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STATE OF NEW JERSEY,

v.

MARTY SMALL

Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION/CRIMINAL PART
ATLANTIC COUNTY

INDICTMENT NO. 24-09-2951-T

Criminal Action

ORDER

THIS MATTER having been brought before the Court by Jordan L. Barbone, Esquire of the law firm of Jacobs & Barbone, P.A., attorneys for defendant Marty Small upon due notice to and in the presence of Elizabeth Fischer, Esquire, Assistant Atlantic County Prosecutor appearing on behalf of the State of New Jersey and the Court having reviewed the submissions and having heard oral argument and no cause appearing to the contrary;

IT IS ON this _____ day of _____, 2025,

ORDERED AND ADJUDGED that Count 2 Indictment No. 24-09-2951-I, terroristic threats in the third degree in violation of N.J.S.A. 2C:12-3A, is hereby DISMISSED.

Hon. Bernard E. DeLury, Jr., J.S.C.

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**DEFENDANT'S BRIEF IN SUPPORT OF
MOTION TO DISMISS *DE MINIMIS*
INFRACTION PURSUANT TO N.J.S.A.
2C:2-11(b)**

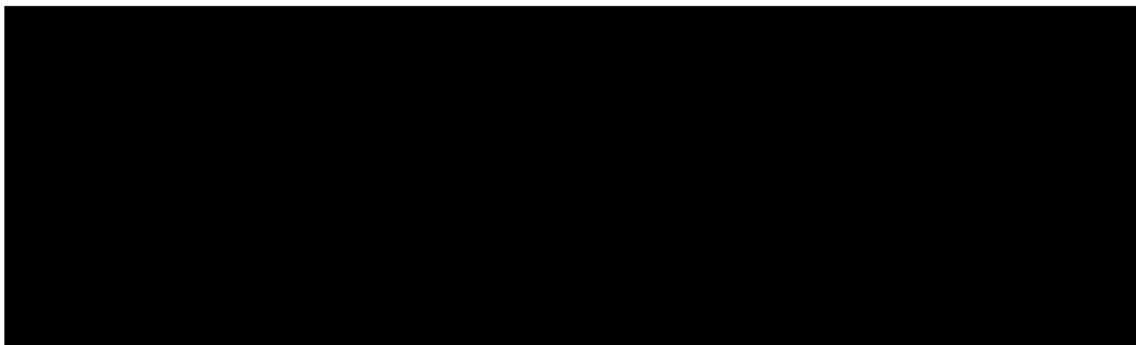
PROCEDURAL HISTORY

On April 15, 2024, defendant was charged under Complaint/Summons S-2024-1446-0180. Count 2 alleged third degree terroristic threats in violation of N.J.S.A. 2C:12-3a. (Exhibit A).

On September 17, 2024, Indictment No. 24-09-2951-I was returned. Count 2 charges terroristic threats in the third degree.

STATEMENT OF FACTS

The Complaint/Summons signed against defendant on April 15, 2024 is attached here as Exhibit A. The first page of the Complaint alleges that the following statements made by defendant to [REDACTED] during a [REDACTED] argument and instance of [REDACTED] reprimand amounted to terroristic threats in violation of New Jersey law:



At pages 3 and 4 of Affidavit of Probable Cause in support of the Complaint, transcribed portions of certain video clips alleged to be dated January 3, 2024 appear. Those portions are the cherry-picked communications defendant made to [REDACTED] over the course of an approximate 30 minute argument among the entire Small [REDACTED] that the State alleges to be terroristic threats. There is absolutely zero context provided in the Affidavit of Probable Cause as to how this "incident" initially began or what it was about. Beyond that, there's no mention in the Affidavit of Probable cause that other [REDACTED] [REDACTED] were involved in the January 3 verbal dispute.

