SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0022-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of
	:	Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Atlantic
	:	County.
NATHANIEL H. RUSSELL,		
	:	Indictment No. 23-02-00362-I
Defendant-Appellant.		
	:	Sat Below:
	:	Hon. Pamela D'Arcy, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: May 1, 2024

DEFENDANT IS CONFINED

TABLE OF CONTENTS

PAGE NOS.

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

TABLE OF CONTENTS (CONT'D)

PAGE NOS.

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

INDEX TO APPENDIX

PAGE NOS.

TABLE OF AUTHORITIES

PAGE NOS.

Cases

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Statutes

TABLE OF AUTHORITIES (CONT'D)

PAGE NOS.

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Nathaniel Russell was convicted on two second-degree counts of terroristic threats for leaving threatening voice messages for a then-municipal court judge in 2021, and three fourth-degree offenses -- harassment, stalking, and retaliation for past official action -- for harassing phone calls to the judge in 2022. The State upgraded the terroristic threats charges for the 2021 voicemails from third- to second-degree offenses on the basis that they occurred "during a declared period of national, State, or county emergency" – namely, the COVID-19 pandemic. N.J.S.A. 2C:12-3(a). Mr. Russell was sentenced to an aggregate 16-year term of imprisonment.

This Court should reverse Mr. Russell's convictions for three reasons. First, the jury was never instructed on the objective element of a terroristic threats prosecution: whether a reasonable person similarly situated to the victim would have interpreted the defendant's words as threatening violence and caused them to fear for their safety. This instruction is constitutionally required in a prosecution for terroristic threats under State v. Fair, 256 N.J. 213, 238 (2024), and failure to provide the requisite instruction requires reversal of the terroristic threats convictions.

Second, prosecuting Mr. Russell's statements as second-degree terroristic threats violated his substantive due process rights. In the absence of

any nexus between the threat made and the period of emergency in place at the time, the penalty enhancement in N.J.S.A. 2C:12-3(a) had no reasonable relationship to a legitimate state purpose.

Third, to guard against any appearance of unfairness or impropriety, the Atlantic County judiciary should have been recused from this case because the victim served as a municipal court judge in several Atlantic County municipalities.

The court was additionally required to merge the fourth-degree convictions for harassment, stalking, and retaliation for past official action. This Court should order the merger of those offenses.

Alternatively, Mr. Russell's 16-year prison sentence, which far exceeded the recommendation of the prosecutor, is manifestly excessive. The matter must be remanded for resentencing for two reasons. First, the sentencing court imposed consecutive terms on the two terroristic threats convictions based on a patently incorrect belief that the threat charges related to calls made in both 2021 and 2022. In fact, Mr. Russell was never charged with making threats in 2022; the terroristic threats charges applied only to calls placed on the same day in 2021, hours apart.

Second, the trial court abused its discretion when it rejected all mitigating factors based in part on the same factual inaccuracy that infected its

consecutive-sentence analysis, and when it refused to consider mitigation that was amply supported by the record. For these reasons, if Mr. Russell's convictions are allowed to stand, he is entitled to resentencing.

PROCEDURAL HISTORY

On November 3, 2021, an Atlantic County grand jury returned Indictment No. 21-11-1634-I, charging the defendant, Nathaniel H. Russell, with one count of third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a), one count of fourth-degree retaliation for past official action, contrary to N.J.S.A. 2C:27-5, and one count of fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b). (Da1-5)[1]

On February 16, 2023, another Atlantic County grand jury returned superseding Indictment No. 23-02-00362-I, charging Mr. Russell with two counts of second-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a) (counts 1 and 2);[2] three counts of fourth-degree harassment, contrary to

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[1] Da – defendant's appendix
1T – April 28, 2023 – motion
2T – May 2, 2023 – trial
3T – May 3, 2023 – trial
4T – May 4, 2023 – trial
5T – July 12, 2023 – motion
6T – July 19, 2023 – sentencing
PSR – pre-sentence report

[2] The original indictment contained a single count of third-degree terroristic threats, alleging that Mr. Russell called Mr. Nehmad three times on August 23, 2021, and left threatening messages. The superseding indictment split the calls from that date into two separate counts and upgraded both charges to second-degree offenses because they occurred during the COVID-19 pandemic. The superseding indictment also added three new counts of fourth-degree harassment.

N.J.S.A. 2C:33-4(e) (counts 3-5); one count of fourth-degree retaliation for past official action, contrary to N.J.S.A. 2C:27-5 (count 6); and one count of fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b) (count 7). (Da6-14) On May 1, 2023, the State dismissed two of the harassment counts (counts 3 and 4). (Da 15)

Mr. Russell was convicted of all charges after a jury trial before the Honorable Pamela D'Arcy, J.S.C., on May 2-4, 2023. (4T 82-19 to 85-21)

On July 19, 2023, Judge D'Arcy sentenced Mr. Russell to an aggregate 16 years' imprisonment: two consecutive 8-year terms for each count of terroristic threats (counts 1 and 2), and concurrent 1-year terms for harassment, retaliation, and stalking (counts 5, 6, and 7). (6T 47-13 to 48-23)

A Notice of Appeal was filed on behalf of the defendant on September 5, 2023. (Da57-59)

STATEMENT OF FACTS

A. Trial

1. Testimony

Mr. Russell appeared for a virtual municipal court appearance before then-Municipal Court Judge Marc Nehmad on August 19, 2021. (3T 10-22 to 11-16) On August 23, 2021, Mr. Nehmad received voice messages left on the phone line for his private law practice. (3T 12-10 to 13-4) The caller identified himself as Nate Russell. (3T 14-12 to 13) Recordings of the voicemails were played for the jury. (3T 17-5 to 18; 21-1 to 11; 24-14 to 25) The messages contained profane language, including, "I will break your fucking jaw mother fucker," and "if I catch you in Northfield, I will beat your ass." (Da6-14)[3]

After Mr. Russell was arrested, he received discovery containing Mr. Nehmad's personal cell phone number. (3T 178-11 to 22; 3T 188-7 to 13) Mr. Nehmad received phone calls to his personal cell phone in April 2022. (3T 38-10 to 16) He answered and recorded one such call, which was played for the jury. (3T 42-1 to 44-6) In that call, he told Mr. Russell to "keep going" four times and concluded by telling him to "stop calling me, please." (3T 43-14 to 44-5) Mr. Nehmad testified that he "felt again harassed" and "felt a little bit

[3] This information comes from the indictment (Da6-14) because the transcript of the recordings as they were played for the jury reads "indiscernible" at the points when these statements were made.

aggravated because he got my cell phone number . . . and he kept calling it numerous times." (3T 44-16 to 19)

On cross-examination, Mr. Nehmad explained that he had been an attorney for nearly twenty years and a municipal court judge for about five years, during which he presided over "[t]housands" of cases. (3T 46-1 to 19) He testified that it was "par for the course" for people to become frustrated or upset about the outcome of a case and he had experience with the same. (3T 47-15 to 20) Mr. Russell never mentioned Mr. Nehmad's home address during the phone calls, and never visited Mr. Nehmad's law office, home, or courthouse. (3T 49-24 to 50-17) Police officers assigned to monitor the area around Mr. Nehmad's home never saw Mr. Russell near the property. (3T 145-20 to 24; 147-9 to 16)

Mr. Russell testified in his own defense. He explained that he called the judge because he did not have an attorney and was trying to get questions about his municipal court proceeding answered. (3T 192-19 to 24) He testified that he had "never even walked through" the towns where Mr. Nehmad lived or worked. (3T 188-16 to 24) He stated that he had been "upset" because he could not get answers to his questions and that he "was wrong for" swearing at Mr. Nehmad. (3T 193-2 to 18)

2. Jury Instructions and Verdict

The jury was instructed that to find Mr. Russell guilty of each count of terroristic threats, it need only find that he threatened to commit a crime of violence, specifically, aggravated assault, and did so with the purpose to terrorize Mr. Nehmad. (4T 55-9 to 18) With regard to the second element – the defendant's subjective mental state – the court informed the jury that

> the State alleges the defendant intended to terrorize Judge Marc Nehmad. The State need not prove that the victim actually was terrorized. A person acts purposely with respect to the nature of his conduct, or result thereof, if it's his conscious object to engage in the conduct of that nature or to cause such a result.
>
> [4T 56-8 to 14.]

The jury was also told that if it found Mr. Russell guilty of making terroristic threats, it would have to decide whether the threats were made "during a declared period of [a] state of emergency." (4T 56-17 to 21)

On May 4, 2023, the jury returned guilty verdicts on all counts. (4T 82-17 to 85-21; Da45-52)

B. Sentencing

The State asked the court to sentence Mr. Russell to concurrent 10-year terms on the two terroristic threats charges, and a consecutive 18-month term "for either stalking or harassment," for an aggregate term of 11 years and 6

months. (6T 28-16 to 21; 35-1 to 5) The court imposed an aggregate 16-year term. (6T 47-13 to 48-23)

The sentencing court found that "none of the counts merge." (6T 41-15) The court found aggravating factors three (the risk that the defendant will commit another offense), six (the extent of the defendant's criminal record and the seriousness of the offenses), and nine (the need to deter the defendant and others) and no mitigating factors. (6T 41-19 to 42-10)

Contrary to the State's recommendation, the court found that "consecutive sentences are justified for the two separate counts of terroristic threats" (6T 45-12 to 17) under State v. Yarbough, 100 N.J. 627 (1985). The court reasoned that the terroristic threats counts related to "independent and separate events which occurred at separate times, some eight months apart, after defendant had been arrested and detained on the charges." (6T 45-19 to 23) The court repeatedly stated that the terroristic threats charges related to events that occurred in August 2021 and April 2022:

> After eight months and defendant's detention on the matters of the Court, the Court could assume the judge felt a sense of peace and safety only to have the rug pulled from under him and have the threats start up again.
>
> Moreover, the fact that these threats are now being made to the judge's personal cell made the threats more palpable and invasive and indicated defendant's escalating criminality.

> …
> The two offenses were committed at different times, different dates, different places, eight months apart, long after defendant was charged for and detained for the initial offenses. These were separate and distinct crimes . . . and it deserves the imposition of separate or consecutive sentences.
>
> [6T 45-25 to 46-8; 47-5 to 11.]

The court sentenced Mr. Russell to an aggregate 16-year term of imprisonment: two consecutive 8-year terms on the second-degree terroristic threats counts, and concurrent 1-year terms for each of the three remaining counts of harassment, retaliation for past official action, and stalking. (6T 47-13 to 48-23)

LEGAL ARGUMENT

POINT I

BECAUSE THE JURY WAS NOT INSTRUCTED ON THE OBJECTIVE "REASONABLE VICTIM" STANDARD, WHICH IS CONSTITUTIONALLY REQUIRED IN TERRORISTIC THREATS PROSECUTIONS UNDER STATE V. FAIR,[4] THE DEFENDANT'S TERRORISTIC THREATS CONVICTIONS MUST BE REVERSED. (Not Raised Below)

The jury at Mr. Russell's trial was never instructed on the objective element of a terroristic threats prosecution: it was never told to assess whether a reasonable person similarly situated to the victim would have interpreted the defendant's words as threatening violence and caused them to fear for their safety. This instruction is constitutionally required in a prosecution for terroristic threats under Fair, 256 N.J. at 238. Instead, the jury was only instructed that it must find that "[t]he words or actions of the defendant [were] of such a nature as to convey menace or fear of a crime of violence to the ordinary person" and that "[t]he State need not prove that the victim actually was terrorized." (4T 55-24 to 56-10) Because the jury did not receive the constitutionally required Fair instruction on how to consider an essential element of the crime, Mr. Russell's terroristic threats convictions under counts 1 and 2 of the indictment must be reversed.

[4] 256 N.J. 213 (2024).

Our Supreme Court in Fair observed that "an objective component is necessary for a prosecution for a threat of violence under N.J.S.A. 2C:12-3(a) to survive" scrutiny under the Federal and State Constitutions. Id. at 237; U.S. Const. amend. I; N.J. Const. art. I, ¶ 6. Under the State Constitution, that objective inquiry requires the jury to determine "whether a reasonable person would have viewed the defendant's words as threatening violence . . . not from the perspective of an anonymous ordinary person, but from the perspective of a reasonable person similarly situated to the victim." Fair, 256 N.J. at 238 (emphasis in original). The Court reversed Mr. Fair's conviction for terroristic threats and remanded the matter for a new trial, in part because the jury was not charged correctly on this component.[5] Id. at 239-41.

