No. _____

IN THE

Supreme Court of the United States

WILLIAM HILL,
Petitioner

v.

STATE OF NEW JERSEY,
Respondent

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

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SYLLABUS

This syllabus is not part of the Court's opinion. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Court and may not summarize all portions of the opinion.

State v. William Hill (A-41-22) (087840)

Argued October 10, 2023 -- Decided January 18, 2024

WAINER APTER, J., writing for a unanimous Court.

In this appeal, the Court considers whether the State's witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad on its face or was unconstitutionally applied to defendant William Hill.

Defendant was charged with first-degree carjacking after the victim, A.Z., selected his photo in a photo array. While defendant was detained and awaiting trial, he sent a letter addressed to A.Z. by name at her home. Defendant maintained that he did not commit the carjacking and stated, "[i]f it's me that you're claiming as 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%." A.Z. delivered the letter to the police, and defendant was charged with third-degree witness tampering, in addition to the carjacking charge.

Under N.J.S.A. 2C:28-5(a), a person commits third-degree witness tampering "if, believing that an official proceeding or investigation is pending . . . he knowingly engages in conduct" that does not involve force or the threat of force but "which a reasonable person would believe would cause a witness or informant to" testify or inform falsely, withhold any testimony, elude legal process, absent himself from any proceeding or investigation, or otherwise obstruct an official proceeding or investigation. The letter did not explicitly ask A.Z. to do any of those things.

At trial, A.Z. testified that receiving the letter "was terrifying" and made her "scared" to testify because she realized defendant knew where she lived. A redacted version of the letter was admitted into evidence, and a detective read the letter aloud to the jury. The State focused on the contents of the letter during opening and closing statements. The prosecutor told the jury during summation to "read the letter" and "look at the contents [of the letter]." The prosecutor's slideshow presentation during summation included portions of the letter, and the jury heard a playback of the detective reading the letter during deliberations. Defendant was convicted of both charges.

The Appellate Division affirmed, holding that "N.J.S.A. 2C:28-5(a) is neither unconstitutionally overbroad nor impermissibly vague" and that "[a] defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime." 474 N.J. Super. 366, 370, 379 (App. Div. 2023).

The Court granted certification "limited to whether the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad." 253 N.J. 595 (2023).

HELD: N.J.S.A. 2C:28-5(a) is not unconstitutionally overbroad. It may, however, have been unconstitutionally applied to defendant in this case. The Court therefore vacates defendant's witness tampering conviction, without dismissing any portion of the indictment, and remands the case for a new trial on that charge. The Court does not vacate defendant's conviction for carjacking.

1. Some types of speech are so utterly lacking in social value that they fall outside the protections of the First Amendment altogether. Those historically unprotected categories of speech include fighting words, obscenity, child pornography, incitement, defamation, true threats, and speech integral to criminal conduct. The parties here dispute the relevance of the final two exceptions in this case. A true threat is speech that, when taken in context, objectively threatens unlawful violence. Speech integral to criminal conduct is speech that is intended to bring about a particular unlawful act. (pp. 15-18)

2. Overbreadth is unlike a typical facial challenge because it does not require a challenger to establish that no set of circumstances exists under which the statute would be valid. Rather, a court may hold a law facially invalid for overbreadth under the First Amendment if the challenger demonstrates that the statute prohibits a substantial amount of protected speech relative to its plainly legitimate sweep. See United States v. Hansen, 599 U.S. 762, 769-70 (2023). A law's unconstitutional applications must be realistic, and their number must be substantially disproportionate to the statute's lawful sweep. Without a lopsided ratio, courts must handle unconstitutional applications case-by-case. (pp. 18-19)

3. The Court reviews the witness tampering statute and agrees with the Appellate Division that N.J.S.A. 2C:28-5(a) is not unconstitutionally overbroad, but for different reasons. The Court does not agree that any communication between a defendant awaiting trial and the victim of a violent crime categorically falls outside the protections of the First Amendment. Courts do not have freewheeling authority to declare new categories of speech outside the First Amendment simply because the value of the speech is less than its societal costs. Instead, speech falls outside the scope of the First Amendment if it falls into one of the historic and traditional categories to which the First Amendment has not applied. (pp. 19-22)

4. The reason defendant's overbreadth claim fails is that there are not far more witness tampering prosecutions for protected speech than for conduct or unprotected speech. Indeed, the heartland of witness tampering prosecutions either do not involve speech at all or prosecute speech that is integral to criminal conduct and is thus unprotected. On the other side of the ledger, the list of potentially unconstitutional prosecutions under N.J.S.A. 2C:28-5(a) appears to be either zero or one (this case). The ratio of unlawful-to-lawful applications of the witness tampering statute is not lopsided enough to justify facial invalidation for overbreadth. Quite simply, "[t]his is not the stuff of overbreadth -- as-applied challenges can take it from here." Hansen, 599 U.S. at 785. (pp. 22-27)

5. Although N.J.S.A. 2C:28-5(a) is not facially overbroad, it may have been unconstitutionally applied to defendant. Defendant was prosecuted for the contents of his letter, which would have been unproblematic if the jury had been required to find that his speech fell into a recognized category of unprotected speech. The true threats exception is not relevant here because defendant's letter does not contain any threat of violence and he was prosecuted for third-degree witness tampering, which specifically excludes the threat of force. And because the letter is facially innocuous, in order to prove that it was speech integral to criminal conduct -- in this case, witness tampering -- the State was required to prove that defendant intended the letter to cause A.Z. to testify falsely, withhold testimony or information, elude legal process, absent herself from a legal proceeding or investigation, or otherwise obstruct, delay, prevent, or impede an official proceeding or investigation. Because the jury here was not so charged, defendant's conviction for witness tampering must be vacated. The Court provides guidance for the new trial. (pp. 27-31)

6. The Court declines to dismiss the witness tampering charge because there is no requirement that the speech succeed in bringing about an unlawful act and because a reasonable jury could conclude that defendant sent the letter to pressure A.Z. to refrain from testifying against him -- i.e., intending to tamper with a witness. (pp. 31-32)

REVERSED as to count two and REMANDED to the trial court.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, FASCIALE, and NORIEGA join in JUSTICE WAINER APTER's opinion.

App. 3

SUPREME COURT OF NEW JERSEY

A-41 September Term 2022

087840

State of New Jersey,

Plaintiff-Respondent,

v.

William Hill, a/k/a Raheem Hill, Ricky Hill, Russell Johnson, Jerry Jones, Raheem Sander, Raheem Sanders, Joseph Sanders, Bruce Strickland, Bruce Strictland, Andrew Young, Andy Young, and Steven Young,

Defendant-Appellant.

On certification to the Superior Court, Appellate Division, whose opinion is reported at 474 N.J. Super. 366 (App. Div. 2023).

Argued	Decided
October 10, 2023	January 18, 2024

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; John P. Flynn, of counsel and on the briefs).

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County

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Prosecutor, attorney; Patrick R. McAvaddy, on the briefs).

Tim Sheehan, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Jeremy M. Feigenbaum, Solicitor General, Michael L. Zuckerman, Deputy Solicitor General, Tim Sheehan, and Amanda G. Schwartz, Deputy Attorney General, of counsel and on the brief).

Ronald K. Chen argued the cause for amicus curiae American Civil Liberties Union of New Jersey (Rutgers Constitutional Rights Clinic Center for Law & Justice and American Civil Liberties Union of New Jersey Foundation, attorneys; Alexander Shalom and Jeanne LoCicero, of counsel and on the brief, and Ronald K. Chen, on the brief).

Doris Cheung argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, attorneys; Doris Cheung, on the brief).

JUSTICE WAINER APTER delivered the opinion of the Court.

In this appeal, we consider whether the State's witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad on its face or was unconstitutionally applied to defendant William Hill. We hold that N.J.S.A. 2C:28-5(a) is not unconstitutionally overbroad. It may, however, have been unconstitutionally applied to defendant in this case. We therefore vacate defendant's witness tampering conviction, without dismissing any portion of

the indictment, and remand the case for a new trial on that charge. We do not vacate defendant's conviction for carjacking.

I.

A.

On the morning of October 31, 2018, A.Z. left her car running outside her home as she ran inside to grab a sweater. When she returned to her car, she saw a man she did not know in the driver's seat. She ran to the car, opened the driver's door, and yelled at the man to get out. The man refused, putting the car in reverse. As the car moved backward, A.Z. jumped into the car and on top of the man.

The man put the car in drive and began to speed away while A.Z. wrestled for control of the steering wheel, her feet dangling out of the open car door. As he sped down the street, the man tried to force A.Z. out of the car by shoving her and swerving into parked cars, causing the still-open car door to repeatedly hit A.Z. in the back. After about four blocks, A.Z. was able to shift the gear into neutral and the car began to slow down. The man then hit the brakes, pushed A.Z. aside, jumped out of the car, and ran.

A.Z. immediately pulled over outside the Harrison police station and went inside to report the attempted carjacking. She estimated that the attempted carjacking lasted approximately two minutes.

A.Z. returned to the police station one week later to view a photo array, eventually selecting the photo of defendant with eighty percent certainty. Defendant was charged with one count of first-degree carjacking in violation of N.J.S.A. 2C:15-2(a)(1).

B.

While defendant was detained and awaiting trial, he sent a letter to A.Z. at her home. Defendant addressed the envelope to A.Z. by name, and he placed his own name in the return address. At the time, a no-contact order was not in place. The letter, in the redacted form as introduced at trial, read as follows:

> Dear Ms. [Z.],
>
> Now that my missive had completed its journey throughout the atmosphere and reached its proper 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 correspondent 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 exitted 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 lead 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 innocents 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 as 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 the way of trouble.
>
> Sincerely,
> Raheem

A.Z. delivered the letter to the Harrison Police Department. In a superseding indictment, defendant was charged with third-degree witness tampering in violation of N.J.S.A. 2C:28-5(a), in addition to the carjacking charge. Under N.J.S.A. 2C:28-5(a), a person commits third-degree witness tampering "if, believing that an official proceeding or investigation is pending . . . he knowingly engages in conduct" that does not involve force or the threat of force but "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."

C.

At trial, A.Z. testified that as she read the letter, she "kind of relived the whole moment all over again" and "it was terrifying." Receiving the letter at

her home made her feel "scared to come" testify at trial, A.Z. explained, because she realized defendant knew where she lived.

A redacted version of the handwritten letter, reprinted above, was admitted into evidence at trial. The State also called a detective from the Hudson County Prosecutor's Office to read the redacted letter aloud to the jury.

The State focused on the contents of the letter during opening and closing statements. In his opening, the prosecutor read portions of the letter out loud. During summation, the prosecutor said: "The letter's really important. Again, you've got to go deep into it. . . . Look at the letter that he wrote and ask yourself, would you write that letter, because we're going to do that, and I don't think any of you would."

Defense counsel objected, and the trial judge ruled that the prosecutor could read the contents of the letter but could not use the text to argue that defendant had admitted to the carjacking. The prosecutor attempted to do so, but after another objection, eventually told the jury, "[w]e're going to skip the letter, but the letter's going with you. You read it. You determine is this the letter -- what does this letter say?" (emphasis added). He then repeated:

> It's your question, you look at the contents [of the letter], right? What is he saying to her? What is he trying to do? What is a reasonable person to take from it? I'm not going to say more than that. That's for you

> guys -- read the letter. Think about it in the context of all this, right?

The slideshow presentation that the prosecutor used during summation also included numerous slides highlighting specific portions of the handwritten letter, along with the outside of the envelope showing A.Z.'s address.

At the close of the State's case, defendant moved for a judgment of acquittal on both charges. On the witness tampering charge, defense counsel argued that "there was nothing in the letter that the prosecutor could point to that in any way shows that Mr. Hill was trying to threaten [A.Z.], [or] trying to get her to be afraid to come into court." The trial court denied the motion, holding that although "there's nothing in the letter that is threatening . . . a reasonable juror could conclude that a reasonable person would feel somewhat upset . . . [that] the person arrested for carjacking her is now writing to her at her home."

The judge instructed the jury on witness tampering in accordance with the Model Criminal Jury Charges, which largely mirror the language of N.J.S.A. 2C:28-5(a). See Model Jury Charges (Criminal), "Tampering with Witnesses and Informants (N.J.S.A. 2C:28-5(a)) (Cases arising after September 10, 2008)" (approved Mar. 2009).

During deliberations, the jury requested a typed, rather than handwritten, copy of the letter. Because there was no such thing in evidence, they heard a playback of the detective reading defendant's letter.

The jury convicted defendant of first-degree carjacking and third-degree witness tampering. Defendant moved for a new trial, contending that the State was required to, but did not, prove he intended to cause A.Z. to testify falsely or otherwise obstruct the proceeding. The prosecutor maintained that three implicit and explicit messages in the letter allowed a jury to conclude that defendant "inten[ded] . . . to influence [A.Z.] in a way that the witness tampering statute is designed to protect" against: (1) "I know where you live"; (2) "I know what you look like"; and (3) "stay out of trouble."