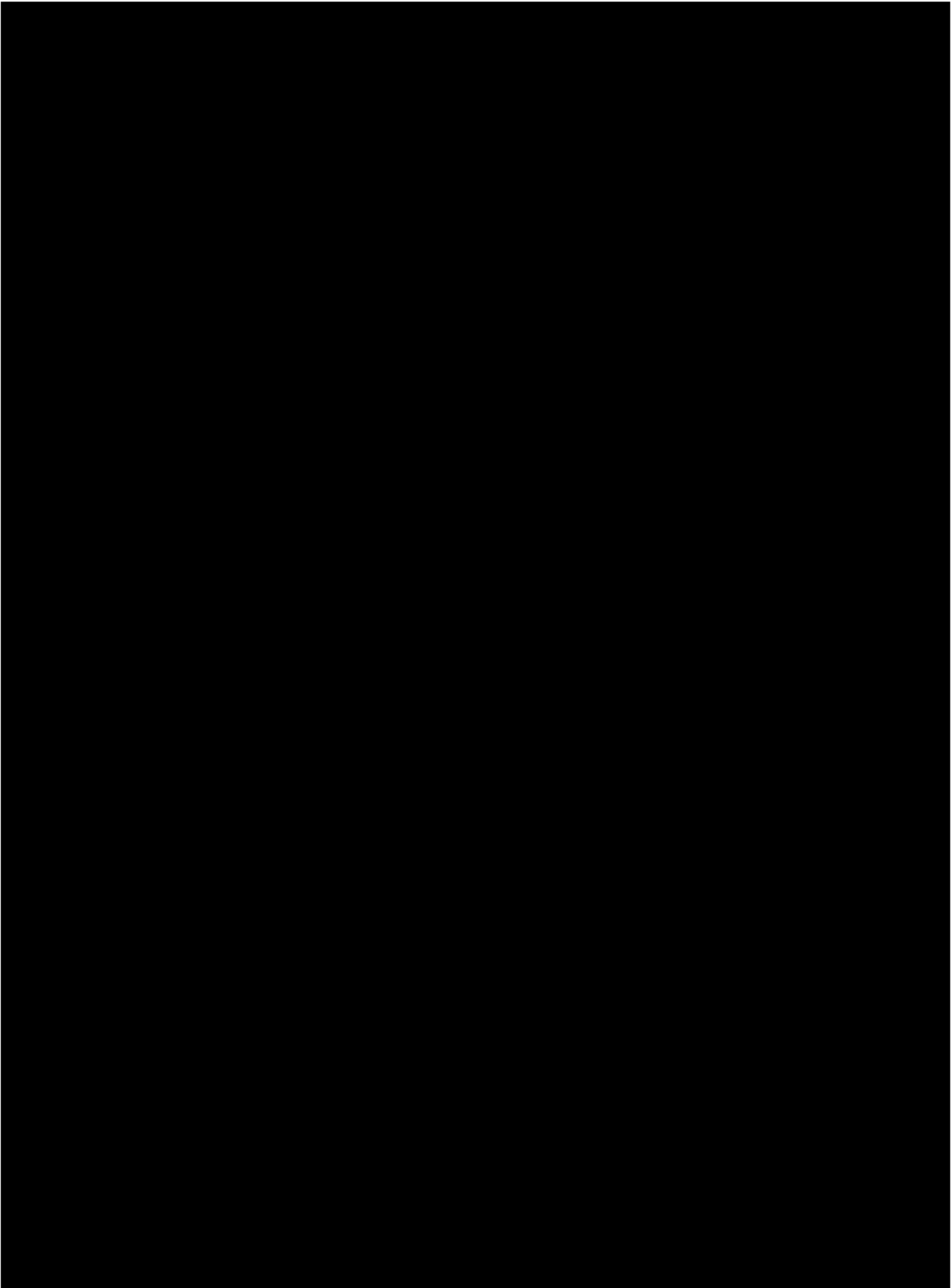
The actual events between defendant, [REDACTED] [REDACTED] [REDACTED] in discovery and which Defendant has already moved to suppress based on a Wiretap violation. There are a total of [REDACTED] The total time lapse of the [REDACTED]