In criminal cases, failure to provide clear and correct jury instructions on material issues – such as the elements of the crime – is presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422 (1997); see also, e.g., State v. Grate, 220 N.J. 317, 329-34 (2015) (finding plain error because the trial court failed to instruct the jury that "knowingly" modified all material elements of the offense); State v. Afanador, 151 N.J. 41, 55-56 (1997) (finding

[5] The jury instructions in Fair were deficient in two additional respects not relevant to this appeal: failure to properly instruct on a mens rea of recklessness, and failure to require unanimity as to which statutory provision was violated. See Fair, 256 N.J. at 233-34, 240-41.

plain error where the trial court failed to instruct the jury on an essential element of the drug kingpin statute); State v. Federico, 103 N.J. 169, 176 (1986) ("[W]e recognize that the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel."); State v. Roberson, 246 N.J. Super. 597, 601, 697 (App. Div. 1991) (finding plain error because the jury was not instructed on an essential element, the weight of the cocaine, even though the evidence was "uncontradicted").

"[C]ontext matters," Fair, 256 N.J. at 238, especially in a case like this -- where the involved parties have had prior interactions, and where there is a risk of unconstitutionally prosecuting speech that amounts to "angry hyperbole." Ibid. The jury heard testimony from the victim that he had encountered many frustrated or upset litigants over the five years he served as a municipal court judge. (3T 46-1 to 47-20) Jurors furthermore heard that Mr. Russell had never visited Mr. Nehmad's home, his law office, or the courthouse, and that he made the phone calls because he was angry no one would answer questions about his municipal court matter. (3T 49-24 to 50-17; 192-19 to 24) The jury was never told to consider this important context in its deliberations on the terroristic threats counts.

Here, as in Fair, the jury was charged incorrectly on the objective element of a terroristic threat. Jurors were told to consider Mr. Russell's statements from the perspective of "the ordinary person" (4T 55-24 to 56-2), rather than "a reasonable person similarly situated to the victim," Fair, 256 N.J. at 238. On this basis, Mr. Russell's terroristic threats convictions (counts 1 and 2) require reversal.

POINT II

IN THE ABSENCE OF A NEXUS BETWEEN A THREAT OF VIOLENCE AND AN EMERGENCY DECLARATION IN PLACE AT THE TIME THE THREAT IS MADE, THE SECOND-DEGREE ENHANCEMENT IN THE TERRORISTIC THREATS STATUTE BEARS NO REASONABLE RELATIONSHIP TO A LEGITIMATE STATE PURPOSE. IT THEREFORE VIOLATES SUBSTANTIVE DUE PROCESS AS APPLIED TO MR. RUSSELL. N.J. Const. art. I, ¶ 1. (Not Raised Below)

The original indictment charged Mr. Russell with a single count of making a third-degree terroristic threat. (Da2) The terroristic threats statute provides that a threat of violence that would otherwise be a third-degree offense is a second-degree offense when the threat "occurs during a declared period of national, State or local emergency." N.J.S.A. 2C:12-3(a). In a superseding indictment, the State charged Mr. Russell with uttering the same threats, but divided them into two separate counts and upgraded both counts to

second-degree offenses on the basis that the statements were made during the COVID-19 pandemic, after Governor Murphy had declared a state of emergency. (4T 28-13 to 23; 53-5 to 8) The threatening statements bore no relation to the public health emergency whatsoever. Nonetheless, Mr. Russell was convicted of the second-degree offenses and received consecutive eight-year terms on each count.

In the absence of a nexus between a threat of violence and a public emergency declaration, N.J.S.A. 2C:12-3(a)'s second-degree emergency enhancement is not reasonably related to a legitimate state purpose. It therefore violates substantive due process as applied to Mr. Russell, and his second-degree convictions must be vacated.

1. Background

The requirement that a statute bears a "reasonable relationship to a legitimate state purpose" comes from the guarantee of substantive due process embodied in Article I, Paragraph 1 of the New Jersey Constitution. See State in the Interest of C.K., 233 N.J. 44, 76 (2018).

Article I, Paragraph 1 provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

[N.J. Const. art. I, ¶ 1.]

Although the words "due process" do not appear in Article I, Paragraph 1, our state courts have "construed the expansive language of" that constitutional provision "to embrace the fundamental guarantee of due process." State v. Njango, 247 N.J. 533, 548 (2021).

Basic rights to life, liberty, property, and the pursuit of happiness "cannot be abridged by arbitrary government action." C.K., 233 N.J. at 73. Central to substantive due process in this state is the principle that a statute must "reasonably relate to a legitimate legislative purpose." Ibid. When the State imposes a restriction on liberty "that bears no rational relationship to a legitimate government goal," the restriction is unconstitutional. Ibid.

Governor James McGreevey signed the September 11th 2001 Anti-Terrorism Act into law in 2002. L. 2002, c. 26. The Act established terrorism as a first-degree crime and amended several terrorism-related provisions of the Criminal Code. Ibid.; see also Press Release, Governor James E. McGreevey, McGreevey Signs "September 11th 2001 Anti-Terrorism Act" Into Law (June 18, 2002).

Prior to the Anti-Terrorism Act, the terroristic threats statute read:

> a. A person is guilty of a crime of the third degree if he threatens to commit any crime of violence with 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.
>
> b. A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.
>
> [L. 1982, c. 290, § 15.]

The Anti-Terrorism Act amended subsection (a) of the terroristic threats statute, adding the following language:

> a. . . . A violation of 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.
>
> [L. 2002, c. 26, § 11.]

The Act added similar language to the false public alarm statute, N.J.S.A. 2C:33-3, upgrading the offense by one degree if the violation "occurs during a declared period of national, State or county emergency." L. 2002, c. 26, § 16. The Act did not add an emergency enhancement to subsection (b) of the terroristic threats statute, which criminalizes threats to kill. N.J.S.A. 2C:12-3(b).

2. Without a nexus between a threat and an emergency declaration in place at the time the threat is made, the second-degree enhancement in the terroristic threats statute bears no reasonable relationship to a legitimate state purpose in violation of substantive due process.

To survive due process challenges, courts generally require a nexus between the crime and an attendant circumstance that increases the penalties for that crime. While New Jersey appears to be the only state with a period-of-emergency enhancement for threats and false public alarm, other states impose increased penalties for burglaries conducted during emergency or disaster conditions. To qualify for the enhanced penalty, though, the burglary must have exploited conditions arising from the emergency. In Florida, second- and third-degree burglaries may be upgraded to first- or second-degree felonies, respectively, "if the burglary is committed . . . within a county that is subject to a state of emergency declared by the Governor . . . and the perpetration of the burglary is facilitated by conditions arising from the emergency." Fla. Stat. § 810.02 (emphasis added); see also Williams v. Florida, 305 So. 3d 673, 676 n.2 (Fla. Dist. Ct. App. 2020). In Louisiana, conduct that could otherwise constitute simple burglary can be prosecuted as a more serious looting offense "when normal security of property is not present by virtue of a hurricane, flood, fire, act of God, or force majeure of any kind, or by virtue of a riot, mob, or other human agency." La. Stat. Ann. §§ 62.5, 62 (emphasis added).

Courts have also required a nexus between a defendant's status as a gang member and the underlying crime in order to impose a gang-membership sentencing enhancement. The Supreme Court of Florida ruled that a "criminal street gang" penalty enhancement violated due process in the absence of "any nexus between the particular criminal act and such membership." Florida v. O.C., 748 So. 2d 945 (Fla. 1999). Other jurisdictions have followed suit. See, e.g., Tennessee v. Bonds, 502 S.W.3d 118, 156-57 (Tenn. 2016) (striking down a similar gang-affiliation enhancement because, without a nexus requirement, "it lacks a reasonable relationship to achieving the legitimate legislative purpose of deterring criminal gang activity and therefore violates the principles of substantive due process").

To support a deadly-weapon sentencing enhancement, the Supreme Court of Washington likewise required "a nexus between the defendant, the crime, and the deadly weapon in order to find that the defendant was 'armed' under the deadly weapon enhancement." Washington v. Barnes, 103 P.3d 1219, 1222 (Wash. 2005); see also Washington v. Brown, 173 P.3d 245, 250 (Wash. 2007) (vacating a first-degree burglary conviction and a deadly-weapon sentencing enhancement where there was no nexus between the burglary and a weapon found at the scene).

Arizona's Supreme Court recently struck down a gang-status enhancement for the crime of threatening or intimidating on the substantive due process grounds asserted here. The court explained with an example:

> Assume a teenager is, unbeknownst to his mother, a gang member. In the midst of a domestic disturbance, he threatens to strike his mother and is subsequently charged with threatening or intimidating. Under the State's argument and the court of appeals' reasoning, the defendant would be subject to a . . . sentencing enhancement for gang membership even though his mother was unaware of his affiliation, he never invoked it to bolster his threat, and the crime was altogether unrelated to his gang activity. And even if the mother knew of her son's gang membership, the State would not have to prove that knowledge or otherwise relate his membership to the offense to invoke [the] enhancement.
>
> [Arizona v. Arevalo, 470 P.3d 644, 649-50 (Ariz. 2020).]

The court invalidated the law, concluding that "no application comports with constitutional standards." Ibid.

Like the Arizona case, Mr. Russell's threatening statements were altogether unrelated to the existence of the pandemic. The substance of the statements for which he was charged – "I will break your . . . jaw"; "I will beat your ass" – made no reference to the pandemic. The threats did not exploit the conditions of the pandemic. And the impact or harm of those statements was not enhanced in any way by the existence of the public health emergency, which had been in place for nearly 18 months at the time of the offenses. (4T

53-5 to 8) Simply, there was no nexus between the threatening statements and the COVID-19 emergency.

In the absence of a nexus between the threat made and the emergency in place at the time, the second-degree enhancement in the terroristic threats statute does not reasonably relate to any legitimate governmental purpose. N.J.S.A. 2C:12-3(a). Because COVID-19 played no role whatsoever in these offenses, the enhancement was unconstitutionally applied to Mr. Russell.

Some threats of violence made during the pandemic could fulfill the nexus requirement by exploiting pandemic conditions or because the harm is greater during a public health emergency. For example, a bomb threat to an overcrowded hospital would endanger patients and strain healthcare resources already under immense pressure; a threat to bite someone to infect him with the virus would more severely terrorize the victim during a pandemic. These threats could be prosecuted as second-degree offenses without running afoul of due process.

By contrast, the content and circumstances of Mr. Russell's voice messages were entirely incidental to the ongoing pandemic. The State had no legitimate interest in punishing those statements more harshly because they occurred during the pandemic rather than after the COVID-19 emergency declaration had been rescinded.

The construction of the terroristic threats statute supports a nexus requirement. If Mr. Russell had threatened to kill instead of threatening to assault, the State could only have charged him with a third-degree offense. Threats to kill are covered by N.J.S.A. 2C:12-3(b), which was not amended by the Anti-Terrorism Act and does not include an emergency enhancement. N.J.S.A. 2C:12-3(b). The Legislature thus increased the penalties for threats made during emergencies only when those threats were made "with the purpose to terrorize another or to cause evacuation . . . or otherwise to cause serious public inconvenience," – in other words, threats that cause enhanced harms during an emergency. N.J.S.A. 2C:12-3(a). All threats to kill, by contrast, are third-degree offenses, even when they are made during a declared period of emergency. Ibid.

Practical considerations favor a nexus requirement as well. According to a 2019 Congressional Research Service report, there were 31 national emergency declarations in effect as of February 2019, most of which are simply renewed annually. Emily E. Roberts, Declarations Under the National Emergencies Act, Part 1: Declarations Currently In Effect, Congressional Research Service (Feb. 28, 2019), http ://fas.org/sgp/crs/natsec/LSB10252.pdf. One national emergency declaration has been in place since 1979. Ibid. Without a nexus requirement, every terroristic threat under N.J.S.A. 2C:12-

3(a) since the enactment of the Anti-Terrorism Act in 2002 could have been charged as a second-degree crime.

Mr. Russell's statements bore no relation whatsoever to the COVID-19 pandemic, and the impact of his statements was in no way enhanced by the existence of a pandemic. Because the State had no legitimate interest in prosecuting the statements as second-degree offenses purely because they were uttered during the COVID-19 pandemic, his substantive due process rights were violated. Mr. Russell's second-degree convictions under counts 1 and 2 must be vacated.