The judge denied the motion and sentenced defendant to twelve years' imprisonment on the carjacking conviction and a consecutive three years' imprisonment on the witness tampering conviction.

D.

Defendant appealed, arguing, among other things, that N.J.S.A. 2C:28-5(a) is unconstitutionally overbroad and impermissibly vague unless it is read to require that defendants know their speech or conduct would cause a witness to testify falsely, withhold testimony, elude legal process, or otherwise obstruct any proceeding.

The Appellate Division invited the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), and the Association of Criminal Defense Lawyers of New Jersey (ACDL) to participate in the case as amici curiae, and it affirmed defendant's convictions in a partially published opinion. State v. Hill, 474 N.J. Super. 366 (App. Div. 2023).

Rejecting defendant's facial challenge to the witness tampering statute, the Appellate Division held that "N.J.S.A. 2C:28-5(a) is neither unconstitutionally overbroad nor impermissibly vague." Id. at 370. Relying on State v. Crescenzi, 224 N.J. Super. 142 (App. Div. 1988), in which it had rejected an overbreadth and vagueness challenge to a prior version of the witness tampering statute, the Appellate Division held that N.J.S.A. 2C:28-5(a) furthers the State's important interest in "preventing intimidation of, and interference with, potential witnesses or informers in criminal matters and easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." Hill, 474 N.J. Super. at 377-78 (quoting Crescenzi, 224 N.J. Super. at 148).

The Appellate Division rejected defendant's reliance on the United States Supreme Court's grant of certiorari in Counterman v. Colorado, 598 U.S. ___, 143 S. Ct. 644 (2023), noting that unlike Counterman, this case required it only to evaluate "speech directed to victims, witnesses, or

informants who are linked to an official proceeding or investigation." Hill, 474 N.J. Super. at 379. The "true threat[s]" doctrine was simply "not at issue," the Appellate Division held, because "[a] defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime." Ibid. Otherwise, the Appellate Division explained, courts might be prohibited from imposing no-contact orders as a condition of pretrial release. Ibid.

E.

We granted defendant's petition for certification "limited to whether the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad" and denied certification "in all other respects." 253 N.J. 595, 595-96, reconsideration denied, 254 N.J. 397 (2023). The amici curiae who appeared before the Appellate Division continued to participate before this Court.

II.

Defendant argues that because his "witness-tampering conviction was entirely based on the content of his speech and required the jury to find only that [defendant] 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." According to defendant, "the First Amendment

exception at issue in this case is true threats" and under the Supreme Court's decision in Counterman, true threats prosecutions require at least a mens rea of recklessness. Because N.J.S.A. 2C:28-5(a) requires only a mens rea of negligence -- that a defendant "knowingly engage[] in conduct which a reasonable person would believe would cause a witness or informant to" obstruct a proceeding -- defendant maintains it is facially overbroad. In order to save the statute from constitutional defect, defendant urges us to construe the "knowingly" mens rea in the statute to apply to both a defendant's speech or conduct, and to whether the defendant "knew that the nature of his speech would cause a witness to withhold testimony." (emphasis added).

The ACLU agrees with defendant that N.J.S.A. 2C:28-5(a) is unconstitutionally overbroad. The ACLU submits that as applied to defendant, N.J.S.A. 2C:28-5 violates the First Amendment under Counterman because defendant's "conviction for witness tampering was based on the 'reasonable person' standard of N.J.S.A. 2C:28-5, which Counterman found was constitutionally insufficient." The ACLU, however, asks us to strike down N.J.S.A. 2C:28-5(a) altogether, rather than "[c]reating a scienter requirement out of whole cloth."

The ACDL asserts that "criminal statutes must be construed to require proof of some level of scienter exceeding negligence." Therefore, defendant's

conviction, "which was based on a statute and jury charge that criminalized 'conduct' which a reasonable person would believe would cause a witness or informant to" testify falsely, must be reversed. On retrial, the ACDL submits, the jury must be instructed that defendant can only be convicted if the prosecution proves that he: "(1) believed that an official proceeding was pending; (2) knowingly sent a letter intending that it be received by [A.Z.]; (3) consciously desired that one or more violations of the statute would occur; and (4) knew that one or more violations of the statute would most likely occur."

The State responds that N.J.S.A. 2C:28-5(a) prohibits certain kinds of conduct, not speech. In the State's view, "[a]ny regulation of speech under the statute is therefore incidental and discussion of pure speech exceptions, like the true threats doctrine, is unnecessary." According to the State, defendant was not prosecuted for the contents of his letter, but for "engaging in a course of conduct that involved sending the letter to his victim's home before the trial, making it clear he knew who she was and where she lived." The State urges that "where a statute regulates conduct and not speech on its face, it should be invalidated as overbroad only when it burdens substantially more speech than necessary to advance its substantial government interest." Here, the State contends, defendant failed to satisfy this "heavy burden." According to the State, we should not find the statute facially overbroad because it

involves the "paramount state interest" of preventing witness tampering and, where it does restrict speech, it does so only incidentally.

The Attorney General agrees with the State that the statute is facially valid and that defendant did not meet his "overwhelming" burden in proving otherwise. The Attorney General explains that "mine-run" witness tampering prosecutions, such as those for murder, assault, and bribery, "do not involve protected expression at all" because they involve conduct, not speech. And those prosecutions that do involve speech, for example, soliciting perjury or extorting a witness, according to the Attorney General, fall within the First Amendment's exception for "speech integral to criminal conduct." Meanwhile, the Attorney General contends, "the other side of the ledger -- that is, the record of applications [of N.J.S.A. 2C:28-5(a)] that violate free-speech rights -- is pretty much blank." The Attorney General also rejects what it characterizes as the "core" of defendant's argument -- his as-applied challenge -- because defendant was not prosecuted for the content of his speech. Rather, the Attorney General claims, defendant was prosecuted for engaging in conduct that showed A.Z. he "knew her name . . . knew where she lived, [and] was willing to engage with her directly, . . . without using his attorney."

III.

A.

Defendant challenges the constitutionality of N.J.S.A. 2C:28-5(a) on the grounds that it is overbroad in violation of the First Amendment. "Our standard of review in determining the constitutionality of a statute is de novo." State v. Hemenway, 239 N.J. 111, 125 (2019). This Court owes no deference to the trial court or Appellate Division's conclusions of law. State v. Vargas, 213 N.J. 301, 327 (2013). "A presumption of validity attaches to every statute," and "defendant bears the burden of establishing its unconstitutionality." State v. Lenihan, 219 N.J. 251, 265-66 (2014).

B.

The First Amendment to the United States Constitution, applied to the states by the Due Process Clause of the Fourteenth Amendment, commands that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I; Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. ___, 138 S. Ct. 2448, 2463 (2018).

Article I, Paragraph 6 of the New Jersey Constitution provides: "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, ¶ 6. The

first sentence of Article I, Paragraph 6 goes beyond the text of the First Amendment, and this Court has recognized that, in several contexts, New Jersey's constitutional protection of free expression is "more sweeping in scope" than the First Amendment. State v. Schmid, 84 N.J. 535, 557 (1980).

"Content-based regulations" of speech that fall within the protections of the First Amendment "are presumptively invalid," R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992), and will be upheld only if they survive strict scrutiny, see, e.g., Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015). A restriction is content-based "if it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." McCullen v. Coakley, 573 U.S. 464, 479 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)). Conversely, content-neutral regulations -- which generally control the time, place, and manner of speech -- must satisfy intermediate, rather than strict, scrutiny. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

Some types of speech are so utterly lacking in social value that they fall outside the protections of the First Amendment altogether. Those historically unprotected categories of speech include fighting words, obscenity, child pornography, incitement, defamation, true threats, and speech integral to

criminal conduct. See, e.g., Counterman v. Colorado, 600 U.S. 66, 73-74 (2023); United States v. Hansen, 599 U.S. 762, 783 (2023).

The parties dispute whether the "true threats" or "speech integral to criminal conduct" exceptions are relevant in this case. A true threat is speech that, when taken in context, objectively threatens unlawful violence. In Counterman, the United States Supreme Court held that under the First Amendment, a true threats prosecution "requires proof that the defendant had some subjective understanding of the threatening nature of his statements," but that a "specific intent to threaten the victim" is not required; instead, recklessness suffices. 600 U.S. at 69, 73. The State must therefore show "that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Id. at 69.

Speech integral to criminal conduct is speech that is "intended to bring about a particular unlawful act." Hansen, 599 U.S. at 783. Indeed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). "For example, a robber's command that a victim turn over money," even though it is undeniably speech, is nonetheless unprotected by the First

Amendment or Article I, Paragraph 6 because it "is integral to the commission of" the crime of robbery. State v. Burkert, 231 N.J. 257, 282 (2017). "It would be an odd constitutional principle that permitted the government to prohibit" robbery, but not the words a person uses to commit robbery (e.g., "Give me your wallet."). United States v. Williams, 553 U.S. 285, 298 (2008).

C.

The First Amendment's overbreadth doctrine provides "breathing room for free expression" because overbroad laws "'may deter or "chill" constitutionally protected speech,' and if would-be speakers remain silent, society will lose their contributions to 'the marketplace of ideas.'" Hansen, 599 U.S. at 769-70 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)). However, because the doctrine is aimed at protecting the "marketplace of ideas," an overbreadth challenge will "[r]arely, if ever . . . succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." Hicks, 539 U.S. at 124.

Overbreadth is unlike a typical facial challenge because it does not require a challenger to "establish that no set of circumstances exists under which the [statute] would be valid." Hansen, 599 U.S. at 769 (alteration in original) (emphasis omitted) (quoting United States v. Salerno, 481 U.S. 739,

745 (1987)). It is therefore "strong medicine" to be used "only as a last resort." New York v. Ferber, 458 U.S. 747, 769 (1982) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

A court may hold a law facially invalid for overbreadth under the First Amendment only if "the challenger demonstrates that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep.'" Hansen, 599 U.S. at 770 (quoting Williams, 553 U.S. at 292). In this regard, "a law's unconstitutional applications must be realistic, not fanciful, and their number must be substantially disproportionate to the statute's lawful sweep." Ibid. (emphasis added). "In the absence of a lopsided ratio" of unconstitutional applications to constitutional ones, "courts must handle unconstitutional applications as they usually do -- case-by-case." Ibid.

D.

N.J.S.A. 2C:28-5 criminalizes tampering with witnesses and informants. The text provides:

> (a) 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 [a specific list of crimes] 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.
>
> [N.J.S.A. 2C:28-5(a).]

As earlier noted, the Appellate Division rejected an overbreadth challenge to a previous version of the witness tampering statute in Crescenzi, holding that "[w]hen the public interest in discovering the truth in official proceedings is balanced against a party's right to speak to a particular witness with the intent of tampering, that party's right is 'minuscule.'" 224 N.J. Super. at 148 (citation omitted).

IV.

We agree with the Appellate Division that N.J.S.A. 2C:28-5(a) is not unconstitutionally overbroad. However, we hold that the statute may have been unconstitutionally applied to defendant in this case. Thus, without dismissing any part of the indictment, we vacate defendant's conviction for witness tampering and remand for a new trial on that charge.

A.

As an initial matter, we disagree with the Appellate Division that any communication between a defendant awaiting trial and the victim of a violent crime categorically falls outside the protections of the First Amendment. Hill, 474 N.J. Super. at 379. As the Supreme Court has explained, courts reviewing criminal convictions do not have "a freewheeling authority to declare new categories of speech outside the scope of the First Amendment" simply because the "value of the speech" is less than "its societal costs." United States v. Stevens, 559 U.S. 460, 470, 472 (2010). Instead, speech falls outside the scope of the First Amendment if it falls into one of the "historic and traditional categories" to which the First Amendment has not applied. Id. at 468 (citation omitted). As previously noted, those historic and traditional categories include fighting words, obscenity, child pornography, incitement, defamation, true threats, and speech integral to criminal conduct.

Communication between a defendant awaiting trial and the victim of a violent crime is not among them.

We therefore address defendant's overbreadth claim. We conclude that, under First Amendment overbreadth doctrine, there are not far more witness tampering prosecutions for protected speech than for conduct or unprotected speech. Indeed, 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. Thus, we join the Appellate Division in "reject[ing] defendant's . . . overbreadth claim," Hill, 474 N.J. Super. at 379, although for different reasons.

