

No. _____

IN THE
Supreme Court of the United States

WILLIAM HILL,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY

JENNIFER N. SELLITTI, Esq.
New Jersey Public Defender

JOHN P. FLYNN, Esq.*
New Jersey Assistant Deputy Public Defender

Office of the NJ Public Defender
31 Clinton St, 9th Floor
P.O. Box 46003
Newark, New Jersey 07101
(973) 877-1200
(973) 877-1239 (fax)
John.Flynn@opd.nj.gov

Attorneys for Petitioner
**Counsel of Record*

QUESTION PRESENTED

When an appellate court concludes that a conviction for one offense violated the First Amendment, is the appellate court required to apply the harmless-error standard set forth in *California v. Chapman*, 386 U.S. 18 (1967), to determine whether to reverse the convictions for other offenses presented at the same trial?

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Petitioner William Hill respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of New Jersey, to the extent the judgment did not vacate Hill's carjacking conviction.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is reported at *State v. Hill*, 307 A.3d 1157 (N.J. 2024), and is attached as Appendix A (App. 1). The order of the Supreme Court of New Jersey denying Hill's motion for reconsideration is reported at *State v. Hill*, 309 A.3d 1290 (N.J. 2024), and is attached as Appendix B (App. 37). The opinion of the Superior Court of New Jersey, Appellate Division is partially reported at *State v. Hill*, 288 A.3d 464 (N.J. Super. Ct. App. Div. 2023), and is attached in its entirety as Appendix C (App. 38).

JURISDICTION

The Supreme Court of New Jersey denied petitioner's timely filed motion for reconsideration on March 8, 2024. Appendix B. This petition for a writ of certiorari is filed within ninety days of the order denying the motion for reconsideration. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment of the United States Constitution states in pertinent part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. . . .

Section one of the Fourteenth Amendment to the United States Constitution states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

N.J. Stat. Ann. § 2C:28-5(a) provides in pertinent part:

a. Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted or has been instituted, he knowingly engages in conduct which a reasonable person would believe would cause a witness or informant to:

- (1) Testify or inform falsely;
- (2) Withhold any testimony, information, document or thing;
- (3) Elude legal process summoning him to testify or supply evidence;
- (4) Absent himself from any proceeding or investigation to which he has been legally summoned; or
- (5) Otherwise obstruct, delay, prevent or impede an official proceeding or investigation.

Witness tampering is a crime of the first degree if the conduct occurs in connection with an official proceeding or investigation involving any crime enumerated in [N.J. Stat. Ann. § 2C:43-7.2(d)]. and the actor employs force or threat of force. Witness tampering is a crime of the second

degree if the actor employs force or threat of force. Otherwise it is a crime of the third degree. Privileged communications may not be used as evidence in any prosecution for violations of paragraph (2), (3), (4) or (5).

STATEMENT OF THE MATTER INVOLVED

This petition arises out of the State of New Jersey's prosecution of petitioner William Hill for carjacking and witness tampering during a single trial. While incarcerated pretrial after being charged with carjacking, Hill mailed a facially innocuous, polite letter to the victim. *State v. Hill*, 307 A.3d 1157, 1161, *reconsideration denied*, 309 A.3d 1290 (N.J. 2024). In the letter, Hill proclaimed his innocence, asked the victim to reconsider the certainty of her identification of Hill in a photo array, and urged her to tell the truth at trial. *Id.* at 1161-62. Although the trial court had not issued a no-contact order prohibiting Hill from contacting the victim, the State indicted Hill for witness tampering in violation of N.J. Stat. Ann. § 2C:28-5(a) and tried Hill for both carjacking and witness tampering in a single trial. The Supreme Court of New Jersey vacated Hill's witness-tampering conviction because the *mens rea* contained in the statute and on which the jury was instructed – negligence – was constitutionally insufficient under the First Amendment as applied to Hill's speech. *Id.* at 1171-73. The Supreme Court of New Jersey, however, did not analyze at all whether the carjacking conviction should be reversed because of this First-Amendment error and merely noted that it did "not disturb the conviction for carjacking." *Id.* at 1173.

This petition presents the question of whether the Supreme Court of New Jersey violated the First and Fourteenth Amendment of the United States Constitution by failing to apply the harmless-error standard set forth in *California*

v. *Champman*, 386 U.S. 18 (1967), to determine whether to reverse the carjacking conviction as a result of the First-Amendment trial error.