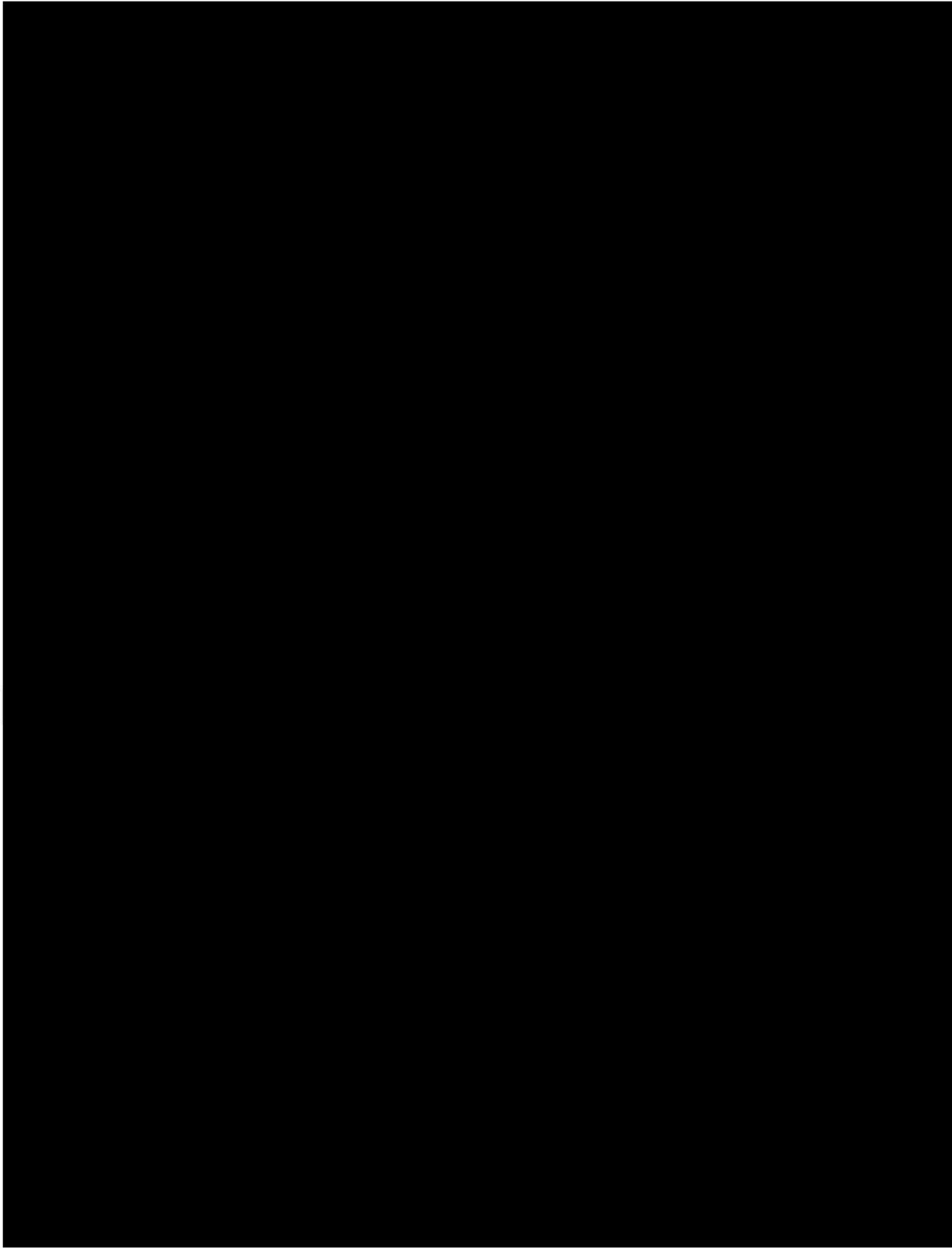


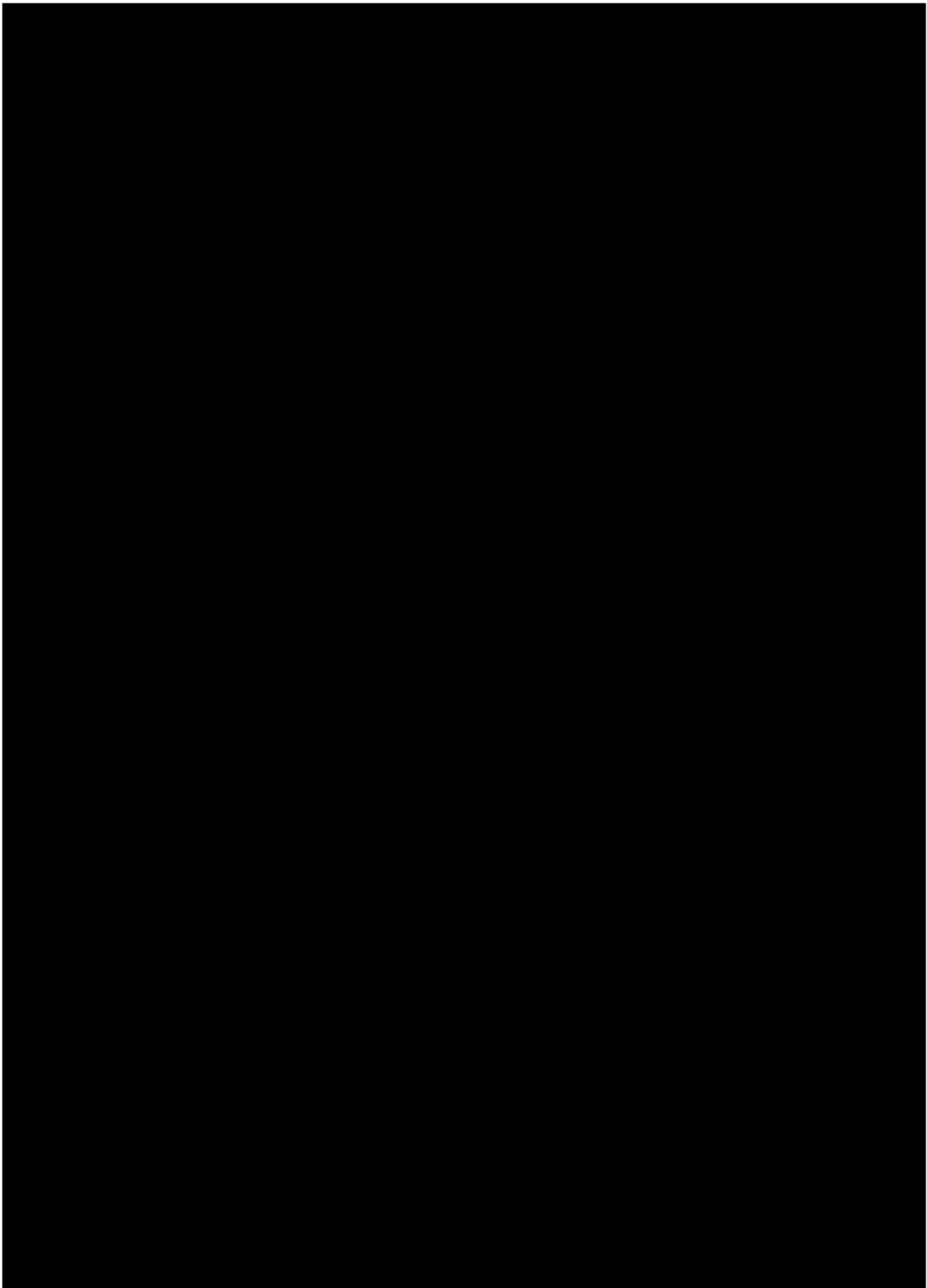
[REDACTED] Good faith summaries of those [REDACTED] follow¹:



¹ The recordings have been provided on a USB for the Court's review in-camera.







LEGAL ARGUMENT

POINT I

COUNT 2 OF THE INDICTMENT AGAINST DEFENDANT MARTY SMALL, SR. ALLEGING TERRORISTIC THREATS SHOULD BE DISMISSED AS A DE MINIMIS INFRACTION PURSUANT TO N.J.S.A. 2C:2-11(b).

A. The De Minimis Infraction Statute

N.J.S.A. 2C:2-11, De Minimis Infractions, provides that the Assignment Judge may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction or...

The purpose of the de minimis statute is "to provide assignment judges with discretion similar to that exercised by the police, prosecutors and grand jurors who constantly make decisions as to whether it is appropriate to prosecute under certain circumstances." State v. Wells, 336 N.J. Super. 139, 141 (Law Div. 2000). Our Supreme Court has emphasized the importance of this statute in preventing unjustified prosecutions for offenses allegedly constituting domestic violence. State v. Hoffman, 149 N.J. 564, 586 (1997).