Many applications of N.J.S.A. 2C:28-5(a) are entirely unrelated to speech. For example, a defendant might be found guilty of witness tampering under N.J.S.A. 2C:28-5(a) for physically harming a witness to deter them from testifying or bribing a witness to keep them away from court. See, e.g., State v. Adams, No. A-1021/1343-14 (App. Div. Feb. 19, 2019) (slip op. at 2-3) (to prevent them from testifying at a murder trial, the defendant killed one witness and threatened another);[1] State v. Johnson, No. A-6238-09 (App. Div. Mar. 27,

[1] The unpublished Appellate Division decisions we cite here have no precedential value, and we do not rely on them for any legal principles they discuss. R. 1:36-3. We cite these decisions merely as records of prosecutions that have been brought under the witness tampering statute in keeping with the

2013) (slip op. at 5-9) (the defendant murdered the victim while released on bail); State v. Seabrookes, No. A-0506-02 (App. Div. Apr. 24, 2006) (slip op. at 5-7) (the week before the defendant's murder trial, he arranged for the victim to be taken out of the state and then transported back to New Jersey and murdered); State v. Deneus, No. A-3698-11 (App. Div. Mar. 24, 2014) (slip op. at 4) (while incarcerated and awaiting trial, the defendant offered $5,000 to another inmate to kill three potential witnesses); State v. Jardim, 226 N.J. Super. 497, 499-500 (Law Div. 1988) (the defendant agreed to pay the victim and her mother $50,000 to leave the state and not return for any grand jury or court proceeding).

The same is true for witness tampering prosecutions in other states and in federal courts. See, e.g., Arnold v. State, 68 S.W.3d 93, 95-96 (Tex. App. 2001) (the defendant paid the witness's travel and living costs so she would evade subpoena to testify at a trial); State v. Sanders, 833 P.2d 452, 454, 457 (Wash. Ct. App. 1992) (the defendant paid and arranged for a key complaining witness to be out-of-state during trial); United States v. Washington, 653 F.3d

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Supreme Court's guidance in Hansen. See 599 U.S. at 784-85; see also Badiali v. N.J. Mfrs. Ins. Grp., 220 N.J. 544, 549 & n.1, 560 (2015) (citing but not relying on an unpublished decision and finding that its "existence" could be considered); State v. Henderson, 208 N.J. 208, 287 n.9 (2011) (noting the existence of, but declining to cite, an unpublished decision in which an identification had been suppressed).

1251, 1253-55 (10th Cir. 2011) (the defendant conspired to kill a witness to prevent him from testifying during a federal court proceeding).

As to witness tampering prosecutions that do involve speech, garden-variety prosecutions are consistent with the First Amendment and Article I, Paragraph 6 of the New Jersey Constitution because they involve speech that is integral to criminal conduct and is thus unprotected.

For example, a defendant may be found guilty of witness tampering for explicitly threatening a witness not to cooperate with an investigation or asking a witness to testify falsely, N.J.S.A. 2C:28-5(a)(1); withhold testimony, (a)(2); elude legal process, (a)(3); absent himself from a proceeding, (a)(4); or otherwise obstruct such a proceeding, (a)(5). See, e.g., State v. Krieger, 285 N.J. Super. 146, 149-50 (App. Div. 1995) (the defendant asked a witness to falsely claim to "know nothing about" transactions underlying the charges against him); State v. Young, No. A-1849-17 (App. Div. Dec. 3, 2018) (slip op. at 5) (the defendant sent the victim "repetitive intimidating threats" to "discourage his testimony" and frequently drove past the victim's home "making hand gestures and calling [the victim] a rat"); State v. Cornish, No. A-3649-05, (App. Div. Dec. 21, 2006) (slip op. at 1) (the defendant offered the victim $100 to drop the charges against him).

Such prosecutions are common in other state and federal courts as well. See, e.g., United States v. Milk, 66 F.4th 1121, 1129 (8th Cir. 2023) (the defendant instructed a co-conspirator to "[f]ollow [his] lead and stick to the code of silence"; "[g]et that story recanted"; and attest that prior statements to law enforcement were "lie[s]" (final alteration in original)); United States v. England, 507 F.3d 581, 583 (7th Cir. 2007) (the defendant threatened to kill his brother-in-law for cooperating with a police investigation); United States v. Norris, 753 F. Supp. 2d 492, 508 (E.D. Pa. 2010) (the defendant agreed to manufacture "false" accounts people "were to parrot when questioned").

On the other side of the ledger, the list of potentially unconstitutional prosecutions under 2C:28-5(a) appears to be either zero or one (this case).

Defendant cites a long list of what he contends are "witness-tampering prosecutions in New Jersey [that] have arisen from a defendant writing a letter to a potential witness. . . . [Or] speaking to a witness."[2] However, he does not

[2] Defendant cites to an unpublished Appellate Division decision, State v. Williams, No. A-0434-15 (App. Div. June 8, 2017), in which a defendant wrote a letter to a victim and the defendant's relatives called the victim on the phone. The letter is not reproduced in the Appellate Division's decision, and the Appellate Division reversed the defendant's witness tampering conviction. In any event, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge'" because they "would not establish that the statute is substantially overbroad." Williams, 553 U.S. at 303 (quoting Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984)).

allege that any of those witness tampering prosecutions clearly involved protected speech -- i.e., speech that was not integral to criminal conduct -- and we have found none. For example, defendant cites State v. Mancine, in which the defendant told a witness "[d]on't say anything [to police], just keep your mouth shut and tell them you don't know nothing about it." 124 N.J. 232, 241 (1991). The speech that led to the witness tampering charge in that case was thus integral to the criminal conduct of witness tampering. See ibid.

Defendant maintains that the witness tampering statute is unconstitutionally overbroad because a defendant could be prosecuted for appearing on national television, writing a song, or posting to social media to explain "that he is innocent . . . or why the prosecution is unjust." But this "string of hypotheticals," Hansen, 599 U.S. at 782, are not "realistic" witness tampering prosecutions, id. at 770. Defendant does not point to any actual prosecution that even resembles that fact pattern, and he cannot explain how a television appearance, song, or social media post that proclaimed a defendant's innocence would be "conduct which a reasonable person would believe would cause a witness or informant" to testify falsely or refuse to testify. N.J.S.A. 2C:28-5(a).

At bottom, "the ratio of unlawful-to-lawful applications" of the witness tampering statute "is not lopsided enough to justify the 'strong medicine' of

facial invalidation for overbreadth." Hansen, 599 U.S. at 784. Instead, defendant asks us to invalidate the witness tampering statute and threaten a wide swath of prior witness tampering convictions as a remedy for what may be one unconstitutional application of the statute: his own case. This we cannot do. Quite simply, "[t]his is not the stuff of overbreadth -- as-applied challenges can take it from here." Id. at 785.

Because we do not find N.J.S.A. 2C:28-5(a) unconstitutionally overbroad, we decline defendant's invitation to construe the "knowingly" in N.J.S.A. 2C:28-5(a) to apply to both a defendant's conduct and whether the defendant knew that the nature of his conduct would cause a witness to testify falsely.

B.

Although N.J.S.A. 2C:28-5(a) is not facially overbroad, we find that it may have been unconstitutionally applied to defendant in this case 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.

The State and the Attorney General both argue that defendant was not prosecuted "because of anything specifically written in the content of the letter," but rather because "he engag[ed] in a course of conduct that involved sending the letter to his victim's home before the trial, making it clear he knew

who she was and where she lived." As proof, the Attorney General maintains that had defendant published the same letter "via an open letter in a newspaper, there would have been no conceivable tampering prosecution."

The second assertion is correct; the first is not. It is true that had defendant published a letter in a newspaper, he could not have been prosecuted for witness tampering. And it is true that defendant could have been prosecuted simply for sending a letter to A.Z. in a way that showed he knew her full name, knew where she lived, and was willing to "engage with her directly." But as a factual matter, he was not.

It is clear from the trial transcript that defendant was prosecuted for the contents of his letter. The prosecutor mentioned the contents of the letter in his opening statement. A redacted version of the handwritten letter was entered into evidence and read out loud to the jury. The prosecutor asked the jury during summation to "read [the letter]. You determine . . . what does the letter say?" And again:

> It's your question, you look at the contents, right? What is he saying to her? What is he trying to do? What is a reasonable person to take from it? I'm not going to say more than that. That's for you guys -- read the letter. Think about it in the context of all this, right?

It is therefore unsurprising that during deliberations, the jury requested a typed copy of the letter to review and then, as an alternative, heard a readback of the letter being read out loud by a detective.

Although the State now insists that defendant was prosecuted solely based on the time, place, and manner of his speech (sending a letter, from jail, to A.Z.'s home), the record shows otherwise. It reflects a consistent strategy by the prosecution to refer the jury to the text of the letter itself. Because the State urged the jury to "examine the content of the [letter] . . . to determine whether a violation" of the witness tampering statute had occurred, defendant's prosecution was content based. See McCullen, 573 U.S. at 479.

Defendant's conviction would nonetheless have been unproblematic if the jury had been required to find that his speech fell into a recognized category of speech unprotected by the First Amendment.

Defendant contends that the relevant exception is true threats. According to defendant, "Counterman controls the outcome here," and under the First Amendment the State was thus required to prove "at a minimum, that [defendant] was reckless as to the threatening nature of his speech." But defendant was not prosecuted for any true threat of violence. His letter does not contain any threat of violence against A.Z. And he was prosecuted for third-degree witness tampering, which specifically excludes the use of "force

or threat of force." N.J.S.A. 2C:28-5(a). Counterman is thus not relevant to defendant's conviction.

The State maintains that the relevant exception is speech integral to criminal conduct. We agree that, had the jury been required to find that the contents of defendant's letter were speech integral to criminal conduct, the letter would have been unprotected by the First Amendment and there would be no issue with defendant's conviction. However, because the jury was not required to make such a finding, defendant's witness tampering conviction must be vacated and remanded for a new trial.

Defendant's letter is not integral to the criminal act of tampering with a witness on its face. It does not explicitly ask A.Z. to testify falsely, withhold testimony, elude legal process, absent herself from any proceeding, or otherwise obstruct, delay, prevent or impede any official proceeding or investigation. It does not openly encourage A.Z. to do any of those things. And it does not threaten A.Z. if she continues to cooperate with the police or the prosecution.

Because the letter is facially innocuous, 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, withhold any testimony or information, elude legal process, absent herself from a legal

proceeding or investigation, or otherwise obstruct, delay, prevent, or impede an official proceeding or investigation. In the trial below, the jury was not so charged. Therefore, defendant's conviction for witness tampering must be vacated.

If the State seeks to re-prosecute defendant for witness tampering on remand, it has two choices. First, it can introduce the envelope addressed to A.Z. and a completely redacted letter, thereby prosecuting defendant for the act of sending a letter to the victim at her home, rather than the contents of the letter itself. A.Z., of course, can testify as she did initially to how receiving the letter impacted her.

Alternatively, if the prosecution chooses to enter the letter into evidence and focus on the contents of the letter itself, the jury must be charged that defendant can be found guilty of witness tampering only if he intended his letter to cause A.Z. to testify or inform falsely, withhold any testimony, elude legal process summoning her to testify or supply evidence, absent herself from any proceeding or investigation to which she had been legally summoned, or otherwise obstruct, delay, prevent or impede an official proceeding or investigation. If a jury finds beyond a reasonable doubt that defendant had such an intent, then his speech was integral to the criminal conduct of witness tampering and he may be constitutionally convicted for its contents.

C.

Defendant urges us to dismiss the witness tampering charge with prejudice because "the evidence is insufficient" to allow a reasonable jury to conclude "that Hill knew that it was practically certain that his polite, facially innocuous letter would cause the victim to engage in one of the actions specified by the witness-tampering statue." This gets both the law and the facts wrong. First, there is no requirement that a defendant be "practically certain" that their speech "would" cause a victim to withhold testimony. Speech integral to criminal conduct is speech that is "intended to bring about a particular unlawful act." Hansen, 599 U.S. at 783. There is no requirement that the speech succeed. Second, although the letter did not expressly threaten A.Z. or ask her to testify falsely, a reasonable jury could conclude that defendant sent it to pressure A.Z. to refrain from testifying against him at trial -- i.e., intending to tamper with a witness.

We therefore decline to dismiss the witness tampering charge. We also do not disturb defendant's conviction for carjacking under N.J.S.A. 2C:15-2(a)(1).

V.

Although we agree with the Appellate Division's determination that N.J.S.A. 2C:28-5(a) is not facially overbroad, we find that defendant's

conviction under that statute must be vacated to ensure that the statute is constitutionally applied to him. We therefore reverse as to count two of his conviction and remand to the trial court for further proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES PATTERSON, SOLOMON, PIERRE-LOUIS, FASCIALE, and NORIEGA join in JUSTICE WAINER APTER's opinion.

SUPREME COURT OF NEW JERSEY
M-598 September Term 2023
087840

State of New Jersey,

Plaintiff,

v.

William Hill, a/k/a Raheem Hill, Ricky Hill, Russell Johnson, Jerry Jones, Raheem Sander, Raheem Sanders, Joseph Sanders, Bruce Strickland, Bruce Strictland, Andrew Young, Andy Young, and Steven Young,

Defendant-Movant.