A. Factual Background

At about 7:00 a.m. on October 31, 2018, A.Z. left her car running outside of her home and found an unknown man in the driver's seat when she returned a few minutes later. *Hill*, 307 A.3d at 1160-61. She told the man to get out, jumped into the car through the passenger's door, and grabbed the steering wheel. *Id.* at 1161. The man drove off with A.Z.'s legs hanging out of the open passenger's door. *Id.* The man drove erratically for about four blocks, hitting several other cars and causing the car door to hit A.Z.'s back. *Id.* After A.Z. eventually shifted the gear into neutral, the man hit the brakes, jumped out of the car, and ran away. *Id.* The incident lasted about two minutes. *Id.*

A.Z. moved her car from the middle of the street to the side of the road, in front of the local police station. *Id.* About thirty minutes after the incident, she provided a formal statement and description of the culprit to the police. *Id.*; *see also State v. Hill*, 288 A.3d 464, 467 (N.J. Super. Ct. App. Div. 2023). During the trial, the State introduced into evidence video footage and still images from nearby surveillance cameras, which the State contended showed the culprit. *Id.* Although the suspect's face is indiscernible in the video and still images, App. 239-41,¹ the State argued that the images should what the suspect was wearing. *Hill*, 288 A.3d

¹ Hill's state-court appellate briefs and appendixes are included in the appendix to this petition because they are essential to understand the petition and to show when and how the federal question sought to be reviewed was raised. Sup. Ct. R. 14(1)(g)(i); Sup Ct. R. 14(1)(i)(vi).

at 467. The State also introduced into evidence photographs of Hill when he was arrested almost a month after the incident. App. 249-254. The parties heavily disputed the consistency between the clothing initially described by A.Z. during her formal statement thirty minutes after the incident, the clothing worn by the suspect in the surveillance videos, and the clothing Hill was wearing when he was arrested. App. 94-95, 98, 220-22, 262-64.

On November 6, 2018, A.Z. viewed an array of six photographs at the police station. *Hill*, 288 A.3d at 467. A detective handed A.Z. the photographs one at a time and instructed her to stack them on top of each other as she reviewed them, but instead she looked at the photographs simultaneously and compared them side by side. *Id.* The detective admitted that this simultaneous viewing was contrary to the New Jersey Attorney General's Guidelines for out-of-court identifications, which require that sequential lineups be used whenever possible. App. 96. A.Z. compared the photographs side-by-side for several minutes, told the detective that the culprit had scruffier facial hair and a darker complexion than Hill's photograph, and asked if the detective had other photographs. App. 96. At one point, she told the detective that she "really thought" the perpetrator was the man in photograph number four (a filler), but the detective said nothing in response to A. Z. possibly identifying another photograph. *Hill*, 288 A.3d at 467; App. 96. Eventually, she selected the photograph of Hill as the perpetrator with eighty percent certainty. *Hill*, 307 A.3d at 1161.

While incarcerated pending trial, Hill mailed a letter to A.Z.'s home and placed his own name on the return address. *Id.* at 1161. The trial court had not issued a no-contact order prohibiting Hill from contacting A.Z. *Id.* at 1161. The letter, as redacted for its use a trial, reads:

Dear Ms. [Z.],

Now that my missive had [sic] completed its passage throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits.

I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author *but please don't be startled because I'm coming to you in peace. I don't want or need any more trouble.*

Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with Car Jacking upon you. *You may be saying I have the audacity to write to you and you may report it but I have to get this off my chest, I am not the culprit of this crime.*

Ms. [Z.], I've read the reports and watched your videotaped statement and I'm not disputing the ordeal you've endured. I admire your bravery and commend your success with conquering a thief whose intention was to steal your vehicle. You go girl! [smiley face].

Anyway, I'm not saying your eyes have deceived you. I believe you've seen the actor but God has created humankind so close in resemblance that your eyes will not be able to distinguish the difference without close examination of people at the same time. Especially not while in wake of such commotion you've endured.

....

Ms. [Z.], due to a woman giving me the opportunity to live life instead of aborting me, I have the utmost

regards for women, therefore, if it was me you accosted, as soon as my eyes perceived my being in a vehicle belonging to a beautiful woman, I would have exited your vehicle with an apology for my evil attempts. *However, I am sorry to hear about the ordeal you had to endure but unfortunately, an innocent man (me) is being held accountable for it.*

Ms. [Z.], I don't know what led you into selecting my photo from the array, but I place my faith in God. By His will the truth will be revealed and my innocence will be proven. But however, I do know He works in mysterious ways so I'll leave it in His Hands.

....

Ms. [Z.], I'm not writing to make you feel sympathy for me, I'm writing a respectful request to you. If it's me that you're claiming is the actor of this crime without a doubt, then disregard this correspondence. Otherwise please tell the truth if you're wrong or not sure 100%.

Ms. [Z.], I'm not expecting a response from you but if you decide to respond and want a reply please inform me of it. Otherwise you will not hear from me hereafter until the days of trial.

Well, it's time I bring this missive to a close so take care, remain focus, be strong and stay out of the way of trouble.