Our courts have recognized that when a defendant "did not actually cause or threaten the harm or evil sought to be prevented" by the law defining the offense, the assignment judge may dismiss a prosecution after a "sufficiency-of-the-evidence" review where the undisputed facts, including facts beyond those presented to the grand jury, would not support a verdict of guilty. State v. Hegyi,

185 N.J. Super. 229 (Law Div. 1982); see also State v. Evans, 340 N.J. Super. 244 (App. Div. 2001). In State v. Evans, defendant paid for multiple items valued at \$593 but did not pay for one item that cost \$12.90. The Court rejected defendant's application for de minimis dismissal and held that theft of even a small item from a store causes the harm sought to be prevented by the shoplifting statute. Id. at 249.

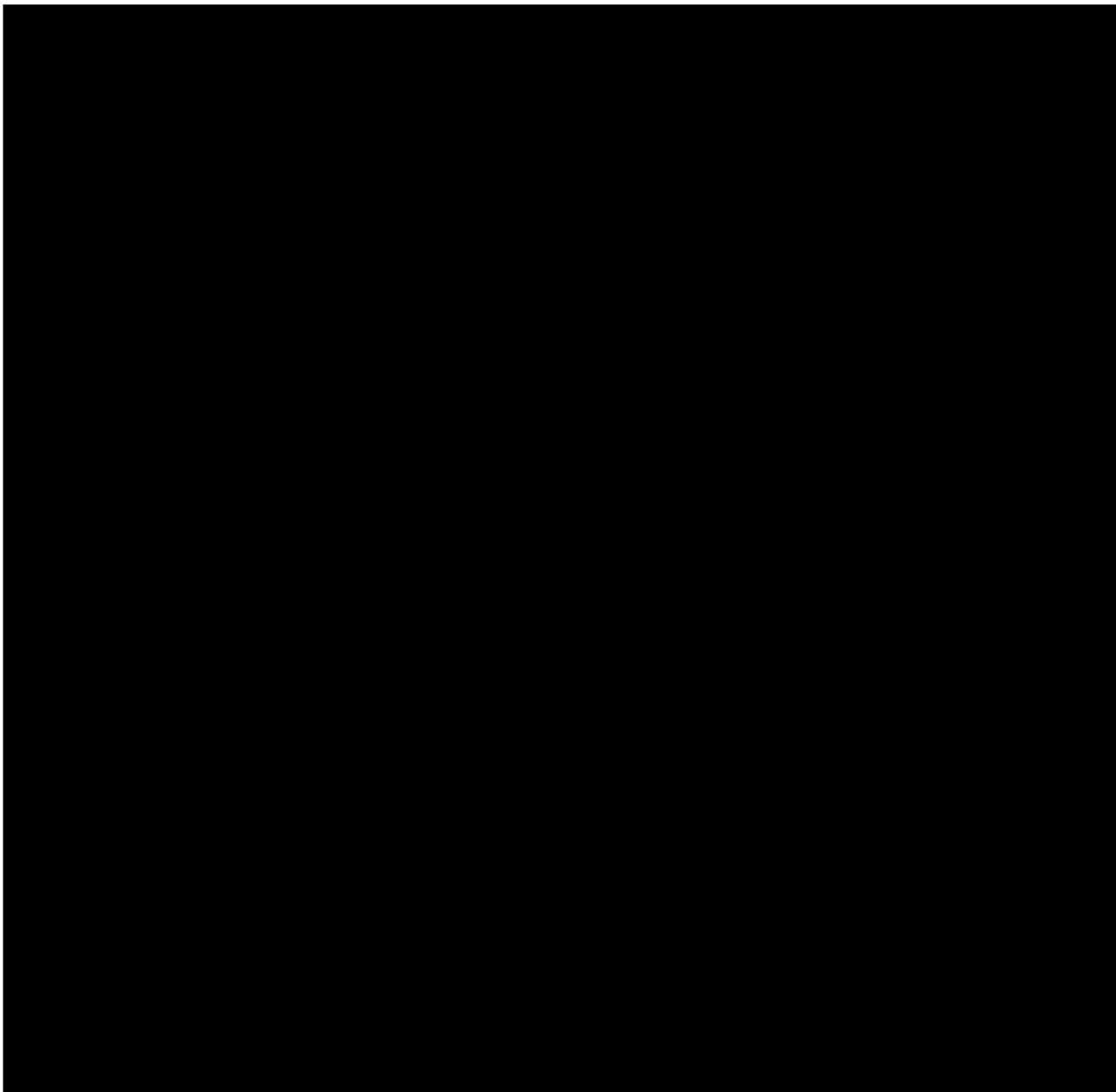
In State v. Johnson, 460 N.J. Super. 481, 500-502 (Law Div. 2019), the Court denied defendant's de minimis application under subsection b. because defendant, a school guidance counselor, requested a photo of his 17-year old female student's breasts and his conduct caused the harm intended to be prevented by the Child Endangerment statute. In State v. Wells, *supra*, the Court rejected defendant's argument that a trace amount of cocaine in his possession did not cause or threaten the harm or evil sought to be prevented by the statute and was therefore de minimis. The Court reasoned that "possession of any quantity of CDS, no matter how small, is part and parcel of the State's overall drug problem." Wells, *supra*, 336 N.J. Super. at 145.