ORDER

It is ORDERED that the motion for reconsideration of the Court's opinion filed on January 18, 2024, is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 5th day of March, 2024.

CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4544-19

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

WILLIAM HILL, a/k/a
RAHEEM HILL, RICKY HILL,
RUSSELL JOHNSON, JERRY
JONES, RAHEEM SANDER,
RAHEEM SANDERS, JOSEPH
SANDERS, BRUCE STRICKLAND,
BRUCE STRICTLAND, ANDREW
YOUNG, ANDY YOUNG, and
STEVEN YOUNG,

Defendant-Appellant.

Argued October 25, 2022 – Decided January 23, 2023

Before Judges Sumners, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Indictment No. 19-09-0946.

John P. Flynn, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ashley Brooks, Assistant Deputy Public Defender, of counsel and on the briefs).

Patrick R. McAvaddy, Assistant Prosecutor, argued the cause for respondent (Esther Suarez, Hudson County Prosecutor, attorney; Patrick R. McAvaddy, on the briefs).

Catlin A. Davis, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Matthew J. Platkin, Attorney General, attorney; Catlin A. Davis, of counsel and on the brief).

Doris Cheung argued the cause for amicus curiae Association of Criminal Defense Lawyers of New Jersey (Pashman Stein Walder Hayden, PC, attorneys; Doris Cheung, on the brief).

Ronald K. Chen argued the cause for amicus curiae American Civil Liberties Union of New Jersey Foundation (American Civil Liberties Union of New Jersey and Rutgers Constitutional Rights Clinic, attorneys; Alexander Shalom and Jeanne M. LoCicero, of counsel and on the brief; Ronald K. Chen, on the brief).

The opinion of the court was delivered by

SUSSWEIN, J.A.D.

Defendant, William Hill, appeals from his jury trial convictions for carjacking and witness tampering. He contends the witness tampering statute, N.J.S.A. 2C:28-5(a), is unconstitutionally overbroad and vague. The statutory framework defendant challenges on appeal provides that a witness tampering offense is committed if a person knowingly engages in conduct which a

reasonable person would believe would cause a witness or informant to do one or more specified actions, such as testify falsely or withhold testimony.[1]

Defendant contends the "reasonable person" feature renders the statute unconstitutional and, to avoid constitutional infirmity, the statute must be construed to require the State to prove the defendant knew his or her conduct would cause a prohibited result. Aside from the constitutional issue, defendant contends the assistant prosecutor committed misconduct during summation and the trial court erred by admitting arrest photos into evidence.

After carefully examining the relevant precedents in light of the arguments of the parties and amici, we conclude N.J.S.A. 2C:28-5(a) is neither unconstitutionally overbroad nor impermissibly vague. We decline to embrace a new rule that categorically prohibits the Legislature from using an objective "reasonable person" test to determine a defendant's culpability. We also reject defendant's trial error contentions and, therefore, affirm his convictions.

I.

The following facts were elicited at trial. On the morning of October 31, 2018, the victim left her car running while she went back into her house to

[1] N.J.S.A. 2C:28-5(a) lists five distinct actions by the targeted witness or informant that can be caused by a defendant's witness-tampering conduct. The superseding indictment in this case alleged all five results, not just testifying falsely or withholding testimony. For purposes of brevity, we refer collectively to the statutorily enumerated actions as "prohibited" results.

retrieve a sweater. When she returned to her car one or two minutes later, she noticed a "figure" in the vehicle. The victim ran to her car, opened the door, and told the man to get out. The man put the vehicle in reverse while the door was still open. To avoid getting hit by the door, the victim jumped into the vehicle. She grabbed the steering wheel while her legs were hanging outside the door. She pulled herself into the car as the man shifted the vehicle into drive and sped off with the door still open. He drove erratically and began hitting other vehicles. Each time the vehicle struck another car, the driver-side door would hit the victim's back. Although she was unable to remove the ignition key, she eventually managed to shift the gear into neutral. When the vehicle began to slow down, the man hit the brakes, pushed the victim aside, jumped out, and ran away. From start to finish, the carjacking incident lasted approximately two minutes.

The victim drove to a police station and provided Harrison Police Department Detective Joseph Sloan a description of the carjacker. She stated he was "very, very scruffy. Like, he had hair all over his face, and it was not well maintained." He also had "big eyes" and his skin was not "too dark, but he wasn't light skinned." She stated the man was wearing a red winter "skully" hat, gray hoodie, olive or brown vest, and faded blue jeans.

Detective Sloan collected video surveillance recordings from the area, including from a coffee shop and a convenience store. The video footage and screenshot stills were introduced as evidence at trial to show what the suspect was wearing.

On November 6, 2018, the victim went to the police station to view a photo array. Sergeant Charles Schimpf showed the victim six photographs. He handed the victim one photo at a time and instructed her to stack the photos on top of one another. Despite the instruction to view the photos sequentially, the victim started looking at the photos simultaneously, comparing one against the other.

The record indicates the victim at one point "really thought" the man who attempted to steal her car was an individual in a photograph that was not defendant. However, she ultimately selected defendant's photograph from the array.

At trial, she testified,

> I recognized him by what I saw in my car. Like, I knew that I . . . know that I saw the person. You know, I was face to face with him. I know exactly what he looks like. The pictures just didn't look up to date, and so, . . . when I was looking at all of the pictures, I knew that I recognized him, but there were so many things missing. I was like this is definitely the guy, but the facial hair isn't there. You know what I mean? He was so scruffy and it looked like the

> picture was taken with a flash, so he looked a little bit lighter, but . . . I just . . . knew.

The victim stated she was confident in her identification because she recognized the carjacker's eyes, explaining, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." She also recognized the man's mouth and nose. The victim stated she was eighty percent confident in her identification.

Defendant was arrested on November 27, 2018. Following the arrest, Detective Sloan took six photographs of defendant. In the arrest photos, defendant is wearing faded jeans, a black jacket, a grey hoodie, and a red skully cap.

In April 2019, while awaiting trial, defendant sent a letter addressed to the victim's home. The letter, as redacted for its use at trial, reads:

> Dear Ms. [Victim],
>
> 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. [Victim], 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. [Victim], 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. [Victim], 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. [Victim], 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. [Victim], 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.
>
> Sincerely,
> [Defendant]

Defendant was initially charged by indictment with first-degree carjacking, N.J.S.A. 2C:15-2(a)(1). Following the letter incident, a superseding indictment added a charge of third-degree witness tampering, N.J.S.A. 2C:28-5(a).

In June 2019, the trial court held a Wade[2] hearing to determine the admissibility of the eyewitness identification. On July 8, 2019, the trial court issued an oral ruling denying defendant's motion to suppress the victim's identification of defendant as the perpetrator.

[2] United States v. Wade, 388 U.S. 218 (1967).

In fall 2019, defendant was tried before a jury over the course of several days. The jury found defendant guilty on both counts. On June 10, 2020, the trial judge denied defendant's motion for a new trial and sentenced defendant to a twelve-year term of imprisonment subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, on the carjacking conviction. The judge imposed a consecutive three-year term of imprisonment on the witness tampering conviction.

Defendant raises the following contentions for our consideration on appeal:

> POINT I
>
> TO AVOID CONSTITUTIONAL INFIRMITY, THE WITNESS-TAMPERING STATUTE MUST BE INTERPRETED TO REQUIRE THAT THE DEFENDANT KNOW THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING.
>
> A. FOR THE WITNESS-TAMPERING STATUTE TO BE CONSTITUTIONAL, IT MUST BE CONSTRUED TO REQUIRE KNOWLEDGE THAT THE SPEECH OR CONDUCT WOULD CAUSE A WITNESS TO IMPEDE OR OBSTRUCT AN INVESTIGATION OR PROCEEDING. OTHERWISE, THE STATUTE MUST BE DEEMED OVERBROAD AND VAGUE.
>
> B. MR. HILL'S CONVICTIONS MUST BE REVERSED BECAUSE THE JURY WAS NOT

INSTRUCTED ON AND DID NOT FIND THAT THE STATE PROVED THIS ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT.

POINT II

THE PROSECUTOR MADE NUMEROUS MISLEADING ARGUMENTS CONTRARY TO LAW AND FACT AS A MEANS OF BOLSTERING THE WEAK IDENTIFICATION, DEPRIVING MR. HILL OF A FAIR TRIAL AND REQUIRING REVERSAL.

A. THE SIMULATION USED BY THE PROSECUTOR IN SUMMATION TO ARGUE THAT, JUST LIKE THE JURORS WOULD NOT FORGET HIS FACE, THE VICTIM WOULD NOT FORGET THE PERPETRATOR'S FACE, WAS EXTREMELY MISLEADING. HIS ARGUMENT THAT THE STRESS OF THE INCIDENT MADE HER IDENTIFICATION MORE RELIABLE COMPOUNDED THE HARM.

B. THE PROSECUTOR ELICITED MISLEADING TESTIMONY AND MADE A MISGUIDING ARGUMENT CONTRARY TO FACT AND LAW: THAT BECAUSE THE EYEWITNESS THOUGHT MR. HILL LOOKED THE MOST LIKE THE SUSPECT, HE WAS THE SUSPECT.

C. THE CUMULATIVE EFFECT OF THE REPEATED PROSECUTORIAL MISCONDUCT DEPRIVED MR. HILL OF A FAIR TRIAL.

POINT III

THE ARREST PHOTOS SHOULD HAVE BEEN EXCLUDED BECAUSE THEY WERE MINIMALLY PROBATIVE, HIGHLY PREJUDICIAL, AND CUMULATIVE. AT MINIMUM, A LIMITING INSTRUCTION SHOULD HAVE BEEN GIVEN. REVERSAL IS THUS REQUIRED.

II.

We first address defendant's constitutional arguments. The State maintains we should not consider defendant's overbreadth and vagueness contentions because he did not challenge the constitutionality of the witness tampering statute before or during the trial. Defendant first argued the State was required to prove he knew his conduct would cause the victim to engage in prohibited acts in his post-verdict motion for a new trial. Defendant, in the relevant point heading of his initial appeal brief, asserts the constitutional argument was "partially raised below." See R. 2:6-2(a)(6).

In State v. Galicia, our Supreme Court explained, "[g]enerally, an appellate court will not consider issues, even constitutional ones, which were not raised below." 210 N.J. 364, 383 (2012) (emphasis added). Accordingly, "appellate 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.'" Nieder v. Royal Indem.

Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co. v. Summer, 58 N.J. Super 542, 548 (App. Div. 1959)). Because the problem of witness intimidation is a matter of great public interest—one that has a direct impact on the integrity of the criminal justice process and public safety—we choose to address defendant's constitutional arguments notwithstanding that they were not fully presented to the trial court.[3]

We begin our substantive analysis by acknowledging certain foundational legal principles. "A presumption of validity attaches to every statute" and the burden is on the party challenging the statute to establish its unconstitutionality. State v. Lenihan, 219 N.J. 251, 265–66 (2014).

Defendant contends the witness tampering statute is both overbroad and vague. Overbreadth and vagueness are analytically distinct concepts that implicate different constitutional concerns. When considering overbreadth, the "first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." State v. B.A., 458 N.J. Super. 391, 407 (App. Div. 2019) (quoting State v. Saunders, 302 N.J. Super. 509, 517 (App. Div. 1997)). In

[3] Because this case raises important issues and implicates the need to deter witness intimidation, we invited the Attorney General, the American Civil Liberties Union of New Jersey (ACLU), and the Association of Criminal Defense Lawyers of New Jersey to participate as amicus curiae. We express our gratitude to the amici for their helpful arguments.

State v. Burkert, our Supreme Court commented that invalidating a statute on overbreadth grounds is a "drastic remedy." 231 N.J. 257, 276 (2017).

The Court in Burkert explained that "[v]ague and overly broad laws criminalizing speech have the potential to chill permissible speech, causing speakers to silence themselves rather than utter words that may be subject to penal sanctions." Ibid. (first citing Reno v. ACLU, 521 U.S. 844, 871–72 (1997); and then citing NAACP v. Button, 371 U.S. 415, 433 (1963)). The Court acknowledged, however, that certain categories of speech may be criminalized, noting that a statute will not be struck down on First Amendment grounds when, for example, the speech at issue "is integral to criminal conduct, . . . physically threatens or terrorizes another, or . . . is intended to incite imminent unlawful conduct." Id. at 281. In B.A., we held that "[w]ith respect to speech 'integral to criminal conduct,' the 'immunity' of the First Amendment will not extend to 'a single and integrated course of conduct' that violates a valid criminal statute." 458 N.J. Super. at 408 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). We further explained in B.A. that when an overbreadth challenge is rejected, "[t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge

only if the enactment is impermissibly vague in all of its applications." Id. at 410 (quoting Saunders, 302 N.J. Super. at 517 (alteration in original)).