Id. at 1161-62 (emphasis added). A.Z. testified that the letter made her scared to testify because it reminded her of the incident and made her realize that Hill knew where she lived. *Id.* at 1162. A handwritten copy of the redacted letter was admitted into evidence, a detective read the letter aloud to the jury, the jury received a playback of the detective reading the letter during deliberations, and the prosecutor focused on the contents of the letter during both opening and closing statements. *Id.* Specifically, during summation, the prosecutor read portions of the

letter and used a slideshow presentation that highlighted portions of the handwritten letter. *Id.* at 1163.

The trial judge instructed the jury using New Jersey's model criminal jury charge on witness tampering under N.J. Stat. Ann. § 2C:28-5(a). *Id.* Mirroring the statutory language, the jury was instructed that a person commits third-degree witness tampering "if, believing that an official proceeding or investigation is pending . . . he knowingly engages in conduct which *a reasonable person would believe would cause a witness or informant to:* (1) Testify or inform falsely; (2) Withhold any testimony . . . ; (3) Elude legal process . . . ; (4) Absent himself from any proceeding or investigation . . . ; or (5) Otherwise obstruct . . . an official proceeding or investigation." N.J. Stat. Ann. § 2C:28-5(a) (emphasis added). Hill's trial counsel did not object to this jury instruction.

The jury convicted Hill of both carjacking and witness tampering. He was sentenced to twelve years' imprisonment, with eighty-five percent of the sentence to be served without parole, for first-degree carjacking. *See* N.J. Stat. Ann. § 2C:15-2(a)(1); N.J. Stat. Ann. § 2C:43-7.2. He was sentenced to a consecutive three years' imprisonment, without any parole ineligibility, for third-degree witness tampering.

B. The New Jersey Appellate Division affirms both convictions.

On appeal to the New Jersey Appellate Division, Hill argued that to avoid constitutional infirmity under the First Amendment, N.J. Stat. Ann. § 2C:28-5(a) should be narrowly construed to require that a defendant knows that his speech would cause a witness to withhold testimony. *Hill*, 288 A.3d at 469-70, App. 177-

196. He contended that a *mens rea* of negligence as to the nature of the speech, as contained in the text of the statute, was constitutionally insufficient. App. 185-95. Hill argued that both the witness-tampering and carjacking convictions should be reversed as a result of this First-Amendment error. App. 196-200.

In January 2023, the New Jersey Appellate Division rejected all of Hill's contentions and affirmed both convictions in a partially published opinion. App. 38-7. Although Hill's counsel had not raised First-Amendment issues in the trial court, the Appellate Division exercised its discretion to review Hill's constitutional arguments as a matter of great public interest. *Hill*, 288 A.3d at 472. While noting that this Court granted certiorari in *Counterman* ten days earlier, the New Jersey Appellate Division nevertheless believed that *Counterman* had no bearing on the issue presented because “[a] defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime.” *Id.* The court therefore rejected Hill's overbreadth claim and narrowing-construction argument. *Id.*

C. The Supreme Court of New Jersey reverses only the witness-tampering conviction and denies Hill's motion for reconsideration.

In May 2023, the Supreme Court of New Jersey granted Hill's petition for certification “limited to whether the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad.” *State v. Hill*, 293 A.3d 505, *reconsideration denied*, 296 A.3d 1060 (N.J. 2023). In his post-certification brief to the Supreme Court of New Jersey, Hill argued that because his “witness-tampering conviction was entirely

based on the content of his speech and required the jury to find only that Hill was negligent as to the possibility that his polite letter would cause the witness to testify falsely, the conviction violated his constitutional right to free speech.” App. 103-117. Hill also raised a separate point heading contending that the “carjacking conviction should be reversed because the jury’s consideration of Hill’s polite letter in the context of a constitutionally infirm witness-tampering charge injected substantial prejudice and influenced the jury to convict Hill of carjacking despite significant weaknesses in the victim’s identification.” App. 133-138. Under this point heading, Hill cited the harmless-beyond-a-reasonable-doubt standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1965). App. 134. He argued that “the jury likely viewed the letter and the improper witness tampering charge as evidence of guilt on the underlying carjacking,” and that “[c]onsidering the significant weaknesses in the State’s evidence on the identity of the carjacker, as well as prosecutor’s arguments to the jury regarding witness tampering and reliance on the constitutionally insufficient negligence standard set forth in the jury instructions, reversal of the carjacking conviction is required” App. 134.