POINT III

TO PRESERVE THE APPEARANCE OF FAIRNESS AND IMPARTIALITY, THE ATLANTIC COUNTY JUDICIARY SHOULD HAVE BEEN RECUSED FROM THIS CASE. (Not Raised Below)

Mr. Nehmad served as a municipal court judge in Egg Harbor Township, and sat as a conflict judge in Hamilton, Galloway, and Atlantic City municipal courts. (3T 8-15 to 20) Because Mr. Nehmad served in these Atlantic County municipalities, the Atlantic County judiciary should have been recused from the proceedings in this case.

In State v. Dalal, recusal of the Bergen County judiciary was warranted when a criminal defendant made threats against two Bergen County Superior

Court judges. 221 N.J. 601 (2015). The Supreme Court concluded that the relationships between judges within a vicinage "can raise legitimate questions about the appearance of impartiality when a colleague presides over a case involving a serious threat against a fellow judge who serves in the same vicinage." Id. at 609. The Court considered "the serious nature of the threat, the absence of any proof of manipulation [i.e., forum-shopping], the potential introduction of the evidence in one of the trials, and the relationships among judges within the Bergen Vicinage," and concluded "that a reasonable, fully informed observer could have doubts about a Bergen County judge's impartiality." Id. at 610. Because one of the threatened judges was subsequently reassigned to the vicinage to which the case had been transferred, and because the other had retired, the Supreme Court remanded the matter to the assignment judge "to determine, after hearing from the parties, whether (1) to ask the Chief Justice to bring in a judge from another vicinage, . . . or (2) to transfer the case to another vicinage." Ibid.

The rules governing judicial recusal are concerned not only with "actual conflicts and bias" but also "the appearance of impropriety." State v. McCabe, 201 N.J. 34, 43 (2010). Accordingly, the Code of Judicial Conduct requires judges to "disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned." Canon 3,

Rule 3.17(B). The standard for deciding a recusal issue is therefore: "Would a reasonably, fully informed person have doubts about the judge's impartiality?" DeNike v. Cupo, 196 N.J. 502, 517 (2008).

Just as in Dalal, even if one could be "confident the trial judge could actually preside fairly and impartially," the mere "appearance of fairness in the future proceedings will be impaired so long as a" judge from the same county "presides over the matter." 221 N.J. at 605 (quoting State v. Dalal, 438 N.J. Super. 156, 162 (App. Div. 2014)). Thus, the Atlantic County judiciary should have been recused from this matter, and a new trial is required. DeNike, 196 N.J. at 507 (remanding for a new trial "[b]ecause any lesser remedy would allow reasonable doubts to linger about the fairness of the outcome of the case"). Alternatively, should this Court remand Mr. Russell's case for additional proceedings, those proceedings should be transferred to another vicinage or heard by a judge from outside the Atlantic County vicinage.

POINT IV

THE COURT ERRED BY FAILING TO MERGE THE HARASSMENT CONVICTION WITH THE STALKING CONVICTION, AND THE STALKING CONVICTION WITH THE CONVICTION FOR RETALIATION FOR PAST OFFICIAL ACTION. (Not Raised Below)

Mr. Russell was convicted of two counts of terroristic threats for phone calls made on August 23, 2021; one count of harassment for calls made on

April 13, 2022; one count of retaliation for past official action for his conduct between August 23, 2021 and April 13, 2022; and one count of stalking for his conduct between August 23, 2021 and April 13, 2022. (Da6-14) The fourth-degree offenses -- harassment, stalking, and retaliation -- should have been merged into a single count.

"The doctrine of merger is based on the concept that an accused [who] committed only one offense . . . cannot be punished as if for two." State v. Tate, 216 N.J. 300, 302 (2013) (quoting State v. Davis, 68 N.J. 69, 77 (1975)) (alterations in original). Therefore "[m]erger implicates a defendant's substantive constitutional rights." Ibid. (citing State v. Miller, 108 N.J. 112, 116 (1987)). Besides its effect on sentencing in many cases, merger "also has a measurable impact on the criminal stigma that attaches to a convicted defendant." State v. Rodriguez, 97 N.J. 263, 271 (1984).

The statutory standard for merger, N.J.S.A. 2C:1-8(a), "provid[es] that offenses are different when each requires proof of facts not required to establish the other." Tate, 216 N.J. at 307 (quoting State v. Hill, 182 N.J. 532, 542 (2005)). That approach "has been characterized as 'mechanical.'" Ibid. Thus, New Jersey instead follows "a 'flexible approach' in merger issues." Hill, 182 N.J. at 542 (quoting State v. Brown, 138 N.J. 481, 561 (1994)).

The more flexible approach requires courts "to focus on the elements of the crimes and the Legislature's intent in creating them, and on the specific facts of each case." Ibid. Courts should consider

> the time and place of each . . . violation; whether the proof submitted as to one count . . . would be . . . necessary . . . to a conviction under [the other] count; whether one act was . . . part of a larger scheme . . . ; the intent of the accused; and the consequences of the criminal standards transgressed.
>
> [Tate, 216 N.J. at 311 (quoting Davis, 68 N.J. at 81) (alterations in original).]

Under any merger analysis, Mr. Russell's fourth-degree harassment, stalking, and retaliation-for-past-official-action convictions must merge.

A person is guilty of harassment

> if, with purpose to harass another, he . . . [m]akes, or causes to be made, one or more communications . . . in offensively coarse language, or any other manner likely to cause annoyance or alarm.
>
> [N.J.S.A. 2C:33-4(a).][6]

A person who repeatedly commits the crime of harassment is guilty of stalking:

> A person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety

[6] As it was in this case, harassment can be upgraded from a petty disorderly persons offense to a fourth-degree crime if the communication at issue is "knowingly direct[ed] . . . to a current or former judge that relates to the performance of the judge's public duties." N.J.S.A. 2C:33-4(e).

> or the safety of a third person or suffer other emotional distress.
>
> [N.J.S.A. 2C:12-10(b).]

"Course of conduct" is defined in the stalking statute as

> repeatedly maintaining a visual or physical proximity to a person; directly, indirectly, or through third parties, by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about, a person, or interfering with a person's property; repeatedly committing harassment against a person; or repeatedly conveying, or causing to be conveyed, verbal or written threats or threats conveyed by any other means of communication or threats implied by conduct or a combination thereof directed at or toward a person.
>
> [N.J.S.A. 2C:12-10(a) (emphases added).]

The State's case against Mr. Russell for stalking encompassed the conduct that established harassment – the phone calls to Mr. Nehmad on April 13, 2022. (Da11-13) Because the crime of stalking consists of repeatedly harassing, it necessarily incorporates all the elements of a harassment conviction, and these two offenses should have merged.

In addition, Mr. Russell's stalking conviction necessarily merges with his conviction for retaliation for past official action. Retaliation for past official action occurs when a person "harms another by any unlawful act with purpose to retaliate for or on account of the service of another as a public servant." N.J.S.A. 2C:27-5 (emphasis added). Because the retaliation charge referred to events occurring on August 23, 2021, through April 13, 2022,

(Da12), the "unlawful act" refers to the stalking count, which covered the identical time period.[7]

The definition of retaliation for past official action incorporates every element of the underlying "unlawful act"; in this case, stalking. The evidence to support the retaliation conviction therefore entailed all the proofs required to establish stalking, plus additional evidence that the acts constituting stalking were undertaken "with purpose to retaliate for" Mr. Nehmad's interaction with Mr. Russell in municipal court. Put differently, the crime of retaliation was no more than (1) the conduct that constituted stalking, (2) which harmed Mr. Nehmad, and (3) was done for the purpose of retaliating for his service as a municipal court judge. These counts must merge.

In sum, stalking is repeated acts of harassment, and retaliation for past official action, in this case, was stalking undertaken for the purpose of retaliation. "Convictions for lesser-included offenses, offenses that are a necessary component of the commission of another offense, or offenses that merely offer an alternative basis for punishing the same criminal conduct will merge." Hill, 182 N.J. at 542 (quoting Brown, 138 N.J. at 561). Because the

[7] Although the jury was instructed that the "unlawful act" within the retaliation charge could refer to either harassment, terroristic threats, or stalking, the harassment charge only covered his conduct on April 13, 2022, and the terroristic threats charges only covered the events of August 23, 2021. (Da6-14)

conviction for retaliation encompassed the stalking conviction, and stalking encompassed harassment, these three fourth-degree crimes should have been merged into a single offense – retaliation for past official action.

POINT V

THE DEFENDANT'S 16-YEAR SENTENCE, WHICH IS SIGNIFICANTLY HARSHER THAN THE 11.5-YEAR SENTENCE REQUESTED BY THE PROSECUTOR, IS MANIFESTLY EXCESSIVE. RESENTENCING IS REQUIRED BECAUSE (1) THE SENTENCING COURT'S YARBOUGH[8] ANALYSIS WAS ENTIRELY BASED ON ITS MISAPPREHENSION THAT THE VOICEMAILS WERE LEFT EIGHT MONTHS APART, RATHER THAN ON THE SAME DAY, AND (2) THE COURT ERRED BY FAILING TO FIND ANY MITIGATING FACTORS. (6T 44-14 to 49-24)

The trial court sentenced Mr. Russell to an aggregate 16-year term of imprisonment for the calls he made to Mr. Nehmad: consecutive 8-year terms for each of two voicemails left on the same day in August 2021. The decision to run the sentences consecutively was exclusively based on the court's incorrect belief that one of the counts of terroristic threats occurred in August 2021, and that the other occurred 8 months later, in April 2022. In reality, Mr. Russell was never charged with making terroristic threats in April 2022. Because the judge's Yarbough analysis was grounded on a single factor, and its

[8] 100 N.J. 627.

analysis of that factor relied entirely on an erroneous factual basis, the matter must be remanded for resentencing. 100 N.J. 627. In addition, the court abused its discretion when it rejected mitigating factors four, eight, and eleven, and treated Mr. Russell's mental health history as an aggravating factor.

1. The sentencing court's decision to impose consecutive sentences was based entirely on the court's erroneous finding that one of the terroristic threats charges applied to a phone call made in April 2022.

The sentencing court rested its decision to impose consecutive sentences for counts 1 and 2 on a single Yarbough factor. Its analysis was fatally flawed because it mistakenly found that Mr. Russell had been charged with terroristic threats for a call made in April 2022. This entitles Mr. Russell to a remand for resentencing.

Count 1 of the indictment charged Mr. Russell with terroristic threats for "leaving a voicemail at approximately 11:30 a.m. on" "the 23rd day of August, 2021." (Da7) Count 2 charged him with "leaving a voicemail at approximately 4:00 p.m." also on "the 23rd day of August, 2021." (Da8) The jury found Mr. Russell guilty of making terroristic threats in the morning hours and the afternoon hours of August 23, 2021. (Da45-48)

When it sentenced Mr. Russell, the trial court believed that one count of terroristic threats occurred in August 2021 and the other in April 2022. It relied on that incorrect belief to impose consecutive sentences under Yarbough,

contrary to the State's recommendation that the sentences be run concurrently. (6T 28-19 to 21)

Yarbough requires sentencing courts to consider the following factors when deciding whether to impose consecutive sentences:

> (a) the crimes and their objectives were predominantly independent of each other;
> (b) the crimes involved separate acts of violence or threats of violence;
> (c) the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior;
> (d) any of the crimes involved multiple victims; [and]
> (e) the convictions for which sentences are to be imposed are numerous.
>
> [100 N.J. at 644.]

Sentencing factors "must be supported by competent, credible evidence in the record" so that "[s]peculation and suspicion [do] not infect the sentencing process." State v. Case, 220 N.J. 49, 64 (2014). When a sentencing court has "faithfully paired the Yarbough factors with the facts as found by the jury, there is no basis upon which to upend its reasoning supporting the imposition of consecutive sentences." State v. Cassady, 198 N.J. 165, 182 (2009); see also State v. Miller, 205 N.J. 109, 129 (2011) ("When a sentencing court properly evaluates the Yarbough factors in light of the record, the court's decision will not normally be disturbed on appeal.").