While the overbreadth doctrine typically addresses First Amendment free speech concerns, "[t]he constitutional doctrine of vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Borjas, 436 N.J. Super. 375, 395 (App. Div. 2014) (quoting State v. Emmons, 397 N.J. Super. 112, 124 (App. Div. 2007)). It "is well settled that '[a] criminal statute is not impermissibly vague so long as a person of ordinary intelligence may reasonably determine what conduct is prohibited so that he or she may act in conformity with the law.'" Id. at 395–96 (quoting Saunders, 302 N.J. Super. at 520–21 (alteration in original)).

Therefore, the test for vagueness is whether "persons of 'common intelligence must necessarily guess at [the statute's] meaning and differ as to its application.'" Id. at 396 (quoting State v. Mortimer, 135 N.J. 517, 532 (1994)). A statute need not be a "model of precise draftsmanship," but rather need only "sufficiently describe[] the conduct that it proscribes." State v. Afanador, 134 N.J. 162, 169 (1993). "[I]mprecise but comprehensible normative standard[s]" are sufficient to survive constitutional challenge. See Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

In State v. Crescenzi, we rejected a vagueness and overbreadth challenge to a predecessor version of the witness tampering statute. 224 N.J. Super. 142, 148 (App. Div. 1988). Regarding overbreadth, we held "the statute furthers the important governmental interest of preventing intimidation of, and interference with, potential witnesses or informers in criminal matters and easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." Id. at 148.

In 2008, the witness tampering statute was significantly amended. L. 2008, c. 81, § 1. The Senate Judiciary Committee Statement noted that the statute was amended to "ensure that tampering with a witness or informant is applied as broadly as possible." Sen. Judiciary Comm. Statement to A. 1598 4 (L. 2008, c. 81).

The societal interest in preventing intimidation of, and interference with, potential witnesses or informers in criminal matters remains an important governmental objective. See State v. Ramirez, 252 N.J. 277, 301 (2022) (noting the Crime Victim's Bill of Rights, N.J.S.A. 52:4B-36(c), was amended in 2012 "to provide that victims have the right to be free from intimidation, harassment and abuse by any person, including the defendant or any person acting in support of or on behalf of the defendant" (emphasis omitted) (quoting Sen. Budget & Appropriations Comm. Statement to A. 2380 1 (L. 2012, c.

27))). Nothing in the 2008 amendments undermines the rationale supporting the conclusion we reached in Crescenzi regarding overbreadth.

We note that very recently—after oral argument in the matter before us—the United States Supreme Court granted certiorari in a Colorado criminal case to address the First Amendment implications of an objective reasonable-person test applied to a stalking statute. Counterman v. Colorado, 598 U.S. ___ (2023). The issue in that case is whether a "reasonable person" interpreting a statement as a threat of violence is sufficient to establish a "true threat" removed from First Amendment protection,[4] or whether the speaker must subjectively know or intend the threatening nature of the statement. Petition for Writ of Certiorari at 2, Counterman, 598 U.S. ___ (No. 22-138). That issue is distinct from the one before us.

Here, we are not evaluating speech directed broadly or to an unspecified class of persons. Instead, we are solely evaluating speech directed to victims, witnesses, or informants who are linked to an official proceeding or investigation. N.J.S.A. 2C:28-5(a). Also, in this case, the communication was sent by a charged defendant through regular mail directly to the victim-

[4] "True threats" to commit violence are not protected by the First Amendment. See Watts v. United States, 394 U.S. 705, 708 (1969).

witness's home. We are not addressing the criminalization of social media posts broadcast to a wide audience.

A defendant awaiting trial has no First Amendment right to communicate directly with the victim of the alleged violent crime. Were it otherwise, a court setting the conditions of pretrial release under the Criminal Justice Reform Act, N.J.S.A. 2A:162-15 to -26, might be foreclosed from imposing a "no contact" order.[5] Thus, the contours of the "true threat" doctrine are not at issue in this appeal. Accordingly, we reject defendant's current overbreadth claim.

The 2008 amendments significantly impact the analytically distinct question of whether the statute in its present form is impermissibly vague. The 2008 amendments added the "reasonable person" standard for determining culpability that defendant now challenges. Because that feature was not at issue in Crescenzi, the legal analysis and conclusion in that case provide no guidance on the vagueness question before us in this appeal.

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[5] We confirmed at oral argument the trial court had not issued an explicit pretrial "no contact" order. We emphasize this is not a case where defense counsel or his investigator reached out to the victim as part of the defense investigation or litigation strategy. See Ramirez, 252 N.J. at 302 (recognizing a distinction between disclosing a victim's address to the defense team and to the defendant himself or herself). Rather, defendant reached out to the victim directly and entirely on his own. The record does not indicate how defendant learned the victim's home address.

The witness tampering statute now reads 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.
>
> [N.J.S.A. 2C:28-5 (emphasis added).]

In State v. Gandhi, 201 N.J. 161 (2010), our Supreme Court interpreted a substantially similar "reasonable person" feature in the stalking statute, N.J.S.A. 2C:12-10.[6] The defendant argued the jury instruction on the stalking

[6] N.J.S.A. 2C:12-10(b) provides:

> A person is guilty of stalking . . . if he [or she] purposely or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or

charge "was insufficient because it did not explicitly require the jury to find that a defendant had the conscious object to induce, or awareness that his conduct would cause, fear of bodily injury or death in his victim."[7] Gandhi, 201 N.J. at 169. In rejecting that claim, the Supreme Court reasoned:

> [W]e do not discern a legislative intent to limit the reach of the anti-stalking statute to a stalker-defendant who purposefully intended or knew that his behavior would cause a reasonable person to fear bodily injury or death. Rather, we read the offense to proscribe a defendant from engaging in a course of repeated stalking conduct that would cause such fear in an objectively reasonable person. We view the statute's course-of-conduct focus to be on the accused's conduct and what that conduct would cause a reasonable victim to feel, not on what the accused intended.
>
> [Id. at 170.]

The Court further explained, "the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker." Id. at 180.

> the safety of a third person or suffer emotional distress.

[7] We note the jury charge/statutory construction argument the defendant raised in Gandhi, while not couched in constitutional terms, is very similar to the argument defendant raised in the present matter in his motion for a new trial.

Although the Court in Gandhi was not called upon to address the constitutionality of the reasonable-person standard,[8] we deem it unlikely, if not inconceivable, that the Court would have gone to such lengths to construe the

[8] The Supreme Court in State v. Pomianek, 221 N.J. 66 (2015), explicitly acknowledged that Gandhi did not address the constitutionality of the stalking statute, explaining:

> The State compares N.J.S.A. 2C:16-1(a)(3) [bias intimidation] to the stalking statute, N.J.S.A. 2C:12-10, which we addressed in State v. Gandhi, 201 N.J. 161 (2010). Unlike N.J.S.A. 2C:16-1(a)(3), the stalking statute has a mens rea component. The stalking statute provides that a defendant is guilty of a crime "if he [or she] purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his [or her] safety or the safety of a third person or suffer other emotional distress." N.J.S.A. 2C:12-10(b) (emphasis added). In Gandhi, we determined only that the Legislature did not intend by the statute's wording to impose a requirement on the prosecution to prove that the defendant purposefully or knowingly "cause[d] a reasonable victim to fear bodily injury or death." 201 N.J. at 187. Our task in Gandhi was statutory interpretation and not constitutional adjudication.
>
> [221 N.J. 66, 88 n.8 (2015) (second alteration in original) (emphasis omitted).]

The witness tampering statute, like the stalking statute, also has a mens rea component in that it requires proof the defendant "knowingly engage[d] in conduct which a reasonable person would believe would cause a witness or informant to [engage in a prohibited action]." N.J.S.A. 2C:28-5(a) (emphasis added).

statute in a manner that would render it impermissibly vague on its face. Following Gandhi, moreover, we upheld the constitutionality of the stalking statute. B.A., 458 N.J. Super. at 398.

Defendant contends the witness tampering statute is impermissibly vague based on our Supreme Court's ruling in Pomianek.[9] The Court in that case addressed the constitutionality of N.J.S.A. 2C:16-1(a)(3), "a bias-crime statute that allows a jury to convict a defendant even when bias did not motivate the commission of the offense." Pomianek, 221 N.J. at 69. The relevant portion of the bias intimidation statute at that time provided:

> (a) A person is guilty of the crime of bias intimidation if he commits, attempts to commit, conspires with another to commit, or threatens the immediate commission of an offense specified in chapters 11 through 18 of Title 2C of the New Jersey Statutes; N.J.S. 2C:33-4; N.J.S. 2C:39-3; N.J.S. 2C:39-4 or N.J.S. 2C:39-5,
>
> > (1) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
> >
> > (2) knowing that the conduct constituting the offense would cause an individual or group of individuals to be intimidated because of race,

[9] Defendant did not rely upon, or even cite to, Pomianek in his initial appeal brief. He did so in compliance with our request to the parties to file supplemental briefs to address Pomianek.

> color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity; or
>
> (3) under circumstances that caused any victim of the underlying offense to be intimidated and the victim, considering the manner in which the offense was committed, reasonably believed either that (a) the offense was committed with a purpose to intimidate the victim or any person or entity in whose welfare the victim is interested because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity, or (b) the victim or the victim's property was selected to be the target of the offense because of the victim's race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.
>
> [Id. at 81 (emphasis added) (quoting N.J.S.A. 2C:16-1).]

The Court concluded that N.J.S.A. 2C:16-1(a)(3) was unconstitutionally vague, noting, "[i]n focusing on the victim's perception and not the defendant's intent, the statute does not give a defendant sufficient guidance or notice on how to conform to the law." Id. at 70. The Court added:

> Unlike subsections (a)(1) and (a)(2), subsection (a)(3) focuses not on the state of mind of the accused, but rather on the victim's perception of the accused's motivation for committing the offense. Thus, if the victim reasonably believed that the defendant committed the offense of harassment with the purpose to intimidate or target him based on his race or color, the defendant is guilty of bias intimidation. N.J.S.A.

> 2C:16–1(a)(3). Under subsection (a)(3), a defendant may be found guilty of bias intimidation even if he [or she] had no purpose to intimidate or knowledge that his [or her] conduct would intimidate a person because of his [or her] race or color. In other words, an innocent state of mind is not a defense to a subsection (a)(3) prosecution; the defendant is culpable for his words or conduct that led to the victim's reasonable perception even if that perception is mistaken.
>
> [Id. at 82 (emphasis omitted).]

Ultimately, the Supreme Court struck subsection (a)(3) of the bias statute but allowed subsections (a)(1) and (a)(2) to stand. Id. at 91–92.

Defendant and the ACLU argue that the "reasonable person" feature in the witness tampering statute is analytically indistinguishable from the portion of the bias intimidation statute struck down on vagueness grounds in Pomianek. We disagree.

A close examination reveals significant, substantive differences between N.J.S.A. 2C:16-1(a)(3) and N.J.S.A. 2C:28-5(a)(1). It is true the witness tampering statute, like the bias intimidation feature that was invalidated in Pomianek, "criminalizes [the] defendant's failure to apprehend the reaction that his words would have [on] another." Id. at 90. It also is true that a defendant may be found guilty of witness tampering even if he or she did not intend to impede a proceeding or investigation.

But the similarities between the two statutes end there. As we have already noted, unlike the invalidated portion of the bias intimidation statute, the witness tampering statute includes a "knowing" mens rea component. See note 8. Most significantly, the invalidated portion of the bias intimidation statute employed a subjective test under which a defendant's culpability was determined from the perspective of the specific victim who was targeted. The witness tampering statute, in contrast, does not depend on the victim's subjective reaction. Rather, like the stalking statute, the witness tampering statute uses a purely objective test that relies on the "objective perspective of the fact-finder." See Gandhi, 201 N.J. at 180.

The Pomianek Court highlighted the subjective nature of the bias crime provision, which focused on the victim's personal perspective. 221 N.J. at 89. The Court explained:

> Of course, a victim's reasonable belief about whether he [or she] has been subjected to bias may well depend on the victim's personal experiences, cultural or religious upbringing and heritage, and reaction to language that is a flashpoint to persons of his [or her] race, religion, or nationality. A tone-deaf defendant may intend no bias in the use of crude or insensitive language, and yet a victim may reasonably perceive animus. The defendant may be wholly unaware of the victim's perspective, due to a lack of understanding of the emotional triggers to which a reasonable person of that race, religion, or nationality would react.
>
> [Ibid.]

That led the Court to conclude that "guilt may depend on facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]," thereby rendering the statute impermissibly vague. Ibid.

The reasonable-person standard employed in the witness tampering statute, in contrast, does not account for, much less depend on, what the victim actually perceived or believed. Rather, it is an objective standard. As our Supreme Court explained in Gandhi,

> [t]he legislative choice to introduce a reasonable-person standard undercuts defendant's argument that the plain language of the statute calls for application of a subjective standard . . . . To the contrary, the reasonable-person standard demonstrates a legislative preference for the objective perspective of the fact-finder to assess a reasonable person's reaction to the course of conduct engaged in by the accused stalker.
>
> [201 N.J. at 180.]