In its January 18, 2024 opinion, the Supreme Court of New Jersey first held N.J. Stat. Ann. § 2C:28-5(a) is not overbroad because “the heartland of witness tampering prosecutions either do not involve speech at all, or prosecute unprotected speech, and therefore do not violate the First Amendment.” *Hill*, 307 A.3d at 1169. Nonetheless, the court held that N.J. Stat. Ann. § 2C:28-5(a) “may have been unconstitutionally applied to” Hill “because he was prosecuted for the contents of his

letter and the jury was not required to find that his letter constituted speech integral to criminal conduct.” *Id.* at 1172. The court found that the record “reflects a consistent strategy by the prosecution to refer the jury to the text of the letter itself,” so the jury should have “been required to find that his speech fell into a recognized category of speech unprotected by the First Amendment.” *Id.* Because Hill’s letter was “facially innocuous” and not threatening, the court concluded that “in order to prove that it was speech integral to witness tampering, the State was required to prove that defendant intended the letter to cause A.Z. to testify falsely” *Id.* The court therefore vacated Hill’s witness-tampering conviction. *Id.* However, without addressing Hill’s argument or providing any reasoning, the court summarily noted that it “did not disturb defendant’s conviction for carjacking.” *Id., see also id.* at 1160 (“We do not vacate defendant’s conviction for carjacking.”).

Hill timely filed a motion for reconsideration and argued that the Supreme Court of New Jersey erred by failing to apply the *Chapman* standard to evaluate whether to reverse the carjacking conviction. App. 143-155. He contended that this failure, by both of the state appellate courts, violated his right to an adequate and effective appeal as guaranteed by the Fourteenth Amendment. App. 144. On March 8, 2024, the Supreme Court of New Jersey denied the motion for reconsideration in a summary order, without providing any additional reasoning. *State v. Hill*, 309 A.3d 1290 (N.J. 2024).²

² On the State’s motion, the trial court dismissed the witness-tampering charge with prejudice on January 26, 2024. App. 80.

REASONS FOR GRANTING THE WRIT

This petition involves the intersection between two rules of this Court’s jurisprudence: (1) when the prosecution is the “beneficiary” of a “trial error” of constitutional magnitude, an appellate court must reverse the defendant’s convictions unless the State proves that the error was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18, 24 (1967); and (2) under the First Amendment, a statute that criminalizes speech must contain a subjective *mens rea* to provide “breathing space” for protected speech, *Counterman v. Colorado*, 600 U.S. 66, 82 (2023).

The Supreme Court of New Jersey disregarded the doctrinal foundations of both rules when it neither applied the *Chapman* standard nor offered any analysis as to whether this First-Amendment error required reversal of the carjacking conviction obtained during the same trial. Even though Hill raised colorable arguments as to how the State benefited from First-Amendment error to convince the jury to convict Hill of carjacking, the Supreme Court of New Jersey refused to address these contentions. Perhaps this refusal was because no opinion of this Court has explicitly held that a *Chapman* harm analysis is required in circumstances like those presented by this case.

The Court should grant Hill’s petition for a writ of certiorari to review this important question of federal constitutional law for three primary reasons. First, the Supreme Court of New Jersey’s summary rejection of Hill’s harmful-error arguments conflicts with relevant decisions of this Court. Sup. Ct. R. 10(c).

Second, given the many statutes throughout the country that contain insufficient mental states under *Counterman* when applied to speech-based prosecutions, the question presented is likely to recur in appellate courts and should be settled by this Court. Sup. Ct. R. 10(c). Third, this case presents an ideal vehicle to resolve the question presented because it demonstrates how application of the *Chapman* standard to First-Amendment trial errors is consistent with the prudential rationale for a stringent test for harmless constitutional error.

I. The Supreme Court of New Jersey’s opinion conflicts with this Court’s precedents.

By affirming Hill’s carjacking conviction without applying the *Chapman* standard to assess the harm of the First-Amendment error, the Supreme Court of New Jersey wrongly “decided an important question of federal law in a way that conflicts with the relevant decision of this Court.” Sup. Ct. R. 10(c). This Court should grant the petition to resolve this important question correctly and explicitly.

The Supreme Court of New Jersey’s failure to evaluate Hill’s harm arguments under the *Chapman* standard violated the requirement and salutary purpose of a stringent test for harmless constitutional error. In announcing the harmless-beyond-a-reasonable-doubt standard in *Chapman*, the Court “recognize[d] that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one.” *Chapman*, 386 U.S. at 22. Although “there may be some constitutional

errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless,” the Court placed the burden on “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 22, 24. This formidable standard “emphasizes an intention not to treat as harmless those constitutional errors that affect substantial rights of a party.” *Id.* at 23 (internal quotation omitted).

The onerous hurdle to prove harmless constitutional error is thus indispensable to protecting the value of constitutional rights in criminal trials. Accordingly, “[c]onsistent with the jury-trial guarantee, the question [*Chapman*] instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand.” *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). “The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” *Id.* Furthermore, the Court has “admonished . . . against giving too much emphasis to overwhelming evidence of guilt” and instead has required appellate courts to assess the “probable impact” of the constitutional error “on the minds of an average jury.” *Harrington v. California*, 395 U.S. 250, 254 (1969) (internal quotation omitted).