The trial court emphasized its misperception about the dates of the offenses repeatedly, saying that the conduct "occurred at separate times, some eight months apart"; that Mr. Nehmad had "the rug pulled from under him" after an eight-month break when "the threats start[ed] up again"; that "[t]he fear and anguish this Judge felt from this new series of phone calls made some eight months after the . . . initial event were separate and distinct harms"; that the "two offenses were committed at different times, different dates, different places, eight months apart." (6T 45-20 to 21; 46-2 to 4; 47-2 to 9)

The court additionally incorrectly believed that one of the charged phone calls was made to Mr. Nehmad's personal cell phone, and it relied on that misapprehension as further support for consecutive terms, saying, "the fact that these threats are now being made to the judge's personal cell phone made the threats more palpable and invasive and indicated defendant's escalating criminality." (6T 46-5 to 8) In fact, the voice messages that gave rise to the terroristic threats charges were left on Mr. Nehmad's law office phone, not his personal cell phone. (3T 12-10 to 23; 13-23 to 24)

The court concluded its Yarbough analysis by saying, "[t]hese were separate and distinct crimes committed against this victim and it deserves the imposition of separate or consecutive sentences." (6T 47-9 to 11)

Nowhere in its analysis did the sentencing court identify which of the Yarbough factors it was considering. But the nature of the court's commentary suggests it only considered factor (c), as the analysis was limited to the false belief that the crimes "occurred at separate times, some eight months apart." (6T 45-18 to 23) Had the sentencing court considered any Yarbough factors beyond factor (c), and done so on the correct factual record, it would have found that every factor weighed in favor of concurrent sentences.

There is no support for the notion that the phone call at 11:30 a.m. on August 23, 2021, had a different, independent purpose from the phone call a few hours later at 4:00 p.m.; rather, the voice messages were left as part of a series of calls Mr. Russell placed throughout the day (factor (a)).

The content of each indicted voice message is also substantively identical. The 11:30 a.m. voicemail includes the statements, "I catch you in Northfield I will beat your ass Marc Nehmad," and "if I come to Northfield and I see you I will break your fucking jaw, Marc Nehmad." The 4:00 p.m. voicemail contains the same threat, nearly verbatim: "I will break your fucking jaw mother fucker." (Da7-8) Thus, these were hardly separate threats of violence; they were substantively identical and part of the same continuing diatribe (factor (b)).

For the same reasons, had factor (c) been considered in light of the correct factual record, the court would have found that it too weighed in favor of concurrent sentences: the messages were left a few hours apart during a series of phone calls throughout the day. And the final factors warrant little discussion: there was a single victim, Marc Nehmad (factor (d)), and there were only two convictions for terroristic threats (factor (e)).

Because the trial court's entire Yarbough analysis was premised on an incorrect understanding of the charges, and no Yarbough factors weigh in favor of consecutive sentences when the correct factual record is considered, Mr. Russell is entitled to a resentencing at which the Yarbough factors will be properly considered and "faithfully paired . . . with the facts as found by the jury." Cassady, 198 N.J. at 182.

2. The 16-year prison sentence for threats made in two voice messages is manifestly excessive and unduly punitive.

Defense counsel asked the court to find mitigating factors 2, 4, 6, 8, 10, and 11. (6T 25-10 to 11) The sentencing court declined to find any mitigating factors and imposed a 16-year sentence that far exceeded both the State's recommendation of 11.5 years and defense counsel's request for a 5-year term. (6T 28-22 to 25; 23-13 to 19) Because the 8-year terms imposed on each count of terroristic threats were manifestly excessive, this Court should reverse and remand for resentencing.

The sentencing court rejected mitigating factor eight, conduct not likely to reoccur. N.J.S.A. 2C:44-1b(8). In doing so, the court made the same factual error it relied on in its flawed Yarbough analysis:

> Factor 8, conduct not likely to reoccur. The Court rejects this based on the history of his prior convictions for two prior terroristic threats and the fact that after eight months of no contact defendant spent two days calling the judge's private cell, making his vile threats of harm.
>
> [6T 43-19 to 24.]

As explained in the previous subpoint, Mr. Russell was never charged with or convicted of making threats in April 2022. Although Mr. Russell made a series of calls to the cell phone in April 2022, the only recording of those calls features a conversation between Mr. Russell and Mr. Nehmad during which not a single "threat[] of harm" was made. (3T 42-1 to 44-6) The court therefore abused its discretion when it based its rejection of mitigating factor eight on the same misapprehension that led to its invalid Yarbough analysis.

In addition, the court ignored Mr. Russell's repeated acknowledgments at trial that he had been "wrong" in his conduct toward Mr. Nehmad, as well as his apology to Mr. Nehmad and his family at sentencing. (3T 193-11; 197-21; 199-8 to 11; 6T 28-8 to 10) Based upon the correct factual record and Mr.

Russell's expressions of remorse, the court should have found mitigating factor eight.[9]

Further, despite its knowledge that Mr. Russell suffered from mental health challenges,[10] the sentencing court refused to find mitigating factor four: that "[t]here were substantial grounds tending to excuse . . . the defendant's conduct, though failing to establish a defense." N.J.S.A. 2C:44-1b(4). "[W]here mitigating factors are amply based in the record before the sentencing judge, they must be found." State v. Dalziel, 182 N.J. 494, 504 (2005).

Courts have remanded matters for resentencing when a trial court has failed to consider the effect of a defendant's mental health under mitigating factor four. See State v. Nataluk, 316 N.J. Super. 336, 349 (App. Div. 1998) ("It is difficult to understand how defendant's condition could not have constituted a mitigating factor."); State v. Nayee, 192 N.J. 475, 475-76 (2007)

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[9] A finding of this factor on remand would be significant as it would cast doubt upon the court's finding of aggravating factor nine. Though they are not "inherently incompatible," finding mitigating factor eight and aggravating factor nine together "will be rare." State v. Fuentes, 217 N.J. 57, 81 (2014).

[10] The court was aware Mr. Russell had been held at Ancora Psychiatric Hospital for several months pending a determination that he was competent to stand trial, and defense counsel made extensive arguments at sentencing regarding his mental health. (1T 48-19 to 23; 6T 6-6 to 7; 6T 25-10 to 27-11)

(summarily remanding for resentencing due to "the trial court's refusal to consider the record before it in respect of defendant's mental illness as a mitigating factor under N.J.S.A. 2C:44-1b(4)").

Nonetheless, the trial court rejected the argument that Mr. Russell's mental health played a role in the offenses:

> As to factor 4, the Court rejects there are substantial grounds to excuse his conduct. There's absolutely no excuse for his conduct. The Court finds defendant knew he was doing it. It was his conscious object to terrorize and intimidate Judge Nehmad. Again, mental health issues do not excuse the conduct by the defendant.
>
> [6T 43-4 to 10.]

Finally, in rejecting mitigating factor eleven, that prison would be an excessive hardship for Mr. Russell, N.J.S.A. 2C:44-1b(11), the court asserted that prison would improve Mr. Russell's mental health:

> Prison is a hardship for everyone and his alleged mental health issues are not unique and could be ameliorated by medication obtained in prison.
>
> [6T 44-6 to 9.]

Rather than treating Mr. Russell's mental health as mitigation, the court suggested without evidence that prison would be an appropriate venue for the treatment of his specific mental health issues, effectively converting his mental health history into an aggravating factor. To use a defendant's mental health difficulties as support for a lengthy period of incarceration runs counter to

basic notions of fairness, undermines the Criminal Code's retributive and deterrent sentencing goals, and contradicts the legal system's view of mental illness as diminishing, not increasing, culpability for criminal conduct.

Mr. Russell received a manifestly excessive 16-year prison term for two verbal threats made on a single day. Because the court's Yarbough analysis rested on an erroneous factual basis, because it relied on that factual inaccuracy to reject mitigating factor eight, and because it erred in rejecting mitigating factors four and eleven and used Mr. Russell's mental health history to support an unduly punitive sentence, a remand for resentencing is required.

CONCLUSION

Because a constitutionally mandated instruction on the crime of terroristic threats was not given to the jury, Mr. Russell's terroristic threats convictions under counts 1 and 2 must be reversed. In addition, the upgrade from third- to second-degree terroristic threats violated his substantive due process rights and independently requires reversal of those convictions. Mr. Russell is furthermore entitled to a new trial because the Atlantic County judiciary should have been recused from his case.

In the alternative, this case must be remanded for resentencing due to the trial court's failure to merge the fourth-degree convictions, its reliance on an erroneous factual basis for imposing consecutive terms, and its imposition of a sentence which was overall manifestly excessive.

Respectfully submitted,

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Dated: May 1, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000022-23T4

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	**On Appeal from a Judgment of Conviction Superior Court of New Jersey, Law Division, Atlantic**
v.	:	**County.** **Indictment No. 23-02-00362**
NATHANIEL H. RUSSELL	:	
Defendant-Appellant.		**Sat Below:**
	:	**Hon. Pamela D'Arcy, J.S.C. and a jury**

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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August 15, 2024

TABLE OF CONTENTS

[1] State v. Fair, 256 N.J. 213 (2024).

TABLE OF APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

MISCELLANEOUS

COUNTERSTATEMENT OF PROCEDURAL HISTORY[1]

On or about November 3, 2021, the Atlantic County Grand Jury charged defendant, Nathaniel H. Russell, under Indictment No. 21-11-01634, with third-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a) (Count One); fourth-degree retaliation for past official action, contrary to N.J.S.A. 2C:27-5 (Count Two); and, fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b) (Count Three). (Da1-5).

On or about February 16, 2023, the Atlantic County Grand Jury charged defendant, Nathaniel H. Russell, under superseding Indictment No. 23-02-00362, which added the charges from defendant's continuing conduct and upgraded the terroristic threat counts from third-degree to second-degree as they occurred during a declared State of Emergency, i.e., the COVID-19 pandemic: two counts of second-degree terroristic threats during a state of emergency, contrary to N.J.S.A. 2C:12-3(a) (Counts One and Two); three counts of fourth-degree harassment while imprisoned or on parole/probation, contrary to N.J.S.A. 2C:33-4(e) (Counts Three,

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1 "Db" refers to defendant's brief.
"Da" refers to the appendix to defendant's brief.
"Pa" refers to the appendix to the State's brief.
"PSR" refers to the pre-sentence report.
"1T" refers to the motion transcript, dated April 28, 2023.
"2T" refers to the trial transcript, dated May 2, 2023.
"3T" refers to the trial transcript, dated May 3, 2023.
"4T" refers to the trial transcript, dated May 4, 2023.
"5T" refers to the trial transcript, dated July 12, 2023.
"6T" refers to sentencing transcript, dated July 19, 2023.

Four, and Five); fourth-degree retaliation for past official action, contrary to N.J.S.A. 2C:27-5 (Count Six); and, fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b) (Count Seven). (Da6-14; Da53).

On May 1, 2023, on the prosecutor's motion, Counts Three and Four (harassment) were dismissed prior to trial. (1T6-13 to 16; Da15).

On May 2, 2023, defendant was tried before the Honorable Pamela D'Arcy, J.S.C., and a jury, which found defendant guilty on all counts. (2T1, et seq.; Da45-52).

On July 19, 2023, Judge D'Arcy sentenced defendant to an aggregate term of sixteen years' imprisonment, reflecting consecutive eight-year flat terms of imprisonment on Counts One and Two (charging terroristic threats during a state of emergency), and concurrent one-year flat terms on Counts Five, Six, and Seven. (6T47-13 to 50-3; Da53-56). Defendant received 694 days of jail credit. (6T47-20-22; Da55).

On or about September 5, 2023, defendant filed a notice of appeal with this Court. (Da57-59).

This appeal follows.

COUNTERSTATEMENT OF FACTS

As a result of defendant's municipal court hearing conducted virtually due to the COVID-19 pandemic, defendant, Nathaniel Russell, engaged in a barrage of threatening and escalating phone calls to the presiding judge, the Honorable Marc Nehmad, J.M.C., over a period of eight months, even after defendant was initially charged. The contents of the voicemails included multiple threats of physical violence and sexually explicit language directed at the judge. Following a jury trial, in which defendant testified, admitting that he made all of those calls and that he was "wrong" for doing that, the jury convicted defendant on all counts.

The victim was a practicing attorney for nearly twenty years, and resided with his wife and three daughters in Egg Harbor Township. (3T7-24 to 25). From 2017 to 2021, the victim served as a municipal court judge in Egg Harbor Township, and practiced law in Northfield, New Jersey. (3T8-11 to 25).