The objective formulation of the witness tampering statute effectively eliminates the concern expressed in Pomianek regarding idiosyncratic personal characteristics of the victim. From a due process notice standpoint, the purely objective reasonable-person standard is vastly different from a subjective standard like the one used in the invalidated bias intimidation provision.

Furthermore, the bias crime provision struck down in Pomianek was a uniquely convoluted culpability formulation that essentially required a

defendant to divine what the victim would perceive as to the defendant's motivation. Notably, the constitutionally deficient portion of the bias intimidation statute did not focus on the impact of a defendant's conduct but rather on the victim's speculation as to what the defendant was thinking. That statute thus required clairvoyance, for lack of a better description, because it presupposed a defendant would somehow be privy to the subjective thought processes of the targeted victim or victims.

Because it uses a purely objective standard, N.J.S.A. 2C:28-5(a) does not suffer from the constitutional defect identified in Pomianek. The witness tampering statute, unlike the invalidated bias intimidation provision, does not require a defendant to know the "personal experiences" or "emotional triggers" of the victim and thus does not depend on "facts beyond the knowledge of the defendant or not readily ascertainable by him [or her]." Pomianek, 221 N.J. at 89.

We also emphasize that the invalidated provision in the bias intimidation statute was unprecedented—that culpability formulation had not been used in any preexisting statute and was never replicated in New Jersey or any other jurisdiction so far as we are aware. The objective "reasonable person" formulation employed in the witness tampering statute, in contrast, appears throughout the New Jersey Code of Criminal Justice. In addition to the

stalking statute construed in Gandhi and upheld in B.A., a "reasonable person" test is used in the following criminal statutes[10]:

> Criminal Attempt, N.J.S.A. 2C:5-1(a)(1) and (a)(3) (a defendant is culpable if he or she engages in conduct that would be criminal "if the attendant circumstances were as a reasonable person believes them to be");
>
> Human Trafficking, 2C:13-9(a)(2) (a defendant is culpable if he or she forces labor from someone "under circumstances in which a reasonable person would conclude that there was a substantial likelihood that the person was a victim of human trafficking");
>
> Distribution/Possession with Intent to Distribute Imitation Controlled Dangerous Substances, N.J.S.A. 2C:35-11(a)(3) (a defendant is culpable if he or she distributes/possesses with intent to distribute a non-controlled substance "[u]nder circumstances which would lead a reasonable person to believe that the substance is a controlled dangerous substance");
>
> Financial Facilitation of Criminal Activity (Money Laundering), N.J.S.A. 2C:21-25(a) to (c) (a defendant is culpable if he or she possesses property "known or which a reasonable person would believe to be derived from criminal activity"; or "engages in a transaction involving property known or which a reasonable person would believe to be derived from criminal activity"; or participates in "transactions in property known or which a reasonable person would believe to be derived from criminal activity");

[10] The following statutory summaries are provided only to demonstrate the Legislature's use of the reasonable-person standard. They do not contain all the elements of the listed offenses.

> Minor's Access to Loaded Firearm, N.J.S.A. 2C:58-15(a)(2) (a defendant is culpable if he or she "knows or reasonably should know" a minor could access a loaded firearm, unless he or she "stores the firearm in a location which a reasonable person would believe to be secure");
>
> Criminal Trespass, N.J.S.A. 2C:18-3(c) (a defendant is culpable if, without consent, he or she peers into another's window "under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed");
>
> Invasion of Privacy, N.J.S.A. 2C:14-9(a) and (b) (a defendant is culpable if he or she, without license or privilege, "and under circumstances in which a reasonable person would know that another may expose intimate parts," observes another without their consent; or, records an image of someone's intimate parts without that person's consent "under circumstances in which a reasonable person would not expect to have his undergarment-clad intimate parts observed").
>
> Theft from Grave Site, N.J.S.A. 2C:20-2.3 (a defendant is culpable if he or she removes a headstone without permission "under circumstances which would cause a reasonable person to believe that the object was unlawfully removed").

So far as we are aware, none of the foregoing statutes have been challenged, much less stricken, on constitutional grounds because they employ a reasonable-person standard. In these circumstances, we decline to create a new categorical rule that would invalidate the use of an objective reasonable-person test for determining criminal culpability.

In sum, we conclude that a person of ordinary intelligence can reasonably determine whether his or her conduct constitutes witness tampering. See Borjas, 436 N.J. Super. at 395–96. In this particular application, moreover, we are satisfied defendant was on constitutionally sufficient notice that the letter he addressed to the carjacking victim's private residence violated N.J.S.A. 2C:28-5(a) as measured from the perspective of a reasonable person. As the ACLU acknowledges, "[o]f course, it is not necessary to a convict[ion] for witness tampering that the witness actually give false testimony or obstruct a proceeding, if the conduct of defendant made the risk of such behavior sufficiently likely." Amicus further acknowledges that "[w]ritten communications can, depending on context, often convey meanings that are at odds with their facial text."

Here, although defendant's letter was not explicitly threatening, the context shows defendant wanted the victim to recant her identification of him. Importantly, the context of the letter shows he knew where she lived and was prepared to interact with her directly and not through his attorney or the prosecutor's office. We believe defendant was thus on sufficient notice that a reasonable person would believe an eyewitness confronted with such a letter would feel pressured to accede to his request to recant an out-of-court identification and refrain from testifying against him at trial.

III.

Defendant next argues the prosecutor committed misconduct during his summation. Specifically, defendant contends the prosecutor improperly: (1) asked the jury to silently observe his face for ninety seconds, the length of time the victim had to observe the assailant; (2) suggested the victim's identification was more reliable because of the stressful nature of the carjacking event; and (3) engaged in "the fallacy of relative judgment," whereby the prosecutor improperly suggested the victim had correctly identified the suspect during the out-of-court identification procedure because his photo in the array most closely resembled the assailant.

A defendant's allegation of prosecutorial misconduct requires us to assess whether defendant was deprived of the right to a fair trial. State v. Jackson, 211 N.J. 394, 407 (2012). To warrant reversal on appeal, the prosecutor's misconduct must be "clearly and unmistakably improper" and "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense." State v. Wakefield, 190 N.J. 397, 437–38 (2007) (quoting State v. Papasavvas, 163 N.J. 565, 625 (2000)).

Prosecutors "are expected to make vigorous and forceful closing arguments to juries." State v. Frost, 158 N.J. 76, 82 (1999) (citing State v. Harris, 141 N.J. 525, 559 (1995)). Furthermore, "[p]rosecutors are afforded

considerable leeway in closing arguments as long as their comments are reasonably related to the scope of the evidence presented." Ibid. "Even so, in the prosecutor's effort to see that justice is done, the prosecutor 'should not make inaccurate legal or factual assertions during a trial.'" State v. Bradshaw, 195 N.J. 493, 510 (2008) (quoting Frost, 158 N.J. at 85). Rather, "a prosecutor should 'confine [his or her] comments to evidence revealed during the trial and reasonable inferences to be drawn from that evidence.'" Ibid. (alteration in original) (quoting State v. Smith, 167 N.J. 158, 178 (2001)). "So long as the prosecutor's comments are based on the evidence in the case and the reasonable inferences from that evidence, the prosecutor's comments 'will afford no ground for reversal.'" Ibid. (quoting State v. Johnson, 31 N.J. 489, 510 (1960)).

We add that if a defendant fails to object to alleged prosecutorial misconduct at trial, reviewing courts apply the plain error standard. See R. 2:10-2. Under that standard, we may reverse a defendant's conviction only if the error was "clearly capable of producing an unjust result." Ibid.; State v. Cole, 229 N.J. 430, 458 (2017). In Frost, our Supreme Court emphasized that "[g]enerally, if no objection was made to the improper remarks, the remarks will not be deemed prejudicial. The failure to object suggests that defense counsel did not believe the remarks were prejudicial at the time they were

made." 158 N.J. at 83–84 (citation omitted); accord State v. Irving, 114 N.J. 427, 444 (1989); State v. Ramseur, 106 N.J. 123, 323 (1987). Failure to object also deprives the trial court the opportunity to take curative action. Irving, 114 N.J. at 444.

A.

We first address defendant's contention the prosecutor conducted an inappropriate demonstration when he argued in summation,

> I want to show you how long she looked at the man sitting behind me. So, I'm going to apologize in advance, because it's going to get awkward. But if it's going to get awkward, imagine how much [sic] she saw the guy for. A minute or two minutes, that's what she said, right? Let's split the difference. Ninety seconds. Ninety seconds in silence. Look towards me, look around me, you choose, but let's see how long it is.
>
> [Silence]
>
> Let me ask you a question. In the time that it takes to watch a Boy Meets World[11] episode, would you be able to identify me? [Thirty-three] minutes later, she described him.

"Ordinarily it is discretionary with the court as to allowing an experiment to be performed in the jury's presence. Demonstrations or experiments may be justified on the ground that they tend to enlighten the jury

[11] Boy Meets World is a thirty-minute television sitcom that originally aired from 1993–2000.

on an important point." State v. LiButti, 146 N.J. Super. 565, 572 (App. Div. 1977). However, "caution and prudence should govern in each instance, depending upon the circumstances and the character of the demonstration." Ibid. (quoting State v. Foulds, 127 N.J.L. 336, 344 (E & A 1941)). Importantly, "[t]he demonstration must be performed within the scope of the evidence in the case." Ibid.

Applying these principles, we do not believe the prosecutor conducted an impermissible demonstration, especially given the absence of an objection. The prosecutor was permitted to demonstrate the duration of the carjacking encounter to show the length of time the victim had to observe the assailant. Importantly, the prosecutor stayed within the bounds of the trial evidence. See LiButti, 146 N.J. Super. at 572. The failure to object, moreover, precluded the judge from interrupting the demonstration, and shows that defense counsel did not believe the demonstration was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444.

B.

We turn next to defendant's contention, again raised for the first time on appeal, that the prosecutor improperly suggested the victim's identification was more reliable because of the stressful nature of the carjacking event. The prosecutor argued the victim's identification was especially reliable because

the carjacking was a moment in her life she would not forget, and that defendant's face was a face she would not forget.

We note the prosecutor's argument was consistent with the victim's trial testimony, in which she stated, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head." The prosecutor thus commented on evidence revealed during the trial. See Bradshaw, 195 N.J. at 510.

The gist of defendant's contention on appeal is that the prosecutor's comment conflicts with our Supreme Court's determination in State v. Henderson, 208 N.J. 208, 261–62 (2011), that stress during a criminal episode is an estimator variable that can diminish an eyewitness' ability to recall and make an accurate identification.[12] We are satisfied the jury was properly

[12] The Henderson Court explained:

> Even under the best viewing conditions, high levels of stress can diminish an eyewitness' ability to recall and make an accurate identification. The Special Master found that "while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator."
>
> . . . .

instructed on how to evaluate the victim's eyewitness identification testimony, thereby mitigating any prejudicial effect of the prosecutor's closing argument. At the beginning of the trial, the judge instructed the jury that arguments in summation are not evidence and that it is the jurors' recollection of the evidence that is controlling. See State v. Timmendequas, 161 N.J. 515, 578 (1999) (noting the prosecutor's statements are not evidence).

The trial court reiterated that point during the final jury charges, explaining:

> Regardless of what counsel said or I may have said in recalling the evidence in this case, it is your recollection of the evidence that should guide you as judges of the facts. Arguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence. Although the attorneys may point out what they think is important in this case, you must rely solely upon your understanding and recollection of the evidence that was admitted during the trial.
>
> Whether or not the defendant has been proven guilty beyond a reasonable doubt is for you and only you to determine based upon all the evidence

---

> We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes "high" stress, which must be assessed based on the facts presented in individual cases.
>
> [208 N.J. at 261–62.]

> presented during the trial. Any comments by counsel are not controlling. It is your sworn duty to arrive at a just conclusion after considering all the evidence which is presented during the course of the trial.

Furthermore, the trial court properly instructed the jury regarding the impact of stress on the reliability of eyewitness identifications, noting:

> Even under the best viewing conditions, high levels of stress can reduce an eyewitness' ability to recall or make an accurate identification. Therefore, you should consider a witness' level of stress and whether that stress, if any, distracted the witness or made it harder for him or her to identify the perpetrator.

Accordingly, even assuming for the sake of argument the prosecutor's comment regarding the impact of stress contradicted social science principles adopted by the Supreme Court in Henderson, the trial court provided the correct standard for the jury to evaluate this estimator variable. "One of the foundations of our jury system is that the jury is presumed to follow the trial court's instructions." State v. Burns, 192 N.J. 312, 335 (2007). We reiterate, moreover, the failure to object shows that defense counsel did not believe the prosecutor's argument was prejudicial within the atmosphere of the trial. See Irving, 114 N.J. at 444. At bottom, we are not persuaded the prosecutor's remarks regarding the effect of stress on the victim's ability to identify the perpetrator were "clearly and unmistakably improper" and "so egregious" as to

deprive defendant of the right to have a jury fairly evaluate the merits of his defense. See Wakefield, 190 N.J. at 437–38.