Consistent with these principles of harmless-error review, the Court has held that the *Chapman* standard applies in assessing the harm of First-Amendment trial errors. *See Pope v. Illinois*, 481 U.S. 497, 500-04 (1987) (inadequate jury instruction to satisfy obscenity exception); *Dawson v. Delaware*, 503 U.S. 159, 168-69 (1992) (improper admission of racist gang membership in capital sentencing hearing). And although the Court has not yet addressed the specific question presented by this petition, the legal analysis fits neatly into the Court’s harmless-error framework. As with all other constitutional errors, the inquiry is simply whether the State “proved beyond a reasonable doubt that the” First-Amendment error in Hill’s trial “did not contribute to the” carjacking verdict. *Chapman*, 386 U.S. at 22. The Supreme Court of New Jersey therefore should have assessed whether the carjacking “verdict actually rendered in *this* trial was surely unattributable to the error” in instructing the jury that Hill committed the crime of witness tampering if he was negligent as to the letter’s capacity to cause the victim to withhold her testimony. *Sullivan*, 508 U.S. at 279. The court’s outright refusal to apply the *Chapman* standard lacked any legal basis under this Court’s harmless-error precedents.

Indeed, the Supreme Court of New Jersey’s failure to evaluate Hill’s harm arguments under the stringent *Chapman* standard is also inconsistent with this Court’s longstanding recognition of the necessity of a “subject mental-state requirement” in speech-based criminal prosecutions to prevent a “chilling effect” on protected speech. *Counterman*, 600 U.S. at 75. As this Court reiterated in

Counterman, a subjective *mens rea* requirement provides “breathing room” to reduce the risk that a speaker “accidentally or erroneously incur[s] [criminal] liability.” *Id.* at 75 (quotation omitted).

Here, Hill very well might have accidentally incurred criminal liability both as to the witness tampering and the carjacking charges because the State’s prosecution infringed upon Hill’s breathing space to voice his innocence. The jury was erroneously instructed that Hill’s letter constituted witness tampering if he was merely negligent as to the possibility that it would cause the victim to withhold her testimony. Contrary to these incorrect instructions, if Hill intended to proclaim his innocence rather than to cause the victim to withhold her testimony, then the letter was constitutionally protected speech. For this reason, Hill argued that reversal of the carjacking conviction was required under *Chapman* because the insufficient mental-state instructions made it much more likely that the jurors would view the letter as criminal wrongdoing that reflected consciousness of guilt as to the carjacking, rather than as a protestation of his innocence. On this record, the Supreme Court of New Jersey’s refusal to consider Hill’s harm arguments under the *Chapman* standard contravened the breathing-space rationale of this Court’s First-Amendment decisions.

By violating these well-established aspects of this Court’s jurisprudence, the Supreme Court of New Jersey improperly diminished the protections of the First Amendment in criminal prosecutions. This Court’s precedents dictate a clear answer to the question presented by this petition, but the Supreme Court of New

Jersey got it wrong. This Court's review is needed to ensure that other appellate courts do not similarly misstep when faced with this important question of federal law.

II. The question presented is likely to recur and should be settled by this Court.

At least twenty-five states, including New Jersey, have criminal statutes that contain only a *mens rea* of negligence with respect to a defendant's awareness of the threatening nature of his or her speech.³ As such, unless courts include supplemental mental-state instructions, these statutes do not pass First-Amendment muster under *Counterman* when they are used to prosecute speech or expression. As summarized below, many courts have already confronted appeals challenging convictions under these problematic statutes. Thus, although it does not appear that another appellate court has yet addressed the specific question presented by this petition, the issue is likely to recur in the wake of the

³ Ariz. Rev. Stat. Ann. § 13-2921(E) (harassment); Ark. Code Ann. § 5-71-229(a)(1), (c)(1) (stalking); Ark. Code Ann. § 5-17-101(death threat); Colo. Rev. Stat. § 18-3-602(1)(c) (stalking); Conn. Gen. Stat. Ann. § 53a-181d(b) (stalking); Del. Code Ann. tit. 11, § 1312 (stalking); Ky. Rev. Stat. Ann. § 508.130(1)(b) (stalking); La. Stat. Ann. § 14:40.1(B) (menacing); La. Stat. Ann. § 14:40.2(A) (stalking); Me. Rev. Stat. tit. 17-A, § 210-A (stalking); Md. Code Ann., Crim. Law § 3-802(a) (stalking); Miss. Code Ann. § 97-3-107 (stalking); N.H. Rev. Stat. Ann. § 633:3-a(1)(a) (stalking); N.J. Stat. Ann. § 2C:12-10(b) (stalking); N.Y. Penal Law § 120.45 (stalking); N.C. Gen. Stat. Ann. § 14-277.3A(c) (stalking); N.D. Cent. Code Ann. § 12.1-17-07.1(c)(1) (stalking); Okla. Stat. Ann. tit. 21, § 1173 (stalking); 11 R.I. Gen. Laws Ann. §§ 11-59-1, 11-59-2 (stalking); S.C. Code Ann. § 16-3-1700(B) (harassment); Tex. Penal Code Ann. § 42.072(a)(3) (stalking); Vt. Stat. Ann. tit. 13, § 1061(4) (stalking); Va. Code Ann. § 18.2-60.3(A) (stalking); Wash. Rev. Code Ann. § 9A.46.020 (harassment); W. Va. Code Ann. § 61-2-9a(b),(h)(4) (harassment); Wis. Stat. Ann. § 940.32(2) (stalking); Wyo. Stat. Ann. § 6-2-506 (stalking). Some state courts have already stricken problematic statutes or mandated supplemental mental-state jury instructions in all prosecutions, so those statutes are omitted from this list.

