DISSENT BY ACOBA, J.

I would accept the application for writ of certiorari because Petitioner/Defendant-Appellant Todd Nishihara (Petitioner) has plainly raised compelling First Amendment arguments that justify further examination of the constitutionality of our terroristic threatening statute. The issue of the requisite state of mind for criminal threats, in light of the First Amendment, was raised at the circuit court level, addressed by the Intermediate Court of Appeals (the ICA), and posed as the sole question by the application.

For example, in his opening brief, Petitioner argued that "recent United States Supreme Court and Federal Ninth Circuit Court of Appeals cases have found that speech may be deemed unprotected by the First Amendment of the United States Constitution as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat[,]" mentioning both Virginia v. Black, 538 U.S. 343 (2003), and United States v. Cassel, 408 F.3d 622 (9th Cir. 2005), discussed herein, and attaching a copy of the First Amendment, and arguing additional federal cases in his reply brief. Respondent/Plaintiff-Appellee State of Hawai'i (Respondent) attempted to distinguish Black and Cassel in its answering brief. The ICA ruled against Petitioner on this constitutional issue. In his application, Petitioner asks whether "the trial court violate[d] the First Amendment" in its instructions. Thus, the record in this case is clear.

Because the question raised warrants "further appeal," HRS § 602-59, this court should grant certiorari.

I.

Petitioner was convicted of terroristic threatening in the second degree.[1] At trial, Petitioner objected to the trial court's jury instruction which stated, "A person commits the offense of Terroristic Threatening in the Second Degree if, in reckless disregard of the risk of terrorizing another person . . . on First Amendment grounds." (Emphasis added.) In his opening brief Petitioner submitted that under Cassel, only an "intentional" threat is a "true threat" unprotected by the First Amendment. He argued that there was a reasonable possibility that the court's error (by instructing the jury as to a reckless but not intentional state of mind) contributed to his conviction, and the jury may have concluded that he did not intend to threaten the victims.

In response, Respondent submitted that the Cassel court specifically noted that its opinion did not address statutes which do not require the government to prove subjective intent. Therefore, according to Respondent, Cassel leaves untouched the reasonable person analysis for HRS § 707-717. Respondent further argued that any error regarding the jury instructions was harmless, as substantial evidence established that Petitioner subjectively intended to threaten the victims.

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[1] Hawai'i Revised Statutes (HRS) § 707-717(1) (1993).

On appeal, the ICA affirmed Petitioner's conviction, and stated that "the trial court instructed the jury consistent with the applicable statute." State v. Nishihara, No. 27537, SDO at 2 (App. Sept. 15, 2006). The ICA rejected Petitioner's argument that a terroristic threat done in reckless disregard of the risk of terrorizing is not a true threat, and protected by the First Amendment. Id. at 3. The ICA quoted Black, and reasoned that "a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur." Id. However, the Supreme Court's opinion referenced an "intentional" state of mind as applicable.

II.

In Black, defendants were convicted under Virginia's cross burning statute. 538 U.S. at 348. The statute provided that, "[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate . . . ." Id. (emphasis added). On appeal, the Virginia Supreme Court held that the cross burning statute was facially unconstitutional. Id. at 351.

The United States Supreme Court disagreed insofar as "[a] ban on cross burning carried out with the intent to intimidate . . . is proscribable under the First Amendment." Id.

at 363. However, the Court reasoned that under the First Amendment, the State may only ban "true threats" which "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Id. at 359 (emphasis added). The Court further stated that "[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Id. at 360 (emphasis added).

A plurality of the Court held that the prima facie evidence provision ("Any such burning of a cross shall be prima facie evidence of an intent to intimidate.") rendered the statute unconstitutional. Id. at 364. The plurality reasoned that it allows the State to convict a person "solely on the fact of the cross burning itself," id., and "ignores all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate[,]" id. at 367 (emphasis added). "The First Amendment does not permit such a shortcut." Id.