C.

We turn next to defendant's contention the prosecutor exploited what defendant calls "the fallacy of relative judgment" by suggesting the victim correctly identified the suspect because his photograph in the array most closely resembled the perpetrator. In his summation, the prosecutor played the video recording of the photo lineup procedure and used a PowerPoint presentation to show the jury which photos were being reviewed and compared by the victim throughout the course of the identification procedure.

During the trial, the prosecutor asked the victim to compare the photos comprising the array and explain why she picked defendant's photo over the others. Defense counsel objected, and the court initially commented this seemed to be the kind of testimony that should not be elicited. The prosecutor explained that this line of questioning was critical because "the complexion which counsel has gone into considerably on cross and my point, to make it probative, relative, is that despite the fact that [photo] number [three], perhaps, is the lightest complexion." The judge permitted this line of examination but instructed the prosecutor to pose non-leading questions.

Defendant now contends the prosecutor improperly argued in summation that the victim looked at defendant's photograph the longest and that the video recording of the identification procedure shows that she was either reviewing or identifying his photo over ninety percent of the time. Defendant did not object to the prosecutor's comment at the time of summation.

The gravamen of defendant's argument on appeal is that the prosecutor yet again contradicted social science principles recognized by our Supreme Court in Henderson. We are not persuaded the prosecutor's comments were improper, much less deprived defendant of a fair trial.

The Court in Henderson, it bears noting, did not hold that simultaneous photo lineups—which allow for side-by-side comparisons—are categorically inappropriate. 208 N.J. at 256–58. Indeed, the Court expressed no preference for sequential presentation of photos over simultaneous presentation.[13] Ibid. However, as defendant notes, the Court expressed concern with a concept called "relative judgment." Id. at 234–35. The Court explained:

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[13] The Court noted that social science researchers disagree on whether it is best to use simultaneous or sequential photo lineup procedures. The Court concluded, "[a]s research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient, authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. As a result, we do not limit either one at this time." Id. at 257–58 (citation omitted).

> Under typical lineup conditions, eyewitnesses are asked to identify a suspect from a group of similar-looking people. "[R]elative judgment refers to the fact that the witness seems to be choosing the lineup member who most resembles the witnesses' memory relative to other lineup members." Gary L. Wells, The Psychology of Lineup Identifications, 14 J. Applied Soc. Psychol. 89, 92 (1984) (emphasis in original). As a result, if the actual perpetrator is not in a lineup, people may be inclined to choose the best look-alike.
>
> [Ibid.]

The Court added that "[r]elative judgment touches the core of what makes the question of eyewitness identification so challenging. Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors." Id. at 235.

But even assuming the prosecutor ought not have suggested that the victim's identification was more reliable because she compared the photos against one another and held on to defendant's photo throughout the identification procedure, that argument was not "clearly and unmistakably improper" or otherwise "so egregious" that it deprived defendant of the "right to have a jury fairly evaluate the merits of his defense," see Wakefield, 190 N.J. at 437–38, especially given the lack of an objection to the prosecutor's summation.

Furthermore, any prejudice was ameliorated by the trial judge's careful and thorough jury instructions on how to evaluate eyewitness identification evidence. See Burns, 192 N.J. at 335. In view of those instructions, the prosecutor's closing argument regarding the eyewitness identification procedure does not warrant reversal of his carjacking conviction.

IV.

Defendant next contends the trial court erred in admitting six photos of defendant taken at the time of his arrest three weeks after the carjacking incident. The photos show defendant was wearing faded jeans, a black jacket, a grey hoodie, and red skull cap. Defendant was not in any restraints.

Defendant objected to the admission of the photographs. The trial judge ruled, "I'll allow them. And, you know, they're relevant as to whether the jurors are going to . . . piece together the clothing he was arrested to . . . the clothing he was allegedly wearing -- someone was allegedly wearing at the time."

Defendant argues on appeal the arrest photos should have been excluded under N.J.R.E. 403[14] because they were "minimally probative, highly prejudicial, and cumulative."

[14] N.J.R.E. 403 provides: "Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is

A trial court's evidentiary rulings are subject to an abuse of discretion standard of review. State v. Garcia, 245 N.J. 412, 430 (2021). "The abuse of discretion standard instructs us to 'generously sustain [the trial court's] decision, provided it is supported by credible evidence in the record.'" State v. Brown, 236 N.J. 497, 522 (2019) (alteration in original) (quoting Est. of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384 (2010)).

We conclude the trial judge did not abuse his discretion in admitting the arrest photos. They were relevant to show that defendant owned clothing that matched the clothing worn by the suspect shown in the surveillance video and screenshots that were presented to the jury. We likewise reject defendant's argument, raised for the first time on appeal, the trial court should have sua sponte issued a limiting instruction. We find no plain error in failing to instruct the jury specifically on how to evaluate the arrest photos. R. 2:10-2.

V.

Finally, we address defendant's contention that the cumulative effect of the trial errors he asserts warrant reversal of his convictions. "When legal errors cumulatively render a trial unfair, the Constitution requires a new trial."

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substantially outweighed by the risk of: (a) Undue prejudice, confusion of issues, or misleading the jury; or (b) Undue delay, waste of time, or needless presentation of cumulative evidence."

State v. Weaver, 219 N.J. 131, 155 (2014) (citing State v. Orecchio, 16 N.J. 125, 129 (1954)). It is well established, however, "[i]f a defendant alleges multiple trial errors, the theory of cumulative error will still not apply where no error was prejudicial and the trial was fair." Ibid. We are satisfied that none of the trial errors defendant claims on appeal, viewed individually or collectively, warrant the reversal of the jury's verdict.

VI.

To the extent we have not specifically addressed them, any remaining arguments raised by defendant lack sufficient merit to warrant discussion. See R. 2:11-3(e)(2).

Affirmed.

ESTHER SUAREZ
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CRIMINAL PART
Pros. File No. 18-7078
Ind. No. 19-09-946

STATE OF NEW JERSEY,	
Plaintiff,	**ORDER**
v.	
WILLIAM D. HILL	
Defendant.	

This matter, having been opened before this Court by Esther Suarez, Hudson County Prosecutor, appearing by Assistant Prosecutor David Feldman, and without opposition from Mary Ciancimino, Esq., appearing on behalf of William D. Hill, and based upon the January 18, 2024 Decision (A-41-22) (087840) of the New Jersey Supreme Court in the above-captioned matter, and the Court having considered the arguments of counsel, and good cause appearing therefrom:

It is on this 26th day of January, 2024

ORDERED that count two of Hudson County Indictment No. 19-09-946 shall be DISMISSED WITH PREJUDICE as it pertains to defendant William D. Hill.

M Pascual
HON. MITCHELL L. PASCUAL, J.S.C.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 087840
APP. DIV. DOCKET NO. A-4544-19

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Certification from a Judgment of the Superior Court of New Jersey,
v.	:	Appellate Division
WILLIAM HILL,	:	
Defendant-Petitioner.	:	Sat Below:
	:	Hon. Thomas W. Sumners, Jr., C.J.A.D.,
	:	Hon. Richard J. Geiger, J.A.D.,
	:	Ronald Susswein, J.A.D.

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-PETITIONER

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Of Counsel and
On the Brief

DEFENDANT IS CONFINED

DATED: July 6, 2023

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PRELIMINARY STATEMENT

The State charged defendant William Hill with witness tampering solely based on his speech. He wrote a polite letter to the victim in which he professed his innocence and asked the victim to think about her identification and tell the truth. His letter did not ask the victim to testify falsely or withhold her testimony, nor did it make any threats. The trial court had not issued a no-contact order prohibiting Hill from contacting the victim.

Hill's conviction for witness tampering, based only on this letter, violated his constitutional right to free speech. The Federal and State Constitutions prohibit a prosecution based on an individual's speech unless the speech falls into one of the narrow categories of speech that is constitutionally proscribable, such as a true threat of violence. As the Supreme Court recently held in Counterman v. Colorado, the true-threats exception requires the State to prove at least a mens rea of recklessness with respect to the threatening nature of the defendant's speech. To convict Hill of witness-tampering under N.J.S.A. 2C:28-5(a), however, the jury was required to find only a mens rea of negligence. Because the conduct underlying Hill's witness-tampering charge was pure speech – sending a letter to a victim – his conviction based on a negligence standard violated the First Amendment.

To remedy this constitutional infirmity and avoid declaring the witness-tampering statute facially overbroad, the knowing mens rea contained in N.J.S.A. 2C:28-5(a) should be construed to apply to all material elements. Thus, the defendant must knowingly speak, and he must also know that the threatening nature of his speech would cause false testimony. Considering N.J.S.A. 2C:2-2(c)(1)'s presumption that a statute's scienter requirement applies to all material elements, the witness-tampering statute is reasonably susceptible to this construction that would render the statute constitutional.

Moreover, Hill's witness-tampering charge should be dismissed with prejudice because the evidence is insufficient to prove that Hill knew his polite, facially innocuous letter would cause false testimony or another result prohibited by the statute. In addition, Hill's carjacking conviction should be reversed because the jury's consideration of an inappropriate charge of witness tampering likely influenced the jury to believe that Hill was guilty of the underlying carjacking. This potential for prejudice was exacerbated because the carjacking conviction rested upon the victim's weak, wavering, cross-racial identification made when simultaneously viewing the photos in the array after seeing the culprit in highly stressful, poor viewing conditions. Given the State's weak evidence as to 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, the constitutional errors in presenting the witness tampering charge to the jury were clearly capable of tipping the scales for the jury to convict of carjacking.

PROCEDURAL HISTORY

Hill relies on the procedural history in his Appellate Division brief (Db1-2), and adds the following.

On January 23, 2023, the Appellate Division affirmed Hill's convictions for carjacking and witness tampering in a partially published opinion. State v. Hill, 474 N.J. Super. 366 (App. Div. 2023). In the published portion of its opinion, the Appellate Division rejected Hill's argument that the witness-tampering statute would be unconstitutionally overbroad unless the statute was construed to require the State to prove that the defendant knew that his speech would cause a victim to withhold testimony. Id. at 375-387. This Court 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, 253 N.J. 595 (2023).[1]

STATEMENT OF FACTS

At around 7:00 a.m. on October 31, 2018, Alessa Zanatta left her car running in front of her house while she went inside to grab a sweater. (7T149-24 to 153-5; 7T28-10 to 29-7). When she returned a few minutes later, she

[1] The Court subsequently denied Hill's motion for reconsideration of the partial denial of certification as to the issue of whether the prosecutor committed misconduct in summation by contradicting the social science set forth in the enhanced jury instructions on eyewitness identification.

saw a man in the car, told the man to get out, jumped into the car through the driver's door, and grabbed the steering wheel with her left arm. (7T153-8 to 19; 7T156-24 to 161-18, 7T208-25 to 209-4). The man drove off with Zanatta's legs hanging out of the car, her stomach on his knees, and her knees between the driver's seat and the door. (7T161-13 to 25; 7T165-13 to 19). The man drove erratically for about four blocks, hitting several other cars and causing the passenger's door to hit Zanatta's back. (7T166-22 to 25; 7T170-19 to 171-7). After Zanatta eventually shifted the gear into neutral, the man hit the brakes, jumped out of the car, and ran away. (7T185-5 to 18). The entire incident lasted one or two minutes. (7T188-12 to 13).

Zanatta moved her car from the middle of the street to the side of the road, in front of the Harrison police station. (7T188-17 to 189-10). About thirty minutes after the incident, she provided a formal statement inside the police station and described the culprit as "very, very scruffy. Like he had hair all over his face, and it was not well maintained." (7T179-8 to 15; 7T29-11 to 38-3). She also said he had big eyes and was not "too dark, but he wasn't light skinned." (7T179-16 to 180-2). She thought the man was wearing faded blue jeans, a red "skully" cap, a grey hoodie, and an olive or brown vest. (7T179-20 to 23). She saw grey arms of the hoodie under the vest and that the culprit was not wearing a jacket on top of the hoodie. (7T215-12 to 15, 7T216-11 to

24). She did not estimate the culprit's height, weight, or age, or the color of the culprit's beard (Hill's beard is primarily grey). (7T211-18 to 213-2, 7T214-11 to 215-6; Da23). And although Hill has a noticeable facial scar between his eyebrows (Da23; Da26; Da27), Zanatta testified that she did not see any scars on the culprit's face. (7T217-4 to 19).