Counterman decision. This Court should therefore settle this important question of federal law.

Courts throughout the country have employed case-specific approaches to challenges arising under *Counterman*. For example, in *State v. Reeves*, ___ A.3d ___, ___, No. 2212003016, 2024 WL 2240234, at *1 (Del. Super. Ct. May 17, 2024), the Superior Court of Delaware recently addressed a defendant’s pretrial motion to dismiss a stalking charge under Del. Code Ann. tit. 11, § 1312. The court found that because Delaware’s statute “applies a negligent state of mind requirement to an attendant circumstance that constitutes an element of the offense,” it “permits a significant number of applications that violate the First Amendment because they criminalize the content of one’s speech.” *Id.* Nevertheless, the court concluded that the statute was not facially overbroad because it “permits a significant number of constitutional prosecutions that do not curtail speech and fit comfortably within the common and ordinary definition of stalking.” *Id.* The court noted that its “decision does not resolve whether [the defendant’s] stalking prosecution will be constitutional on an as-applied basis” because that will “depend in large part on whether the State relies on the content of [the defendant’s] messages and statements at trial to prove that he engaged in a course of conduct that amounted to stalking.” *Id.* Notably, the defendant was charged with several other offenses in addition to stalking. *Id.* at *1-2. So, if the trial court incorrectly decides the as-applied First-Amendment issues and the defendant is convicted of all counts in a single trial, the defendant will likely argue

on appeal that all his convictions should be reversed because the state unconstitutionally prosecuted him based on the content of his speech.

In another post-*Counterman* decision, the Supreme Judicial Court of Maine similarly concluded that Maine's stalking statute was not unconstitutionally overbroad on its face, and that the defendant in that case was not entitled to relief under plain error review because “[t]his case was not about the contents of [the defendant]’s statements; it was about persistent, unwelcome contact via electronic communication devices, even after being legally ordered not to have any contact.” *State v. Labbe*, 2024 ME 15, ¶¶ 38-57, ___A.3d ___, ___ (Me. 2024). Nevertheless, the court acknowledged that Maine's stalking statute, like Colorado's stalking statute at issue in *Counterman*, “employs an objective, reasonable person standard concerning the effect of an actor's communication on a victim.” *Id.* at ¶ 6 (referring to Me. Rev. Stat. tit. 17-A, § 210-A). The court interpreted *Counterman*’s holding to be “clear: where the State relies on the content of a defendant's expression as the basis for a stalking charge and to establish harm to the victim, the additional requirement to prove subjective *mens rea* of recklessness applies.” *Id.* at ¶ 50. The court further observed: “Admittedly, the line separating a stalking prosecution based on the threatening content of a defendant's speech (in whole or part) from a stalking prosecution based on conduct may not be clear in some instances and will need to be scrutinized carefully in each case.” *Id.* at ¶ 50 n.21. As in Delaware, Maine courts will therefore need to perform case-specific analyses to determine the mental state on which to instruct the jury in speech-based stalking prosecutions.

Other state courts have employed similar, case-specific reasoning to analyze the propriety of convictions under these problematic statutes. *Compare State v. Hensley*, No. 57518-3-II, 2024 WL 800338, at *1 (Wash. Ct. App. Feb. 27, 2024) (reversing a felony harassment conviction for threatening to kill a judge because “the jury instructions allowed the jury to convict him without finding that he had the subjective intent *Counterman* requires” and “[d]ue to conflicting testimony at trial about [the defendant]’s mental state, this error was not harmless beyond a reasonable doubt”); *State v. Billings*, 287 A.3d 146, 162-70 (Conn. App. Ct. 2022) (reversing and dismissing stalking and harassment charges because the convictions were predicated solely on protected speech); *State v. Shackelford*, 825 S.E.2d 689, 691 (N.C. Ct. App. 2019) (reversing stalking convictions because the convictions rested primarily upon the content of internet posts), *with State v. Snyder*, No. 1 CA-CR 23-0038, 2024 WL 342301, at *5 (Ariz. Ct. App. Jan. 30, 2024) (affirming a conviction for harassment because the defendant “was not prosecuted based on the content of any protected speech, but was prosecuted for his conduct in harassing [the victim]”); *Stanberry v. State*, No. 07-23-00194-CR, 2024 WL 538835, at *1 (Tex. Ct. Crim. App. Feb. 9, 2024) (declining to consider an overbreadth challenge to Texas stalking statute under *Counterman* because the issue was not raised below).