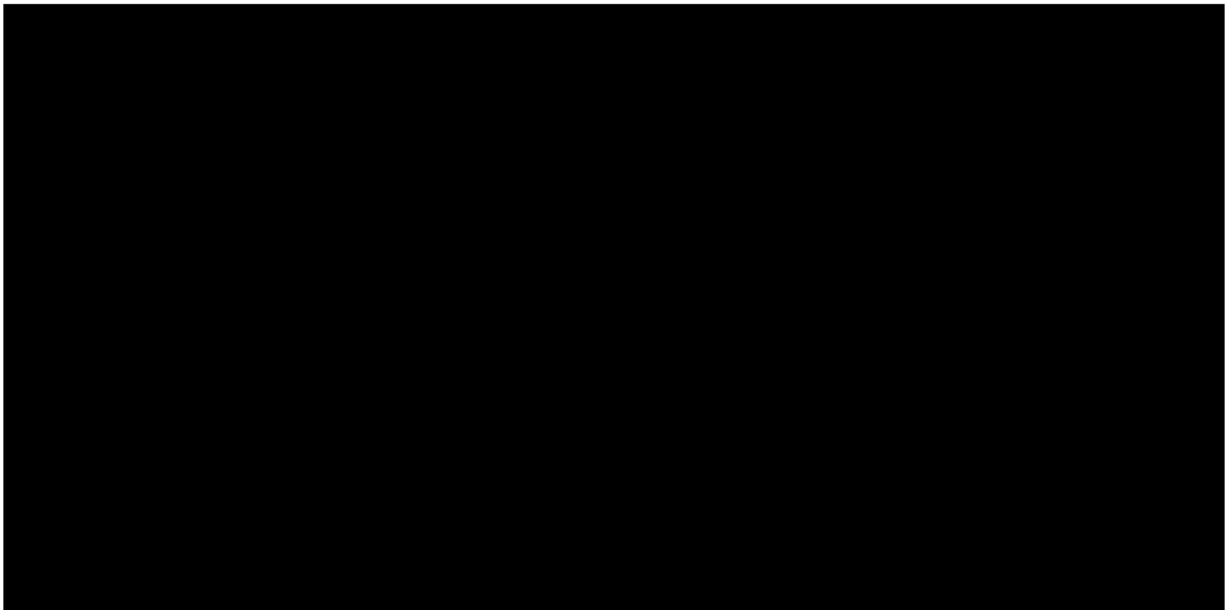
Beyond all that, defendant's alleged conduct is "too trivial to warrant the condemnation of conviction." Although there is no consistent approach to determining which factors are relevant to an analysis of the triviality aspect of the statute, the primary factor to be taken into account is "the risk of harm to which society is exposed by defendant's conduct." Evans, *supra*, 340 N.J. Super. at 249, 253. Here, there is no risk of harm to society whatever: Defendant was attempting to control and reprimand [REDACTED] in his own home, who defied his every word and engaged in verbal disputes with multiple Small [REDACTED]

over the course of 30 minutes.

Unlike Evans, Johnson and Wells, defendant's statements to [REDACTED] [REDACTED] as an instance of [REDACTED] reprimand during an argument between multiple [REDACTED] within the Small [REDACTED] is not the conduct sought to be prevented by the terroristic threat statute.