In August of 2021, municipal court was being conducted virtually due to the pandemic;[2] the victim's name appeared on the Zoom screen as, "Judge Marc Nehmad." (3T9-4 to 25). On August 19, 2021, the victim was serving as a conflicts judge in Atlantic City, and presided over a recorded virtual proceeding wherein defendant was a participant. (3T10-22 to 11-16). As was the practice, the judge gave an opening statement at the start of the proceedings, identifying himself

[2] The parties stipulated that a declared State of Emergency was in effect in New Jersey throughout the relevant time period. (4T53-5 to 8; Da24).

as the judge, and explaining how the proceedings would unfold. (3T10-1 to 13). The victim recognized defendant in the courtroom at the instant trial, as the participant the victim was able to see and hear virtually in court that day, as well as someone with whom he had had a previous court hearing. (3T11-14 to 12-9; 3T14-18 to 22).

On August 23, 2021, following a day of court, the victim returned to his law office and retrieved three phone messages from defendant on his direct office line. (3T12-14 to 13-18; S-1 in Evidence). Defendant identified himself in the messages as "Nate Russell," but the victim also recognized defendant's voice from court, describing it as "a very distinctive voice…[that] is very overly aggressive…." (3T14-9 to 22).

The victim described the phone messages as "very nasty, aggressive [and], threatening" in tone, threatening physical harm and violence, with defendant seeming to know where he lived and worked; he saved the recordings, and out of concern for himself and his family, he called the police. (3T12-14 to 18; 3T14-25 to 15-12; Pa1-4). The messages, played in full for the jury, contained profane language and threats, such as, "I will break your f**ng jaw mother f**er" (Pa2), and "play games with me pussy get your f**cking neck broke" (Pa3), and "when I catch you in Northfield ima beat your ass…" (Pa3), and, "I will break your f**cking jaw marc Nehmad Lawyer pussy ass nig**…" (Pa3). (3T17-5 to 18;

3T21-11; 3T24-14 to 25-1; Pa1-4). The threats continued with repeatedly vulgar and sexually explicit language, including, "suck my dick," (Pa2-3), and "Give me a call, pussy. I'm not f**king p[l]aying no games…big pussy….I'll come to your motherf**cking office in Northfield, how is that. Either way, motherf**cker, I'm going to see you" (Pa2). (3T21-6 to 10; Da9).

The next day, on August 24, 2021, defendant left two additional voicemail messages on the victim's law office line, which were also saved and turned over to the police. (3T32-10 to 33-2; S-2 in Evidence). Defendant continued to threaten the victim by name, referenced the August 19, 2021 hearing, mentioned both Northfield and the judge's hometown of Egg Harbor Township, and used vulgar and sexually explicit language, with statements such as, "You better motherf**king move out of mother**king Egg Harbor Township…" (Pa6), and "I will have my foot in your motherf**king ass," (Pa6). (3T34-7 to 35-17; 3T36-21 to 37-3; Pa5-7; Da6; Da10).

Around that time, defendant was also calling the Egg Harbor Municipal Court trying to reach the victim. (3T63-14 to 64-22). Defendant would identify himself by name, and get "irate," yelling, cursing, and threatening of the judge when the court administrator would not let him speak to the judge. (3T64-11 to 66-22). On August 23, 2021, after receiving three such calls, the court

administrator filed a judiciary incident report out of concern for the judge's safety. (3T65-9 to 12; 3T67-14 to 70-7; S-4 in Evidence).

In the calls, defendant not only identified himself by name, but also, left two callback numbers, which were ultimately confirmed to belong to defendant. (3T26-17 to 27-4; 3T35-22 to 36-1; 3T110-22 to 113-24; Pa1-11).

The victim testified that the calls were "very frightening and scary." (3T14-5 to 6). He especially found defendant's reference to where the victim lived to be "extremely alarming." (3T14-4-8; 3T20-12 to 21). The victim testified, "I felt frightened. I felt frightened for myself and my family." (3T20-20 to 21). When defendant "aggressive[ly]" said he was going to come to his Northfield office, the victim testified, "I felt, again, alarmed, frightened….That fight or flight anxiety kicked in….I felt afraid for myself and for my family." (3T23-20 to 24-5). By the third message, the victim said, "I felt scared, alarmed. My adrenalin got up there pretty high. I was anxious….He said he was, you know, going to harm me and I felt frightened, especially for myself and my family again." (3T27-7 to 12).

After immediately calling the police, the victim called his wife. (3T27-16 to 21). His wife was driving home with two of their kids, and their young niece and nephews, in the car; he told her everything, and asked that she drive around for an hour until he could get home to meet her and the police at his house. (3T28-7 to

25; 3T153-13 to 21). His wife testified that she was scared and worried. (3T155-5 to 7).

When the police met the victim at his home, the victim appeared "visibly shaken and scared." (3T98-19). Given the severity of the threats, the police instituted safety precautions for two months, and the victim testified that he changed his routine. (3T31-23 to 32-6; 3T102-14 to 104-13).

After defendant was charged, the calls stopped for a period of time, until the victim received about thirteen more calls from defendant over three days in April of 2022. (3T38-5 to 39-15; Pa8-11). This time, defendant was calling on the victim's personal cell phone, which defendant apparently got from discovery. (3T38-14 to 39-1). The victim picked up the calls, and when he recognized defendant's voice, he hung up. (3T39-20 to 25). But on one occasion that the victim picked up, he decided to speak with defendant, and his wife recorded the call. (3T39-20 to 40-7; 3T42-1 to 44-6; Pa8-11). The victim testified that he, again, felt "harassed," "threatened that I was in danger," and "alarmed." (3T44-16; 3T45-9-16). The victim testified, "I couldn't believe he got my cell phone number and he was calling me and wouldn't stop." (3T45-9 to 11).

The victim testified that, while he had experienced frustrated litigants before, nothing like this had ever happened to him before, he had never been called

or physically threatened, either as a judge or when he had been a municipal prosecutor. (3T54-12 to 55-17).

Finally, defendant elected to testify at trial, admitting that he had made all of the calls to the victim, and to the court, from his two phones. (3T186-17 to 25; 3T187-9 to 188-13; 3T190-20 to 191-8). Defendant testified that he was "upset" after the hearing and wanted to "ask questions," but admitted that he was not still angry in April of 2022. (3T187-24 to 188-3; 3T189-24 to 190-4; 3T193-2 to 3; 3T201-4 to 17). Defendant further acknowledged he obtained the victim's cell phone through discovery. (3T188-9 to 10). Defendant maintained he was "wrong" for cursing, yelling, and calling the victim names, but stated he was not "prejudiced." (3T193-7 to 20; 3T199-11 to 12).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON TERRORISTIC THREATS UNDER THE LAW AT THE TIME, THE NEW RULE IN FAIR[3] SHOULD NOT BE RETROACTIVE, AND ANY ERROR WAS NOT PRESERVED AND NEVERTHELESS HARMLESS (3T54-11 to 58-14). [Not Raised Below.]

Despite the fact that the jury was properly charged under the existing Model Jury Charge in his 2023 terroristic threats trial, defendant argues for the first time on appeal that reversal is required under the new 2024 rule articulated in State v. Fair adding an objective inquiry to the "reasonable victim" standard. (Db11-14). Without arguing retroactivity, defendant claims that Fair's subsequent change in the instruction from having the jury determine whether "a reasonable person" would have viewed the defendant's words as threatening violence, to whether "a reasonable person similarly situated to the victim" would, alone requires reversal. (Db11-14). The State maintains that Fair's new rule should not be retroactive, but that even if it is given pipeline retroactivity, reversal is not required under the particular circumstances of this case, as it did not affect the jury's verdict. While defendant failed to preserve this objection below yielding plain error review, defendant nevertheless unsuccessfully made the argument to the jury, and the facts

[3] State v. Fair, 256 N.J. 213 (2024).

elicited at trial showed quite definitively that the result would not have been different.

A jury charge is presumed to be proper when it tracks the model jury charge verbatim because the process to adopt model jury charges is "comprehensive and thorough." State v. R.B., 183 N.J. 308, 325 (2005). Generally, the failure to object to jury instructions when given constitutes a waiver of the right to challenge the instruction on appeal. R. 1:7-2; State v. Chew, 150 N.J. 30, 82 (1997), cert. denied, 528 U.S. 1052 (1999). Pursuant to R. 1:7-2, if a jury charge is not the subject of an objection at trial, appellate review is available only if the alleged defect rises to the level of plain error as defined in R. 2:10-2. Plain error in the jury charge "requires demonstration of '[l]egal impropriety…prejudicially affecting the substantial rights of the defendant 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. Burns, 192 N.J. 312, 341 (2007) (quoting State v. Jordan, 147 N.J. 409, 422 (1997)).

Here, the trial judge properly instructed the jury on the law as it existed at the time of defendant's jury trial, verbatim of the Model Jury Charge. More than six months later, however, the New Jersey Supreme Court stated a new rule, adding an objective component to the subjective mens rea inquiry of recklessness. Fair, 256 N.J. at 237. The rule in Fair was premised on a new United States

Supreme Court opinion in Counterman v. Colorado, 600 U.S. 66 (2023), also decided after the instant trial, which established the federal constitutional requirements for a true threats prosecution, affirming that a mens rea of recklessness sufficed. Fair, 256 N.J. at 226-33.

In Fair, the New Jersey Supreme Court stated that it departed from Counterman and from New Jersey's existing Model Jury Charge "in one minor respect." Id. at 237. The Fair Court held that, in addition to a subjective mens rea of at least recklessness, an objective component was necessary. Ibid. The Court concluded that the determination of whether the threat of violence must be of such a nature as to convey menace or fear of a crime of a violence must be made not "from the perspective of an anonymous ordinary person, but from the perspective of a reasonable person similarly situated to the victim." Id. at 237-38.

The concern in adding the objective element was to assure consideration of whether it was objectively reasonable for the victim to fear for their safety in the context of their experiences with the perpetrator. Id. at 238. The Court explained that "context matters," in terms of considering prior interactions between the parties, to protect against convictions "for statements made in jest, political dissent, or angry hyperbole, while allowing the State to prosecute true threats of violence that would instill fear of injury in a reasonable person in the victim's position." Id.

at 238-39. The Fair Court asked the Model Criminal Jury Charges Committee to review the model charge, accordingly, indicative of its new rule. Id. at 239.

Finally, when a decision sets forth a new rule, three factors are considered to determine whether to apply the rule retroactively: "'(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice.'" State v. G.E.P., 243 N.J. 362, 386 (2020) (quoting State v. Henderson, 208 N.J. 208, 300 (2011)). Courts also consider "more generally … what is just and consonant with public policy in the particular situation presented." State v. Dock, 205 N.J. 237, 255 (2011) (quoting State v. Cummings, 184 N.J. 84, 97 (2005)). Once retroactivity is deemed appropriate, a determination must be made as to which "retroactivity option is to be chosen." Dock, 205 N.J. at 256. The new rule may be applied: (1) "purely prospectively"; (2) "in future cases and in the case in which the rule is announced, but not in any other litigation that is pending or has reached final judgment at the time the new rule is set forth"; (3) "in all future cases, the case in which the rule is announced, and any cases still on direct appeal," known as "pipeline retroactivity"; or (4) completely retroactively. Ibid.

Here, the State maintains that Fair's new rule should not be applied retroactively, but that even if it is given pipeline retroactivity, reversal is not

required under the particular circumstances of this case, as it did not affect the jury's verdict. First, there is no basis to apply Fair's new rule more than purely prospectively. The Fair Court itself referred to the change as merely "one minor respect." Fair, 256 N.J. at 237. Nothing about needing to add an objective component to the already subjective assessment threatens the integrity of a trial's "truth-finding function" nor raises "serious question[s] about the accuracy of guilty verdicts in past trials." State v. Feal, 194 N.J. 293, 308-09 (2008); see State v. Czachor, 82 N.J. 392, 409 (1980) (suggesting that complete retroactivity is largely reserved for new rules which "rest on constitutional grounds").

In addition, in terms of the "degree of reliance" factor, good-faith reliance was required as courts were bound to follow the then-prevailing model jury charge. Courts and, more importantly, victims should not be penalized with the retroactive application of a new rule in this area. Finally, while specific data regarding the kind of impact retroactive application of the new rule will have upon the administration of justice is not readily available, the existing jury charge had a long, unbroken history. In addition, the victims' interests in not having to re-live the trauma of this type of crime in a retrial is compelling. Accordingly, the State urges that, when weighing all factors bearing upon retroactivity, a purely prospective application of the new rule is appropriate.