Similarly, after *Counterman*, two Courts of Appeals identified shortcomings in the jury instructions in threats-based federal prosecutions, but the courts declined to reverse the convictions because the issues were neither preserved nor properly presented on appeal. *United States v. Hunt*, 82 F.4th 129, 137-39 (2d Cir.

2023) (threatening to assault and murder members of Congress in violation of 18 U.S.C. § 115(a)(1)(B)), *cert. denied*, No. 23-6305, 2024 WL 1706045 (U.S. Apr. 22, 2024); *United States v. Dodson*, No. 22-3998, 2024 WL 712494, at *5-7 (6th Cir. Feb. 21, 2024) (retaliating against a witness in violation of 18 U.S.C. § 1513(b)(2)).

As in all the above-refenced opinions, courts throughout the country will need to grapple with case-specific analyses to determine how to instruct juries in speech-based prosecutions under many stalking, harassment, and threat statutes. Likewise, as in Hill’s case, New Jersey courts will need to employ an as-applied approach when defendants raise First-Amendment challenges to witness-tampering prosecutions involving speech. *See, e.g., State v. Gabriel*, No. A-1066-19, 2024 WL 1084431 (N.J. Super. Ct. App. Div. Mar. 13, 2024). Undoubtedly, sometimes trial courts will err in these case-specific analyses and provide juries with mental-state instructions that are insufficient under the First Amendment. And defendants will often be tried for other charges in addition to those arising under these constitutionally problematic statutes. In turn, appellate courts will be presented with arguments that these First-Amendment trial errors, when reviewed under the stringent *Chapman* standard for harmless error, should result in the reversal of all the convictions that were obtained at trial.

Without guidance from this Court, appellate courts may decide this critical issue inconsistently or incorrectly. Because the question presented is likely to recur, this Court should grant the petition and answer this “important question of

federal law that has not been, but should be, settled by this Court.” Sup. Ct. R. 10(c).

III. This case presents an ideal vehicle to answer the question presented.

Although this Court does not ordinarily review erroneous factual findings, the question presented by this petition is a legal issue. The Supreme Court of New Jersey did not engage in any factual analysis in relation to the question presented. And once the New Jersey appellate courts exercised their discretion under state law to review that First-Amendment issue despite it not being raised in the trial court, the question presented was squarely before the Supreme Court of New Jersey.⁴ Moreover, because Hill raised colorable arguments as to how it was reasonably likely that the First-Amendment error contributed to his carjacking conviction, the question presented will likely be outcome-determinative as to the propriety of that conviction and the corresponding twelve-year prison sentence. To be sure, an appellate court will sometimes reasonably conclude that a First-Amendment error of this sort did not affect the jury’s verdict on other charges and was harmless beyond a reasonable doubt. For example, the State’s evidence and arguments to the jury on each charge might be separate and unrelated. But here, the State’s presentation of its case to the jury inexorably linked the witness tampering to the

⁴ Under New Jersey law, appellate courts apply the *Chapman* standard even when the constitutional error was not raised below. *See, e.g., State v. Greene*, 233 A.3d 361, 375 (N.J. 2020); *State v. Camacho*, 95 A.3d 635, 646-48 (N.J. 2014); *State v. Simon*, 398 A.2d 861, 869 (N.J. 1979).

carjacking and amplified the harm of the constitutional error. For all these reasons, this case is an ideal vehicle to answer the question presented.

The record in this case shows how applying the *Chapman* standard to review First-Amendment trial errors is consistent with the salutary purpose of a stringent test for harmless constitutional error. As the Supreme Court of New Jersey found, “the record . . . reflects a consistent strategy by the prosecution to refer the jury to the text of the letter itself.” *Hill*, 307 A.3d at 1172. For example, in summation the prosecutor urged the jurors to consider Hill’s letter as consciousness of guilt as to the carjacking. The prosecutor contended that it would be a “lazy analysis” for the jurors to think that Hill’s letter might be a reaction to being falsely accused and emphasized the negligence standard by asking the jurors to consider “[w]hat is a reasonable person to take from [the letter]?” App. 102; *Hill*, 307 A.3d at 1172.