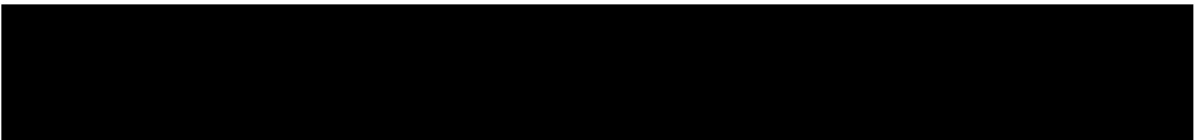
The audio recordings provided by the State in discovery plainly and clearly show [REDACTED]





[REDACTED] See Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary (October 1971); see also N.J. Model Criminal Jury Charges, Terroristic Threats, N.J.S.A. 2C:12-3a. How many of us have had our parents threaten to pull our hair? How many of our parents have actually pulled our hair? A weave is not even real hair and the smacking of a weave not a crime of violence.

Defendant's [REDACTED] during this multi-party argument within the Small residence on January 3, 2024 was not communicated directly to [REDACTED]. What Defendant said to [REDACTED]



[REDACTED] was conditional; "too trivial" to warrant conviction; and "did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense."

Defendant's comments "expresse[d] fleeting anger" or were made "merely

to alarm.” (See Section B. below). The comments were conditional. Defendant’s attempt to control and reprimand [REDACTED] is not the conduct the legislature intended to prevent by and through the terroristic threat statute.

Count II against Defendant, charging terroristic threats, should be dismissed.

B. The Terroristic Threat Statute

The terroristic threat statute appears at N.J.S.A. 2C:12-3. Subsection a. provides:

“A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with the purpose to terrorize another...or in reckless disregard of the risk of causing such terror...”

The statute’s purpose is not “to authorize grave sanctions against the kind of verbal threat that expresses transitory anger rather than settled purpose to carry out the threat or to terrorize the other person.” The Final Report of the New Jersey Criminal Law Revision Commission, Vol. II: Commentary, ¶3 (October 1971). It is not a violation of the statute if the threat expresses fleeting anger or was made merely to alarm. Model Criminal Jury Charges, Terroristic Threats, June 14, 2004. An alleged threat under subsection a. is required to be “serious and that the psychological result, intended or risked, be grave. Commission Commentary, ¶1. Finally, disorderly persons offenses are not “crimes of violence” sufficient to support a charge of making terroristic threats. State. v. MacIlwraith, 344 N.J. Super. 544, 548 (App. Div. 2001).

It is beyond pure adventure that circumstances like these, where defendant was expressing “transitory anger” during an instance of [REDACTED] reprimand within

his own home while [REDACTED] objected to his every instruction and verbally argued with multiple other [REDACTED] on January 3, 2024, were never intended to be within the reach of the criminal law.

Beyond all that, our Appellate Division in State v. Carroll, 456 N.J. Super. 520 (App. Div. 2018), set out the “true threat” test. A true threat includes “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual...” Id. at 538. “Alleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. Id. (citing Planned Parenthood of Columbia/Willamette, Inc., v. Am. Coalition of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002))(see also United States v. Kelner, 534 F.2d 1020, 1026 (2d. Cir. 1976)(stating that true threats are “only those according to their language and context convey[] a gravity of purpose and likelihood of execution).

In determining whether a true threat was made, the Court should look at contextual factors including the language itself and whether it is stated conditionally. State v. Carroll, 456 N.J. Super. at 538. A Court must also consider:

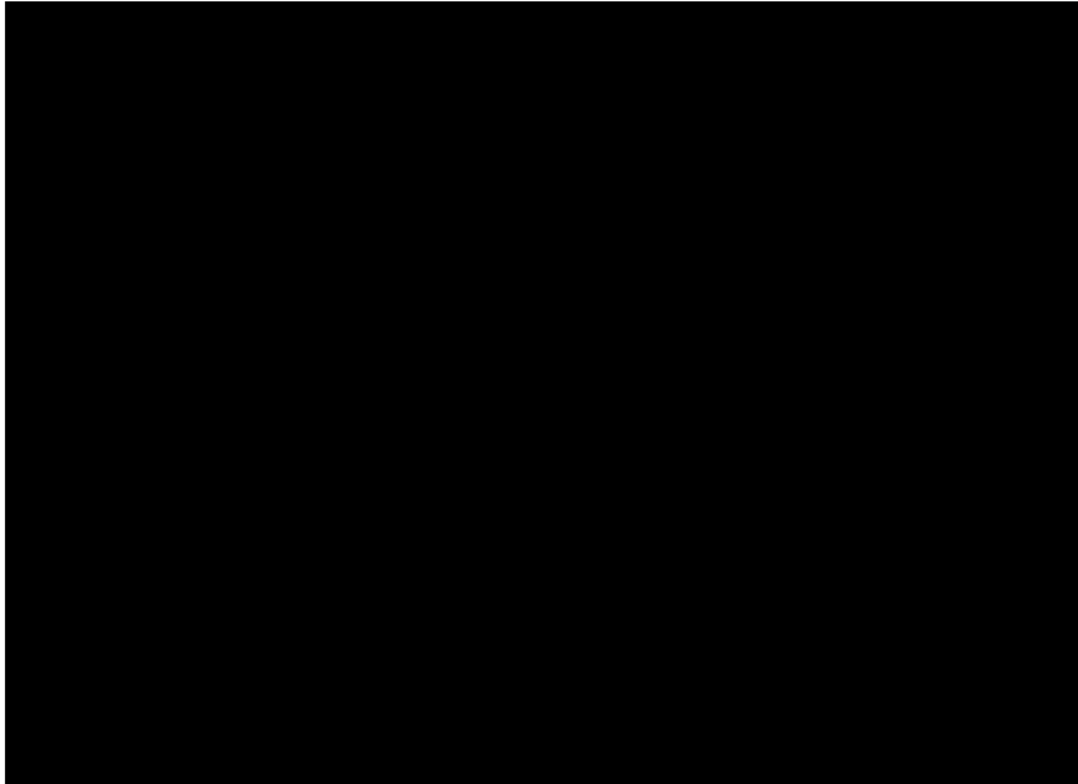
[T]he reaction of the recipient of the threat and of other listeners; whether the threat was conditional; whether the threat was communicated directly to its victim; whether the maker of the threat had made similar statements to the victim in the past; and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. Id. at 539, citing United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996).

The Carroll Court made clear that the “forum in which the speech is delivered may also provide context.” State v. Carroll, 456 N.J. Super. at 539.

In this particular instance, the State relies on four comments by Defendant

[REDACTED]

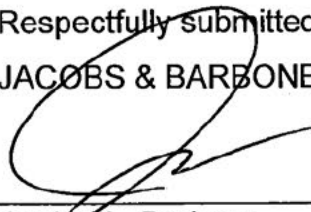
[REDACTED] None of Defendant's comments amount to terroristic threats – Defendant was expressing transitory anger in an effort to control [REDACTED]. Analyzing Defendant's comments under Carroll, the "true threat" fails for the following reasons:



CONCLUSION

For all the above reasons, the Court should dismiss Count II of the Indictment against Defendant charging terroristic threats.

Respectfully submitted,
JACOBS & BARBONE, PA



Jordan L. Barbone

Dated: 1/13/25

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INDICTMENT NO. 24-09-2951-T

Criminal Action

**NOTICE OF MOTION TO DISMISS DE
MINIMIS INFRACTION PURSUANT TO
N.J.S.A. 2C:2-11(b)**

TO: Elizabeth Fischer, Esquire
Assistant Atlantic County Prosecutor
Atlantic County Prosecutor's Office
4997 Unami Boulevard, PO Box 2002
Mays Landing, New Jersey 08330


PLEASE TAKE NOTICE that Defendant Marty Small shall move by and through counsel, namely Jordan L. Barbone, Esquire of the law firm of Jacobs & Barbone, P.A., attorneys for Defendant Marty Small, upon due notice to and in the presence of Elizabeth Fischer, Esquire, Assistant Prosecutor for the County of Atlantic and appearing on behalf of the State of New Jersey, before the Hon. Bernard E. DeLury, Jr., J.S.C. at the Atlantic County Criminal Court House, 4997 Unami Boulevard, Mays Landing, New Jersey 08330, on January 31, 2025, or as soon thereafter as the Court may direct for an Order Dismissing De Minimis Infractions pursuant to N.J.S.A. 2C:2-11(b).

Defendant relies upon the brief and exhibits filed simultaneously herewith.

Pursuant to R. 1:6-2(d), oral argument is requested.

A proposed form of Order is attached.

JACOBS & BARBONE, P.A.
Attorneys for Plaintiffs

By: 

Jordan L. Barbone, Esquire

Dated: January 13, 2025