But second, even if the new rule is given pipeline retroactivity, reversal is not required under the particular circumstances of this case, as it did not affect the jury's verdict. There was no plain error in the trial court's failure to anticipate the objective component of the recklessness inquiry, in terms of having the jury weigh things from the perspective of a reasonable person similarly situated to the victim, rather than an anonymous ordinary person. Given the specific facts of this case, the testimony of the victim, and the arguments made at trial, there was no risk that this "minor" aspect of the charge possessed a clear capacity to bring about an unjust result.

At the outset, defense counsel actually presented this argument to the jury, and the jury rejected it. In summation, defense counsel's focus was precisely on the victim as a judge "just doing his job," and urging the jury to find that the victim overreacted to "absurd" allegations because he "has been working as an attorney for two decades and [been] a judge for half a decade." (4T12-5 to 11). Rather than arguing about how the ordinary victim would react, defense counsel specifically urged the jury to consider the threats from the perspective of someone similarly situated to the victim, arguing that the victim was "not new to disgruntled people." (4T12-12). Defense counsel argued that, as a judge, dealing with "disgruntled people," such as defendant, this was "par de course [sic.], business as usual." (4T12-14). Defense counsel continued, the victim was "[s]omeone who knows

that when people come to court they're experiencing some of the most difficult or frustrating or annoying times in their lives. Someone who has first hand experience with hundreds…thousands of people in the public who's dealt with disgruntled folks on multiple, multiple, multiple occasions. And he stood before you and told you he was afraid of a few voicemails." (4T13-3 to 10). Even with respect to the stalking charge, defense counsel expressly addressed how the victim's reaction of fearing for his safety was not reasonable when viewed from the perspective of someone in his circumstances: "[T]his was not reasonable. There was nothing to fear here….no real threat. And certainly nothing for a reasonable person to be afraid of. Especially a reasonable person who had worked in the legal system for 20 years." (4T20-19 to 21-3) (emphasis added). The jury heard these very arguments, and rejected them.

Finally, even if the new rule had been in place, the victim's testimony made it clear that the result would have been the same when judged by the perspective of a person similarly situated to the victim. At trial, the victim specifically testified that, while he had experienced frustrated litigants before, nothing like this had ever happened to him before, he had never been called or physically threatened, either as a judge or when he had been a municipal prosecutor. (3T54-12 to 55-17). Therefore, if the jury were to view the threats from the perspective of someone similarly situated to the victim, it would not have been any different than from that

of the ordinary reasonable person. The actual context of someone in the victim's shoes would include someone who had never received these types of threats before. The facts of this particular case do not justify a finding that the result would have been different with a revised jury charge in this "one minor respect." Fair, 256 N.J. at 237.

Accordingly, defendant has presented no reason to support a finding of error, much less, plain error in the terroristic threats charge, to compel reversal of defendant's conviction.

POINT II

THE PROVISION OF THE TERRORISTIC THREATS STATUTE ENHANCING THREATS MADE DURING A STATE OF EMERGENCY IS CONSTITUTIONAL. [Not Raised Below.]

Again raising a claim for the first time on appeal, defendant now argues that the terroristic threats enhanced statute violated substantive due process as applied to defendant, for failing to require a nexus between a threat of violence and a public emergency declaration. (Db14-22). Defendant maintains that the State had "no legitimate interest" in punishing defendant's statements more harshly because they occurred during the pandemic, as defendant's threatening statements were allegedly "altogether unrelated to the existence of the pandemic." (Db20-21). Defendant provides no legal support for this belated claim.

At the outset, defendant's constitutional claim should not be considered because it was not raised below. It is well-understood that courts "will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." State v. Robinson, 200 N.J. 1, 20 (2009) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)). Defendant's claim fits neither category.

Notwithstanding the procedural deficiency, defendant's claim also lacks substantive merit. Notably, while this Court had found the reckless-disregard portion of subsection (a) unconstitutional in State v. Fair, 469 N.J. Super. 538, 541 (App. Div. 2021), rev'd in part by 256 N.J. 213 (2024), this Court noted in dictum that "the remaining provisions [of the statute]…clearly pass constitutional muster."

Substantive due process, as applied to a statute, requires only that the statute have a rational basis. "[A] state statute does not violate substantive due process if the statute reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory. Briefly stated, if a statute is supported by a conceivable rational basis, it will withstand a substantive due process attack." Greenberg v. Kimmelman, 99 N.J. 552, 563 (1985) (citations omitted); see also Matter of M.H., 475 N.J. Super. 580, 593 (2023), certif. denied, 256 N.J. 195 (2024).

Review involves significant deference to the judgment of the legislative body regarding both the propriety of the governmental involvement in the area covered by the legislation, and the reasonableness of the means chosen to achieve the legislative goals. See, e.g., Orange Taxpayers Council, Inc. v. City of Orange, 83 N.J. 246, 356 (1980) (employing "judicial deference to the judgment of elected lawmakers…." In

review of a substantive due process challenge); Hutton Park Gardens v. Town Council of Town of West Orange, 68 N.J. 543, 564-65 (1975) ("statutes[] carry a presumption of validity"…."Legislative bodies are presumed to act on the basis of adequate factual support and…it will be assumed that their enactments rest upon some rational basis within their knowledge and experience.").

Here, the state-of-emergency provision of the terroristic threats statute is neither arbitrary nor discriminatory, and is rationally related to the legitimate legislative purpose of providing essential tools to law enforcement to combat terrorism. See Sponsor's Statement to to S.775 23-27 (L. 2002, c. 26); Sponsor's Statement to S.1296 18-20 (L. 2002, c. 26). (Excerpted in Pa12-19). The Legislature clearly had a rational basis to enhance punishment for threats to commit crimes of violence made during declared periods of emergency. See State v. Maldonado, 137 N.J. 536, 552 (1994). As the United States Supreme Court has recognized, a "prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders[.]'" Virginia v. Black, 538 U.S. 343, 360 (2003) (citation omitted). It is reasonable to consider a threat even more dangerous and disruptive when committed during a state of emergency, when public sensitivities and fears are already heightened, as was certainly

the case during the COVID-19 pandemic. Municipal court was still being conducted on Zoom at the time of the instant offenses. (3T9-4 to 13). And, of course, there is no denying the national emergency that was the coronavirus pandemic, which would claim over one million American lives, including over 36,000 New Jerseyans. See https://covid.cdc.gov/covid-data-tracker/#maps_deaths-total.

The potential for injury by a defendant, who is threatening to commit acts of violence with the purpose to terrorize a victim, is enhanced during a global pandemic regardless of whether that defendant took express advantage of the pandemic conditions. At the time defendant terrorized the victim in this case, our courts were still subject to Executive Orders, and citizens continued to shelter in place. Threats to commit crimes of violence at the victim's home and office, made during that state of emergency, rationally served to heighten the fear and anxiety engendered by piercing the sanctity the emergency declarations aimed to restore.

Defendant's reliance on out-of-state statutory schemes regarding unrelated subjects as requiring a nexus to accomplish their purpose is misplaced. (Db18-20). Defendant recognizes that none of those statutes relate to a terroristic threats enhancement. (Db18). Those few cases defendant references all involve crimes that require a nexus to further the

purpose of the enhancement legislation in order to distinguish them from status crimes.

Rather, the instant legislation is more like that recently upheld in Illinois, where the crime itself furthers the purpose of the enhancement. See, e.g., People v. Villareal, 216 N.E.3d 188 (Ill. 2023) (rejecting a substantive due process challenge to the gang enhancement penalties set forth in the unlawful possession of a firearm in public areas by a street gang member, under 720 Ill. Comp. Stat. Ann. 5/24-1.8(a)). In rejecting a substantive due process challenge to the enhanced penalty statute, the Illinois Supreme Court recognized that "the legislature's decision to increase the penalty was reasonable and rationally related to its stated purpose of curbing gang violence against innocent citizens in public areas." Villareal, 216 N.E.3d at 197. Specifically, the Villareal court rejected a nexus challenge, like the one proffered in the instant appeal, reasoning that the legislature did not increase penalties for all offenses committed by a gang member, but rather, only targeted the specific violence of gang members possessing firearms in public areas to further the legislative purpose. Ibid. The court reasoned, "While requiring the possession of the firearm to be directly connected to specific gang activity may be an alternate means of accomplishing the legislative

purpose, the rational basis test does not require the statute to be the best means of accomplishing the legislature's objectives." Ibid.

Defendant's belated claim is nothing more than a veiled attempt to legislate, which should be rejected. As the Villareal court put it, "The determination of the best means to achieve the legislative goal is best left to the legislature, not the courts." Id. at 197.

POINT III

THERE WAS NO PLAIN ERROR IN FAILING SUA SPONTE TO RECUSE ALL OF THE ATLANTIC COUNTY SUPERIOR COURT JUDICIARY, WHERE DEFENDANT FAILED TO IDENTIFY A SINGLE INSTANCE OF BIAS, OR THE APPEARANCE OF IMPROPRIETY. [Not Raised Below.]

Again raising a claim for the first time on appeal, defendant claims that the entirety of the Atlantic County judiciary should have been recused from the case, sua sponte. (Db23-25). Without identifying a single instance of actual bias or prejudice arising from Judge D'Arcy's involvement in presiding over the proceedings, defendant maintains that the sheer fact that a part-time Municipal Judge was the victim prompts sua sponte recusal of every Superior Court judge in the county. (Db23-25). Defendant's belated claim is belied by the facts and the law, especially when weighed against the overwhelming objective evidence of guilt in the case.

Because defendant did not raise this issue below, "the scope of review on appeal is narrow." State v. Walker, 385 N.J. Super. 388, 410 (App. Div. 2006). Although this Court may consider allegations of errors or omissions not brought to the trial court's attention if they meet the plain error standard under Rule 2:10-2, that standard requires first that the defendant identify an error that has a clear capacity to produce an unjust result. State v. Macon, 57 N.J. 325, 337-39 (1971).

Instead, this Court generally declines to consider issues which were not properly presented at trial. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973).

Canon 3(C)(1) of the Code of Judicial Conduct states that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Rule 1:12-1(g) similarly directs that judges shall not sit in any matter "when there is any … reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so."

Consistent with these obligations, in DeNike v. Cupo, 196 N.J. 502, 517 (2008), the Supreme Court set forth the proper standard to assess a defendant's request for recusal from a matter: "Would a reasonable, fully informed person have doubts about the judge's impartiality?" See also State v. Dalal, 221 N.J. 601, 606-07 (2015); State v. McCabe, 201 N.J. 34, 45-46 (2010) (internal quotation omitted) (requiring disqualification where judge and defense counsel were actively adversaries in another open, unresolved matter).

But while "the mere appearance of bias may require disqualification[,]...before the court may be disqualified on the ground of an appearance of bias, the belief that the proceedings were unfair must be objectively reasonable." Pantich v. Pantich, 339 N.J. Super. 63, 67 (App. Div. 2001). More specifically, the focus is not on whether the defendant suffers any prejudice, but

rather, a case-by-case analysis of the particular facts presented. See Dalal, 221 N.J. at 606-07 (recognizing that the standard "calls for an individualized consideration of the facts in a given case," and noting that there is no bright-line rule for determining whether a judge acted partially).

Indeed, the specific facts matter. In Dalal, after a defendant made death threats against two judges in a vicinage, transfer to a third judge within the same vicinage justified either a transfer of venue or that a judge from another vicinage be brought in to try the case. Id. at 610. The New Jersey Supreme Court observed that "all judges in a vicinage meet together periodically and socialize as a group on occasion. Judges within a particular division also work more closely with one another on a substantive level." Id. at 609. The Court recognized that "All of those relationships can raise legitimate questions about the appearance of impartiality when a colleague presides over a case involving a serious threat against a fellow judge who serves in the same vicinage." Ibid. Notably, the Court's insights regarded judges "within a particular division." Ibid.

Here, there was no basis for sua sponte recusal of the entire Atlantic County Superior Court judiciary when the victim was a part-time municipal judge, from an entirely different division, or level of court. There is no support either in the law or in the facts of this case, for the categorical recusal defendant belatedly seeks.

Defendant's reliance on the extreme scenario of Dalal is misplaced. The camaraderie the Court described there was limited to judges working together "within a particular division," and trying a case where their close, daily, long-term colleague was the victim. In the instant case, there were two distinct levels of court involved. The Municipal Court judges of a vicinage are generally not considered to be close colleagues with the Superior Court judges. The Municipal Court judges operate in a different building, are part-time and without tenure, and, as here, often are still practicing attorneys. And, decisions by Municipal Court judges are actually reviewed by Superior Court judges, so the dynamic is supervisory.