The prosecutor’s arguments were amplified by the constitutionally insufficient mental state instruction. Jurors are likely to view witness tampering as evidence of a defendant’s consciousness of guilt on the underlying offense, so improperly diminishing the State’s burden to prove an intentional mental state for witness tampering also injected prejudice as to the jury’s consideration of underlying carjacking. The prosecutor’s specific arguments to the jury in conjunction with constitutionally insufficient jury instructions likely made the jurors view Hill’s facially innocuous letter as criminal wrongdoing that was reflective of consciousness of guilt rather than as a protestation of his innocence. The record thus shows that, with respect to the carjacking conviction, the State was

“the beneficiary of a constitutional error,” *Chapman*, 386 U.S. at 24, and that the error had a “probable impact . . . on the minds of an average jury,” *Harrington*, 395 U.S. at 254.

Furthermore, this case demands onerous harmless-error review because “the question of guilt or innocence” as to the carjacking was “a close one.” *Chapman*, 386 U.S. at 22. No physical or forensic evidence directly tied Hill to the crime. The suspect’s face is indiscernible in the surveillance video footage and still images that the State contended showed the culprit. App. 239-41. The defense contended that there were multiple discrepancies in the clothing initially described by A.Z. during her formal statement thirty minutes after the incident, the clothing worn by the suspect in the surveillance videos, and the clothing Hill was wearing when he was arrested. App. 94-95, 98, 220-22, 262-64. Moreover, when initially describing the culprit to the police, A.Z. did not estimate the culprit’s height, weight, age, or the color of the culprit’s beard; and she did not identify a scar on the culprit’s face, despite Hill having a noticeable scar between his eyebrows. App. 95, 150, 249, 253.

Most importantly, several factors significantly undermined the reliability of A.Z.’s out-of-court identification: (1) the identification was cross-racial; (2) she viewed the culprit in poor lighting at 7:00 a.m. and in a highly stressful and obstructive setting as she was hanging out of a moving car; (3) during the array procedure, she simultaneously compared the photographs rather than viewing them sequentially; (4) at one point, she “really thought” a filler was the culprit; (5) she repeatedly wavered when asked to express her level of confidence in her

identification; and (6) she picked the photograph she thought looked the most like the culprit even though she thought Hill's photograph had lighter skin and different facial hair than the culprit – thereby engaging in the fallacy of relative judgement. App. 93-97, 135-36. The Supreme Court of New Jersey has found that social scientists agree that all these factors weigh against the reliability of an identification. *State v. Henderson*, 27 A.3d 872 885-88, 920-22 (N.J. 2011), *see also* The Innocence Project, *DNA Exonerations in the United States*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (noting that 69% of DNA exonerations from 1989-2020 involved eyewitness misidentification). The record therefore presents a real possibility that an innocent person has been convicted based on a mistaken, cross-racial identification.

Despite all these scientifically recognized factors that increased the risk of misidentification, the prosecutor used the content of Hill's letter to bolster the A.Z.'s shaky identification. As discussed, the prosecutor relied on the constitutional insufficient jury instructions to argue that Hill's letter reflected criminal wrongdoing and a consciousness of guilt. The prosecutor also paraphrased the letter's request for A.Z. to consider whether she was 100 percent sure of her identification and argued that the fact that she chose to report the letter to the police reflected that she has a "fixed memory" of her assailant and has "never once . . . in any way wavered from that identification. She's known all along and she will tell you that the man who sits before you sat beneath her." App. 100-101. As the jury requested and received a playback of a detective reading the letter in

summation, there is a reasonable possibility that the jurors relied on the content of Hill's letter and were persuaded by the prosecutor's arguments regarding A.Z.'s alleged fixed memory and Hill's alleged consciousness of guilt. Based on the ways in which the State used the content of Hill's letter, therefore, the State cannot show beyond a reasonable doubt that the carjacking verdict "rendered in *this* trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279.

Accordingly, the record shows that applying the demanding *Chapman* standard in circumstances like those presented here is essential to protecting the constitutional rights of criminal defendants. This case therefore presents an ideal vehicle to answer the question presented. Moreover, if this Court grants the petition and answers the question presented in the affirmative, the record is adequate for the Court to either apply the *Chapman* standard itself or to remand to the Supreme Court of New Jersey to do so. *See Pope*, 481 U.S. at 504. Or, as an alternative to granting certiorari for full briefing and argument, the Court could grant the petition, vacate the Supreme Court of New Jersey's judgment to the extent it affirmed the carjacking conviction, and remand the case for further proceedings. *See* 28 U.S.C. § 2106.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JENNIFER N. SELLITTI, Esq.
New Jersey Public Defender
Attorney for the Petitioner

/s/ John P. Flynn
JOHN P. FLYNN, Esq.
New Jersey Assistant Deputy Public Defender

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