, N.J.S.A. 2C:12-3(b) not only requires that the defendant threaten to

kill another person, and not only requires proof that the threat was made under circumstances reasonably causing the victim to believe that the threat was likely to be carried out, but also requires proof that the speaker had a subjective purpose to put the victim in imminent fear of death.

In sum, this Court should not consider ACLU-NJ's argument concerning the constitutionality of N.J.S.A. 2C:12-3(b) because that issue was not raised by the parties and is not before the Court. Nevertheless, the State also submits that ACLU-NJ's argument is substantively without merit, and that N.J.S.A. 2C:12-3(b) is constitutional.

CONCLUSION

For all the foregoing reasons, and for all the reasons stated in the State's initial brief and the Attorney General's amicus curiae brief, 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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