And, contrary to the standard set forth in the law, defendant's categorical claim is completely devoid of specific facts. By defendant's rationale, all judges would theoretically be incapable of presiding over a case where one of their kind (a judge) was a victim, based on the blanket appearance of allegiance. Accordingly, defendant's belated claim should be rejected.

POINT IV

CONSISTENT WITH LEGISLATIVE INTENT, THE TRIAL COURT PROPERLY DECLINED TO MERGE THESE SEPARATE AND DISTINCT, BUT CONCURRENT, FOURTH-DEGREE OFFENSES (6T; Da53-56). [Not Raised Below.]

Although not raised below, defendant asserts that the trial judge abused her discretion by failing to merge the fourth-degree offense of harassment with the fourth-degree stalking conviction, and failing to merge the stalking conviction with the fourth-degree retaliation for past official action conviction. (Db25-30). Defendant claims these convictions should have merged because they allegedly were "encompassed" within one another. (Db25-30). The State submits that defendant's claim lacks merit. The judge explained that these crimes were independent of each other, and involving distinct harms and time periods, constituting justification to deny merger consistent with the Davis[4] factors. Double jeopardy principles are not offended by denying merger for these concurrent fourth-degree sentences imposed based on the instant facts.

Our courts have rejected "technisms and inflexibility" when resolving merger issues. State v. Cole, 120 N.J. 321, 326 (1990); State v. Davis, 68 N.J. 69, 81 (1987). Instead, in ensuring that defendants are not punished twice for the same conduct, courts focus their flexible inquiry on the specific facts of each case, and the "episodic fragments of the events." State v. Truglia, 97 N.J. 513, 521 (1984);

[4] State v. Davis, 68 N.J. 69, 81 (1987).

State v. Miller, 108 N.J. 112, 116-17 (1987). Of course, this Court has defined "same conduct" as meaning "identical conduct," recognizing that a defendant should not be rewarded just by virtue of proximity in time or place of the crimes. State v. Fraction, 206 N.J. Super. 532, 536-39 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986). The Davis Court provided a number of factors for a judge to consider, including: "the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one count was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed." Davis, 68 N.J. at 81.

Indeed, merger may even be improper where a single course of conduct constitutes a violation of two different criminal statutes. Miller, 108 N.J. at 118; accord Fraction, 206 N.J. Super. at 536-39 (rejecting merger of convictions resulting from a single criminal episode). For instance, in Davis, the Supreme Court held that a conviction for unlawful possession of C.D.S. did not merge with a conviction for distribution. Davis, 68 N.J. at 82. Although the Court acknowledged that the same conduct could sustain both convictions since "one must indeed possess the drug in order to sell it," id. at 82, it found no evidence that the possession in that case was a "mere fleeting and shadowy incident of the sale." Id. at 83.

The merger decision, thus, focuses on the elements of the crime and the Legislature's intent in creating them. Miller, 108 N.J. at 116. The critical factor in this analysis often stems from the different interests protected by the statutes violated. Id. at 118. For instance, in Miller, the Supreme Court reversed the Appellate Division's failure to recognize the separate significance of the defendant's relationship to the victim recognized in the crime of endangering the welfare of a child. Ibid. While the convictions for aggravated sexual assault and endangering were based on "precisely the same conduct," the Supreme Court nevertheless heeded the Legislature's aim in distinguishing these offenses to treat sexual acts committed by a father on his child differently from abuses committed by a stranger. Id. at 118-19. Recognition of the Legislature's specific aim to elevate the violation of the duty that a parent owes a child, led the Miller Court to reverse the Appellate Division's judgment merging the two offenses. Id. at 120-21; see also State v. D.R., 109 N.J. 348, 377 (1988) (dictum following Miller precluding merger of a father's endangering and the aggravated sexual assault of his daughter).

Indeed, courts have held that merger is not required notwithstanding an ambiguous jury verdict, when the evidence supports a broader unlawful purpose. State v. Diaz, 144 N.J. 628, 641 (1996). As long as the jury instructions do not preclude a broader finding, and particularly if the prosecutor argues the

possibilities to the jury, merger is not required under an otherwise ambiguous jury verdict. Id. at 641-42 (finding merger required because the jury instructions were insufficient to permit a finding on both the substantive and possessory offenses, nor did the prosecutor argue for it in summation).

Here, the judge properly exercised her discretion to conclude that none of the counts merged. (6T41-4 to 15). Referencing defendant's conduct over the course of eight months, the judge explained that "these are separate criminal events. The threats were independent and separate events which occurred at separate times, some eight months apart, after defendant had been arrested and detained on the charges." (6T45-19 to 23). The judge recounted how defendant's conduct disturbed the victim's "sense of peace and safety only to have the rug pulled from under him and have the threats start up again." (6T46-3 to 4). The judge further highlighted the escalation of calling the threats into the victim's personal cell phone, making them "more palpable and invasive and indicat[ive] defendant's escalating criminality." (6T46-6 to 8). Evolving from the judge's private office in the courthouse, to placing calls, after defendant was already supposed to be secured in custody, to the judge's personal cell phone on a weekend when defendant would presume the judge was in the sanctity of his home, made the later threats "more intense, personal, more frightening and threatening because

what the defendant is saying is you will never be safe from me, I can still get you and I will get you anywhere." (6T46-16 to 19).

While the explanation was given in the context of imposing consecutive sentences on the two terroristic threats convictions, it likewise explains the judge's reasonable thought process that this conduct was not simply one eight-month episode. The threats not only repeated, but escalated, in location, and in terms of violating both the victim's professional and then personal privacy and sanctity. Indeed, even the time period between the 8/21 calls and the 4/22 calls required an enhanced police presence due to defendant's repeated threats, making the impact of defendant's crimes ongoing. Factually, therefore, these fourth-degree offenses were properly viewed as separate crimes.

Indeed, the stalking charge (Count Seven) in this case reflected the trauma defendant's conduct continued to cause to the victim during the full eight-month timeframe from 8/23/21 to 4/13/22 preceding the 4/13/22 calls that were the subject of defendant's harassment conviction (Count Five). (Da11; Da13). Defendant's August 2021 conduct constituted stalking by virtue of serving to repeatedly exceed harassment, and the harassment that occurred on 4/13/22 differed both in time and in location, calling to the judge's personal cell phone eight months later, as well as differed in content, by virtue of the "vulgar and sexually explicit language" charged in the indictment. (Da11; Da13). These were

properly deemed separate under the Davis factors, given the specific facts of this case.

Finally, defendant's stalking conviction (Count Seven) was likewise distinct from defendant's conviction for retaliation for past official action (Count Six), both factually and in terms of legislative intent. Of course, the elements of the offenses do not overlap, as the legislature sought to punish different aspects of bad behavior through these offenses. The legislative intent underlying the retaliation conviction, under N.J.S.A. 2C:27-5, "expresses a clear mandate of public policy that serves to protect public officials" in the exercise of official duties. MacDougall v. Weichert, 144 N.J. 380, 398 (1996). That aspect of protecting public officials is entirely distinct and absent from the anti-stalking statute, evidencing the legislative intent to punish bad conduct for different reasons. Specifically, the retaliation conviction punishes a person for harming another "by any unlawful act with purpose to retaliate for or on account of the service of another as a public servant." N.J.S.A. 2C:27-5. It is not just "the unlawful act" that the legislature sought to punish, but also, it is the defendant's specific purpose in engaging in that "unlawful act." So while the "unlawful act" referenced within the retaliation elements may have included stalking, the retaliation crime contains elements beyond the elements of stalking.

Moreover, the "unlawful act" referenced in the retaliation offense was expressly defined by the judge in its charge to the jury as constituting "terroristic threats or harassment or stalking," and the verdict sheet appropriately did not specifically indicate which was found. (4T62-21 to 25; Da51). Contrary to defendant's claim on appeal, the jury was not so limited to consider only stalking as the "unlawful act" underlying the retaliation conviction. (Db29 n.7). The trial judge properly heeded the Legislature's aim in distinguishing these offenses.

Accordingly, failing to merge these concurrent fourth-degree offenses was well-supported.

POINT V

THE STATE AGREES TO A REMAND TO CLARIFY THE FACTUAL BASIS FOR IMPOSING CONSECUTIVE TERMS; THERE IS NO OTHER BASIS TO DISTURB THE TRIAL COURT'S REASONABLE EXERCISE OF DISCRETION (6T; Da53-56). [Partially Raised Below.]

The State agrees to a remand to clarify the factual basis for imposing consecutive terms on the two terroristic threats convictions. (Db30-39). While the State maintains that consecutive terms should not be foreclosed upon remand, the record requires clarification regarding the fact that both terroristic threats charges stemmed from the same date of August 23, 2021, albeit at separate times that day, rather than eight months apart. (6T44-14 to 48-4; Da7-8).

The State respectfully submits that comprehensive appellate review of sentencing should be reserved for after any remand, because the finding and weighing of aggravating and mitigating factors should be based upon a defendant as he "stands before the court on the day of sentencing." State v. Rivera, 249 N.J. 285, 299 (2021). The State only notes that the trial court's rejection of mitigating factor eight (conduct not likely to recur) was appropriately based on the entirety of defendant's conduct, rather than focusing only on certain counts underlying a Yarbough[5] analysis, so defendant's complaint about consecutive sentencing does not extend to the trial judge's rejection of mitigating factor eight. (Db36). In

[5] State v. Yarbough, 100 N.J. 627 (1985).

rejecting mitigating factor eight, the trial judge properly considered the fact that this was defendant's third conviction for terroristic threats. (6T43-19 to 24).

CONCLUSION

For the reasons expressed, the State respectfully requests that this Court affirm the defendant's conviction, but remand for resentencing consistent with Point V.

Respectfully submitted,

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August 27, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0022-23
INDICTMENT NO. 23-02-00362-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court of
v.	:	New Jersey, Law Division, Atlantic County.
NATHANIEL H. RUSSELL,	:	Sat Below:
Defendant-Appellant.	:	Hon. Pamela D'Arcy, J.S.C.,
	:	and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

TABLE OF CONTENTS

REPLY PROCEDURAL HISTORY AND STATEMENT OF FACTS

Following a jury trial in 2023, defendant-appellant Nathaniel H. Russell was convicted of two counts of second-degree terroristic threats, contrary to N.J.S.A. 2C:12-3(a); one count of fourth-degree harassment, contrary to N.J.S.A. 2C:33-4(e); one count of fourth-degree retaliation for past official action, contrary to N.J.S.A. 2C:27-5; and one count of fourth-degree stalking, contrary to N.J.S.A. 2C:12-10(b). Mr. Russell filed his plenary brief on May 7, 2024, in which he raised four points challenging the conviction and one point challenging the sentence. (Db)[1] The State filed its responding brief on August 15, 2024. (Pb)

Mr. Russell now files this reply brief in which he responds to the State's Point I concerning the retroactivity of the Supreme Court's decision in State v. Fair[2] and Point II concerning the constitutionality of the emergency enhancement in the terroristic threats statute. (Pb 9-22) Mr. Russell additionally relies on the detailed procedural history and statement of facts in his opening brief. (Db 4 to 10)

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[1] Pb – State's response brief
Db – Defendant's opening brief
Da – Defendant's appendix to his opening brief

[2] 256 N.J. 213 (2024).

LEGAL ARGUMENT

Mr. Russell relies on the legal argument from his initial brief and adds the following. (Db 11 to 39)

REPLY POINT I[3]

THE SUPREME COURT DID NOT ANNOUNCE A NEW RULE IN FAIR, BUT IF IT DID, PIPELINE RETROACTIVITY IS REQUIRED, AND CONSTITUTIONALLY DEFICIENT JURY INSTRUCTIONS ON THE ELEMENTS OF AN OFFENSE ARE REVERSIBLE ERROR.

In Point I of his plenary brief, Mr. Russell explained that his terroristic threats convictions must be reversed because the jury was never instructed on the objective element of a true threat: that a reasonable person similarly situated to the victim would have interpreted the words as threatening violence. The State responds that the Supreme Court's decision in State v. Fair announced a new rule that should not be enforced retroactively. 256 N.J. at 239. (Pb 9-13) In addition, the State argues that any deficiency in the jury instructions was harmless error. (Pb 13-16) These arguments are fundamentally flawed.