Two courts have interpreted the Black definition of a true threat[2] as requiring a subjective intent to threaten. In Cassel, the Ninth Circuit followed Black and held that "speech

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[2] True threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." Black, 538 U.S. at 359 (emphasis added).

may be deemed unprotected by the First Amendment as 'true threat' only upon proof that the speaker subjectively intended the speech as a threat." 408 F.3d at 633. The Ninth Circuit stated that under the Supreme Court's definition of true threats in Black, "only intentional threats are criminally punishable consistently with the First Amendment." Id. at 631. In addition, the communication itself must be intentional and the speaker must intend for his or her language to threaten the victim. Id.

In addition, the Tenth Circuit has stated that true threats "must be made 'with the intent of placing the victim in fear of bodily harm or death.'" United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting Black, 538 U.S. at 360). "An intent to threaten is enough; the further intent to carry out the threat is unnecessary." Id. (citing Black, 538 U.S. at 360). See also Paul T. Crane, "True Threats" and the Issue of Intent, 92 Va. L. Rev 1225 (2006) (detailing the inconsistent interpretations of Black, and advocating for the adoption of a subjective intent to threaten).

Several courts have interpreted Black to require an intent to communicate, rather than an intent to threaten. See generally Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616 & n.26 (5th Cir. 2004) (noting that under Black, a threat must be intentionally or knowingly communicated to either the object of the threat or a third person (emphasis added)); New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457 (S.D. N.Y. 2006) (following Porter); United States v. Ellis, No. CR. 02-687-1, 2003 WL

22271671, at *4 (E.D. Pa. July 15, 2003) (declining to hold that Black requires a subjective intent standard, and also stating that Black requires that the speaker must have some intent to communicate the statement, meaning that the statement may not be a product of accident, coercion or duress) (emphasis added); People v. Pilette, No. 266395, 2006 WL 3375100, at *5 (Mich. App. Nov. 21, 2006) (The relevant intent is the general intent to communicate a "serious expression of an intent to commit an act of unlawful violence." Whether the speaker communicated the "true threat" with the specific intent to cause the person to whom the threat was communicated to feel threatened is irrelevant to determining whether the communication was a true threat. (Emphasis added.)).

Some jurisdictions, however, have not interpreted Black to require a subjective intent to threaten. In United States v. Floyd, 458 F.3d 844, 846-47 (8th Cir. 2006), defendants were convicted of mailing threatening communications. On appeal, defendants cited Black and contended that the trial court erred in refusing to instruct the jury that intent to threaten was an element of the offense. Id. at 847. The Eighth Circuit affirmed and declined to require the element of intent to threaten. Id. at 848. But that court distinguished Black and Cassel because as defendants did not submit a First Amendment challenge in the present case, id. at 848 & n.2, existing Eighth Circuit precedent (decided after Black) did not require an intent to threaten under the statute in question - and the determination that such

precedent was faulty in light of Black should be decided en banc, id. See also United States v. Romo, 413 F.3d 1044, 1051 n.6 (9th Cir. 2005) (noting that the present case did not raise First Amendment issues, and declining to extend Cassel and its requirement of subjective intent to threaten for Presidential threats).

III.

The Hawaii Revised Statutes' formulation of terroristic threatening may be inconsistent with the United States Supreme Court and Ninth Circuit's definition of a true threat insofar as it permits "reckless" as the state of mind sufficient to convict. HRS § 707-715 provides that:

> A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:
> (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person . . . .

(Emphasis added.) Insofar as the court instructed that Petitioner could be convicted for reckless disregard of the risk of terrorizing, it may have committed harmful error. See State v. Nichols, 111 Hawai'i 327, 334, 141 P.3d 974, 981 (2006) (stating that "[e]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial" (quoting State v. Gonsalves, 108 Hawai'i 289-292-93, 119 P.3d 597-600-01 (2005) (internal citations and quotations marks omitted) (emphasis added)) (other citation omitted))).

Accordingly, I believe the case merits further review and would grant certiorari.