1. No retroactivity analysis is required because Fair did not announce a new rule.

The first question in any retroactivity analysis is whether the cited legal

[3] This Point replies to Point I of the State's brief. (Pb 9-16)

proposition constitutes "a new rule of law." State v. G.E.P., 243 N.J. 362, 382 (2020) (quoting State v. Feal, 194 N.J. 293, 307 (2008)). When an appellate court has not announced a new rule of law, "retroactivity is not an issue." State v. Harvey, 121 N.J. 407, 422 (1990). To be deemed a new rule of law for retroactivity purposes, a court's holding must represent "a departure from existing law." State v. Burstein, 85 N.J. 394, 403 (1981).

Fair did not set forth a new rule of law. Contrary to the State's view, the Fair Court's critical pronouncement was not that jurors must be given a particular instruction on the elements of a terroristic threat, but rather that, as a matter of constitutional law, any prosecution for true threats – a narrow exception to constitutional free speech guarantees – requires an objective inquiry into whether a reasonable person similarly situated to the victim would have understood the defendant's words as threatening violence. In other words, Fair clarified the elements of the crime of terroristic threats, N.J.S.A. 2C:12-3(a), so that prosecutions under that statute would comport with the free speech protections of both the Federal and State Constitutions. That a jury must be accurately instructed on those elements is not new, nor is it a rule that comes from Fair – it is a longstanding, elementary principle of criminal prosecutions. State v. Burgess, 298 N.J. Super. 254, 261 (App. Div. 1997) ("It is . . . clear that a charge which fails properly to define the substantive

elements of the offense is ordinarily fatal to the ensuing conviction."). And, in any case, a decision that clarifies the elements of an offense that "had not been properly charged to the jury . . . [does] not create a new rule of law." State v. Afanador, 151 N.J. 41, 58 (1997).

Fair's definition of the objective element of a true threat is also not a new rule. Fair reached the Supreme Court as an appeal as of right under Rule 2:2-1(a)(1), which requires that the constitutional question presented be yet unsettled. E. Windsor Mun. Utils. Auth. v. Shapiro, 57 N.J. 168, 170 (1970) ("[A]n appeal as of right is maintainable only where the record reveals a substantial rather than merely a colorable question arising under the federal or state constitutions that has not been the subject of a conclusive judicial determination." (emphasis added)). An appellate court's answer to an unsettled question cannot be a "departure from existing law." Burstein, 85 N.J. at 403.

Moreover, Fair's statement of the objective element of a true threat was a straightforward application of the free speech protections provided by the First Amendment to the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution. Fair, 256 N.J. at 237. Those protections are hardly new -- the First Amendment remains unchanged since 1791; the free speech provisions of the New Jersey Constitution since 1844. See U.S. Const. amend. I; N.J. Const. of 1844 art. I, ¶ 5.

2. If Fair announced a new rule, then federal and state retroactivity law requires that it apply to cases on direct appeal.

Even if Fair had announced a new rule, federal and state retroactivity analyses favor, at a minimum, pipeline retroactivity – that is, the application of Fair to cases on direct appeal. Federal retroactivity law is clear on this: The "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," and there is "no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 322, 412 (1987). Our state courts recognize that the Griffith standard is "now well-established" and applies to new federal constitutional rules. State v. Wessells, 209 N.J. 395, 412 (2012).

Under New Jersey's retroactivity principles, the result is the same. Three factors guide the analysis: "(1) the purpose of the rule and whether it would be furthered by a retroactive application, (2) the degree of reliance placed on the old rule by those who administered it, and (3) the effect a retroactive application would have on the administration of justice." G.E.P., 243 N.J. at 386 (quoting State v. Henderson, 208 N.J. 208, 300 (2011)). The factors are "not accord[ed] . . . equal weight"; rather, the first factor is often decisive. Ibid.

First, the purpose of the Fair decision is to "foster[] 'the reliability of the

truth-finding process'" by protecting defendants from unconstitutional and inaccurately rendered guilty verdicts. Afanador, 151 N.J. at 59. This is "the pivotal consideration" to be accorded the greatest weight and strongly favors retroactive effect. Burstein, 85 N.J. at 406-08 (contrasting rules designed to obtain accurate verdicts, which are given retroactive effect, with those designed to deter illegal police conduct, which generally are not). The question then is whether the second and third factors can "outweigh the first." G.E.P., 243 N.J. at 386-88. They cannot.

The State incorrectly asserts that the second factor, the degree-of-reliance factor, favors prospective application because courts have relied on the pre-Fair model jury charge. But a model jury charge "is not considered a long-standing practice for purposes of the reliance argument." Afanador, 151 N.J. at 58; see also Burgess, 298 N.J. Super. at 270 (noting that model jury charges provide poor grounds for reliance given they are "entirely unofficial" and "[do] not have the weight of law"). As to the third factor, the effect that pipeline retroactivity would have on the administration of justice is likely insignificant, given that the ruling would apply to a very narrow subset of criminal defendants: defendants convicted of making true threats, who were convicted after a jury trial rather than a guilty plea, and who have not yet completed their appeals. Thus, marginal reliance interests or administration-of-

justice considerations are easily overwhelmed by the first factor – that the ruling's purpose is to protect defendants from unconstitutional convictions.

In sum, because Fair did not announce a new rule of law, there is no need for this Court to proceed to a retroactivity analysis. But if this Court were to determine that the decision amounted to a new rule, federal and state retroactivity law require its application to Mr. Russell's case. Fair therefore entitles Mr. Russell to a new trial.

3. Failure to instruct the jury on the element of an offense is reversible error, and arguments of counsel are no substitute for correct instructions from the court.

The State argues in the alternative that if Fair applies to Mr. Russell's appeal, failure to instruct the jurors on the material elements of the crime was harmless error. The State is wrong. In criminal cases, failure to provide clear and correct jury instructions on material issues – such as the elements of the crime – is presumed to be reversible error. State v. Jordan, 147 N.J. 409, 422 (1997).

"[P]roper jury instructions are essential to a fair trial." State v. McKinney, 223 N.J. 475, 495 (2015) (quoting State v. Green, 86 N.J. 281, 287 (1981)). Trial courts therefore have "an 'independent duty . . . to ensure that the jurors receive accurate instructions on the law as it pertains to the facts and issues of each case.'" State v. Cooper, 256 N.J. 593, 608 (2024) (quoting State

v. Reddish, 181 N.J. 553, 613 (2004)). Nowhere is that duty "more critical [than] in a criminal case when a person's liberty is at stake." McKinney, 223 N.J. at 496 (quoting Green, 86 N.J. at 296).

Thus, a conviction must be reversed – even on review for plain error – if the jury was not properly instructed on an essential element of the offense. See State v. Grate, 220 N.J. 317, 329-334 (2015) (finding plain error because the trial court failed to instruct the jury that "knowingly" modified all material elements of the offense); Afanador, 151 N.J. at 55-56 (finding plain error where the trial court failed to instruct the jury on an essential element of the drug kingpin statute); State v. Federico, 103 N.J. 169, 176 (1986) ("[W]e recognize that the failure to charge the jury on an element of an offense is presumed to be prejudicial error, even in the absence of a request by defense counsel."); State v. Roberson, 246 N.J. Super. 597, 601, 697 (App. Div. 1991) (finding plain error because the jury was not instructed on an essential element, the weight of the cocaine, even though the evidence was "uncontradicted").

The State argues that the trial court's fundamental obligation to instruct jurors on the elements of an offense was satisfied by comments made by defense counsel in summation. It was not. "[A]rguments of counsel can by no means serve as a substitute for instruction by the court." State v. Townsend,

186 N.J. 473, 499 (2006); see also State v. Eldridge, 388 N.J.Super. 485, 496 (App. Div. 2006) ("If a jury instruction is faulty, arguments by a defense attorney in closing by no means serve as a substitute for proper instructions from the court.").

Indeed, that argument obscures the true deficiency in the jury instruction. Though defense counsel pointed out to jurors that the victim had experience with disgruntled litigants, jurors were not told they were required to consider that experience, nor his experience with Mr. Russell in particular, as an element of the terroristic threat charges. Further, jurors were also advised – correctly – that they must "accept and apply" the law as given to them by the court, not the attorneys. (4T 43-16 to 21) They were never instructed that the State had to prove beyond a reasonable doubt that a reasonable person similarly situated to the victim would have viewed Mr. Russell's words as threatening. Jurors deliberated on Mr. Russell's guilt with a constitutionally deficient understanding of the State's burden of proof. That requires reversal of Mr. Russell's convictions.

REPLY POINT II[4]

THIS COURT IS NOT BARRED FROM CONSIDERING ON APPEAL MR. RUSSELL'S CLAIM THAT THE SECOND-DEGREE ENHANCEMENT IN THE TERRORISTIC THREATS STATUTE IS UNCONSTITUTIONAL, AND THE STATE HAS FAILED TO IDENTIFY AN INTEREST IN PUNISHING MORE HARSHLY THREATS THAT ARE ENTIRELY UNRELATED TO AN EMERGENCY DECLARATION.

The State's assertion that State v. Robinson precludes appellate review of a constitutional objection not raised below "unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest" ignores the well-settled plain error standard of review. 200 N.J. 1, 20 (2009). As the very next sentence in Robinson, which the State neglects to quote, explains,

> [T]he limitation on the scope of appellate review is not absolute; it is subject to finite, qualified exceptions. . . . [O]ur . . . appellate courts are empowered, even in the absence of an objection, to acknowledge and address trial error if it is "of such a nature as to have been clearly capable of producing an unjust result." . . . Further, our appellate courts retain the inherent authority to 'notice plain error not brought to the attention of the trial court[,]' provided it is 'in the interests of justice' to do so. R. 2:10-2.
>
> [Ibid.]

[4] This Point replies to the State's Point II. (Pb 17-22)

In Robinson, the issue the Court declined to consider for the first time on appeal was highly fact-sensitive, so failure to initially pursue the claim in the trial court "denied any reviewing court the benefit of a robust record within which the claim could be considered." Id. at 21. By contrast, this challenge is a legal claim – that the emergency enhancement in the terroristic threats statute violated Mr. Russell's due process rights. Unlike in Robinson, there are no "factual shortcomings" in the record that would be "dispositive" as to preclude full and fair consideration of this issue on appeal. Id. at 20. And there can be no question that a conviction in violation of substantive due process principles would be "an unjust result." R. 2:10-2. The State's claim that this Court lacks jurisdiction to consider this issue on appeal is therefore without merit.

The State's substantive argument also fails. The State does not explain how general concerns about COVID-19 increased the harm of a private threat of violence simply because the threat was received before Governor Murphy rescinded his pandemic emergency orders.

The State's reliance on People v. Villareal to reject a nexus requirement is misplaced. 216 N.E.3d 188 (Ill. 2023). The Illinois Supreme Court in fact found there was a "direct connection" – or nexus – between the legislative goal of reducing gang violence in public areas committed by armed gang members and the criminalization of public possession of firearms by gang members. Id.

at 197. On that basis, the court distinguished the Illinois law from the gang-enhancement laws found unconstitutional in Florida v. O.C., 748 So. 2d 945 (Fla. 1999), and Tennessee v. Bonds, 502 S.W.3d 118 (Tenn. 2016), cited in Mr. Russell's brief (Db 19), which "failed to even obtusely target gang-related criminal activity." Villareal, 216 N.E.3d at 197 (internal quotation marks omitted). The Villareal Court recognized that something more than coincidence – a connection, a nexus – is needed. Here, an equivalent "direct connection" could be found between an emergency declaration and a threat of violence that exploits or causes greater harm as a result of that emergency. (See Db 21) But where there is no nexus – where the existence of the emergency is purely incidental to the threat uttered by a defendant – the State has no legitimate interest in increasing the penalties for that threat. Punishing Mr. Russell's statements more harshly simply because they were uttered before Governor Murphy's COVID-19 orders expired bears no reasonable relationship to the Legislature's anti-terrorism goals.

The State further asserts that the law is "neither arbitrary nor discriminatory." (Pb 19) But the State fails to address the fact that the country has been perpetually under a state of emergency since the emergency-enhancement's enactment in 2002 (see Db 22-23), so that every terroristic threat under subsection (a), from 2002 to the present day, could be prosecuted

as a second- rather than third-degree crime. Without a nexus requirement, there are no limits on the application of the second-degree enhancement, leaving the law highly susceptible to arbitrary and discriminatory enforcement.

For these reasons and those laid out in Mr. Russell's initial brief, the second-degree enhancement imposed on his terroristic threats charges was unconstitutional.

CONCLUSION

For the reasons in this reply and in Mr. Russell's initial brief, his convictions require reversal.

Respectfully submitted,

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Dated: August 27, 2024