During the trial, the State introduced into evidence video footage and still images from nearby surveillance cameras, which the State contended showed the culprit. (Da13-15; 7T70-1 to 77-24; 7T162-18 to 167-6). The culprit's face is indiscernible in the video footage and in the still images. Contrary to Zanatta's description of the culprit during her statement to the police, these still images show the culprit wearing dark pants (not faded blue jeans), a black hat (not a red hat), and a black jacket (not a brown or olive vest over a grey sweatshirt). (Da13-15; Da42-43).

On November 6, 2018, Zanatta viewed an array of six photographs at the police station. (7T193-9 to 19). The video of the array procedure was played for the jury. (Da12; 7T109-10 to 122-7).[2] A detective handed Zanatta 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

[2] A CD containing the video of the out-of-court identification (Da12) was submitted under separate cover with Hill's petition for certification.

simultaneously and compared them side by side. (7T128-2 to 129-4, 7T130-8 to 131-15, 7T227-2 to 229-3). The detective admitted that Zanatta's simultaneous viewing of the photographs was contrary to the then-existing Attorney General's Guidelines for out-of-court identifications, which require that sequential lineups be used whenever possible. (7T130-18 to 131-15).[3]

After comparing the photographs simultaneously for about three minutes (Da12 at 2:48 to 5:40), Zanatta handed the officer Hill's photograph and stated, "Okay. Okay. He looked a little bit more scruffy." (7T121-3 to 6). The detective asked how certain she was in this identification. (7T121-5 to 6). Zanatta asked if this was the only picture the police had of the individual. (Da12 at 6:05 to 6:07; 7T121-7 to 8). The detective confirmed that these were the only photographs, and after Zanatta sat in silence for about twenty seconds (Da12 at 6:07 to 6:27), the detective asked, "And what was it that you said about the photo?" (7T121-10 to 11). Zanatta responded, "I feel like he was a little bit -- I could see the side a little bit better. I feel like he's too white, but it -- but again, it was dark." (7T121-11 to 13).

The detective again asked her to describe her level of certainty in the identification in her own words, and in response Zanatta asked to view the

[3] See State v. Herrera, 187 N.J. 493, 523 n.3 (2006) (Albin, J., dissenting) ("The Attorney General's Guidelines require that photographs be shown not in a lineup form, but sequentially, whenever possible.").

photographs again. (7T121-14 to 19). Zanatta again compared several photographs side by side for about one minute. (Da12 at 7:05 to 8:10). 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 Zanatta possibly identifying another photograph. (Da12 at 7:30 to 7:40; 7T224-21 to 225-1). Ultimately, Zanatta stated that she was "pretty certain" that Hill's photograph was the culprit and estimated that she was eighty percent certain. (7T121-18 to 122-2).[4]

During the trial, Zanatta did not make an in-court identification of Hill. She also acknowledged that the photograph of Hill did not have "scruffy" facial hair and that his skin looked lighter than the perpetrator. (7T192-10 to 22). Despite these discrepancies, she thought she had picked out the correct person from the array because she remembered his eyes, mouth, and nose. (7T195-1 to 6). She believed that, "When you look at someone in the eyes at such a terror -- terrific moment . . . . [i]t's something that doesn't leave your head. . . ." (7T195-1 to 5). All six photographs in the array are of black men with dark brown eyes. (Da16-22).

[4] After holding a Wade hearing, the trial court denied Hill's pretrial motion to suppress the out-of-court identification. (1T; 2T).

The police arrested Hill on November 27, 2018. (Da7). Over the defense's objection, the State introduced into evidence six photographs of Hill taken after his arrest. (Da23-28; 7T81-15 to 83-14; 5T39-16 to 45-24). In these photographs, Hill is wearing faded jeans, a black jacket, a grey sweatshirt, and a dark red hat with a North Face logo. (Da23-28). The police did not show these photographs to Zanatta to see if she thought Hill's clothing resembled the clothing worn by the culprit. (7T86-10 to 22). In summation, the prosecutor argued that the clothing Hill was wearing when he was arrested – a month after the carjacking – resembled the culprit's clothes. (8T67-7 to 68-2; 8T85-13 to 19; 8T92-5 to 6; Da35-45). The trial court did not instruct the jurors that they should not infer guilt from the fact that Hill was arrested.

On April 8, 2019, Zanatta received a letter in the mail from Hill, who had been detained since his arrest. (7T195-11 to 197-5; Dsa1-3).[5] The trial court had not issued a no-contact order prohibiting Hill from contacting the victim. Hill, 474 N.J. Super. at 379 n.5. The letter, as redacted for use at trial, reads as follows:

> Dear Ms. Zanatta,
>
> Now that my missive had [sic] completed its passage throughout the atmosphere and reached its

[5] Five months after Hill sent this letter, and about three weeks before the scheduled trial date, the State obtained a superseding indictment charging Hill with witness tampering. (Da1-2; 5T36-11 to 38-3; 4T4-18 to 6-16).

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. Zanatta, 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. Zanatta, 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. Zanatta, 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. Zanatta, 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. Zanatta, 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.
>
> Sincerely,
> [Defendant]

[(Da29-30, 7T245-13 to 247-19) (emphases added).]

Zanatta testified that the letter made her scared to testify because it reminded her of what had happened and made her realize that Hill knew where she lived. (7T199-10 to 19, 7T200-17 to 201-23).

In his opening statement, the prosecutor argued that the fact that Zanatta chose to report this letter to the police reflected that she had a "fixed memory"

of the culprit's appearance and that she had never "in any way wavered" from her identification:

> Now, it should have ended there. That should have been the end of the story, correct? We've got an identification. We've got an arrest. It's time for the criminal process, but Mr. Hill wasn't done just yet. He started his seconds, we've moved onto minutes. Then it was days, then weeks. Months after this incident, Ms. Zanatta received a letter, and that letter came from Mr. Hill. Now, again, we're going to discuss what's in the actual letter later, but at the end . . .
>
> [inaudible sidebar conversation discussion in response to defense counsel's request]
>
> So, again, we'll discuss towards the end -- when we're at the end of the trial what was actually in that letter, but here's what was at the end. It was a request. It said, "if you're 100 percent certain that it's me, then disregard this. But if you're not telling the truth or if you're not 100 percent certain, say so."[6] Well, Ms. Zanatta didn't disregard the letter, but she also didn't say so the way that Mr. Hill was asking. She took option number C and here's what she did. She called the detectives and said, here's the letter sent by the guy who carjacked me on that day, and she dropped it off the next day.
>
> And you know why? This is one of those moments where it's not a fleeting memory. It's a fixed memory. Seconds, days, weeks, months and now you will see for yourselves nearly a year after that incident that never once has Ms. Zanatta in any way wavered from that

[6] The letter actually reads, "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%." (Da30).

> identification. She's known all along and she will tell you that the man who sits before you sat beneath her. She shared that small space, and though he physically ran from the car when it stopped outside of Town Hall, figuratively speaking, the two have been sharing that same seat ever since. You will hear with your own ears, you will see with your own eyes when she testifies. Once you have that in conjunction with the letter, the photos, and the video, you will have no doubt that Mr. Hill is guilty of both counts for which he is charged.
>
> [(7T13-19 to 15-10 (emphases added).]

In his summation, the prosecutor argued to the jury that "[t]he letter's really important." (8T87-3). He further contended:

> I totally understand if any of you were thinking, hey man, if I was in a situation where perhaps I was falsely accused, maybe it wouldn't be the right thing to do, but I'm writing a letter. I get that. There's nothing wrong with that. But don't do lazy analysis. Look at the letter that he wrote and ask yourself, would you write that letter, because we're going to do that, and I don't think any of you would.
>
> [(8T87-4 to 12 (emphasis added).]

The prosecutor also emphasized the negligence mens rea contained in the jury charge, urging the jurors to consider "[w]hat is a reasonable person to take from [the letter]?" (8T91-13 to 14).

In a motion for a judgment of acquittal at the close of the State's case, defense counsel argued that the witness-tampering charge should be dismissed because "there was nothing in the letter that the prosecutor could point to that

in any way shows that Mr. Hill was trying to threaten Ms. Zanatta, trying to get her to be afraid to come into court." (8T29-22 to 32-5). The trial court denied the motion. The court found that "this is a very close call because there's nothing in the letter that is threatening." (8T34-24 to 35-1; 8T37-6 to 7). Nevertheless, the court concluded that, considering Zanatta's testimony that the letter caused her fear and the reasonable-person standard in N.J.S.A. 2C:28-5(a), there was sufficient evidence to submit the witness-tampering charge to the jury. (8T35-1 to 38-13).

Defense counsel renewed these arguments in a post-verdict motion for a new trial, and the trial court again found that there was sufficient evidence to submit the charge to the jury. (11T26-3 to 27-2; 11T38-3 to 41-1). The court reasoned that "maybe Mr. Hill didn't intend that . . . she testify or inform falsely, but I have to use the word reasonable person." (11T39-4 to 7).

LEGAL ARGUMENT

POINT I

HILL'S CONVICTION FOR WITNESS TAMPERING, PREDICATED ON A MENS REA OF NEGLIGENCE, VIOLATED HIS CONSTITUTIONAL RIGHT TO FREE SPEECH.

The State charged Hill with witness tampering solely based on his speech: a polite letter in which he professed his innocence and asked the victim to think about her identification and tell the truth. Because the jury

was required to find only that Hill was negligent as the possibility that his letter would cause the victim to give false testimony, his witness-tampering conviction rested upon a constitutionally insufficient mens rea to prosecute a true threat and therefore violated his constitutional right to free speech.

To remedy this constitutional infirmity and avoid declaring the witness-tampering statute facially overbroad, the knowing mens rea in N.J.S.A. 2C:28-5(a) should be construed to apply both to the defendant's speech or conduct (here, sending the letter) and to the results of the defendant's speech or conduct (here, that Hill knew that the nature of his speech would cause a witness to withhold testimony). Considering N.J.S.A. 2C:2-2(c)(1)'s presumption that a statute's scienter requirement applies to all material elements, the witness-tampering statute is reasonably susceptible to this construction that would render the statute constitutional.

In this case, moreover, Hill's witness-tampering charge should be dismissed with prejudice because the evidence is insufficient to prove that Hill knew his letter would cause false testimony or another result prohibited by the statute. In addition, Hill's carjacking conviction should be reversed because the jury's consideration of Hill's facially innocuous letter in the context of an inappropriate charge of witness tampering had the clear capacity to influence the jury to believe that Hill was guilty of the underlying carjacking. The

potential for such prejudice was exacerbated because several factors greatly undermined the reliability of the victim's identification.

A. Because Hill's 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.[7]

Both the Federal and State Constitutions enshrine the right to free speech. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech."); N.J. Const. art. 1, ¶ 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press."); see also N.J. Const. art. 1, ¶ 18; Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012) (noting that the State Constitution "offers greater protection than the First Amendment").

[7] As described above in the statement of facts, Hill argued that his letter did not constitute witness tampering in his motion for a judgment of acquittal and in his motion for a new trial. (8T29-22 to 32-5; 11T26-3 to 27-2). The Appellate Division correctly chose to address Hill's constitutional arguments because they concerned a matter of great public interest. Moreover, as issues regarding the constitutionality of statues are subject to de novo review, appellate courts often review such issues for the first time on appeal. See, e.g., State v. Lenihan, 219 N.J. 251, 265 (2014); State v. Sene, 443 N.J. Super. 134, 139, 142-43 (App. Div. 2015); State v. Saunders, 302 N.J. Super. 509, 516 (App. Div. 1997); State in the Interest of S.M., 284 N.J. Super. 611, 615-19 (App. Div. 1995).

Furthermore, "[t]he First Amendment affords protection to symbolic or expressive conduct as well as to actual speech." Virginia v. Black, 538 U.S. 343, 358 (2003).

"[T]he First Amendment has 'permitted restrictions upon the content of speech in a few limited areas.'" Counterman v. Colorado, No. 22-138, ___ U.S. ___, ___ (2023), 2023 WL 4187751, at *4 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)). Accordingly, "[s]peech . . . cannot be transformed into criminal conduct merely because it annoys, disturbs, or arouses contempt." State v. Burkert, 231 N.J. 257, 281 (2017). The Legislature may only "criminaliz[e] certain limited categories of speech, such as speech that is integral to criminal conduct, speech that physically threatens or terrorizes another, or speech that is intended to incite imminent unlawful conduct." Ibid.

As such, criminal laws proscribing speech or expressive conduct run the risk of being unconstitutionally overboard. Id. at 277. A statute is facially overbroad if it "reaches a substantial amount of constitutionally protected conduct." Id. at 276 (quoting State v. Mortimer, 135 N.J. 517, 530 (1994)); accord United States v. Hansen, No. 22-179, ___ U.S.___, ___ (2023), 2023 WL 4138994, at *5 (2023). Even if a statute is not facially overboard, a defendant may establish that the statute unconstitutionally restricts free speech

as applied to the defendant's speech or expressive conduct. Hansen, ___ U.S. at ___, 2023 WL 4138994, at *11-*12 (leaving open the possibility of as-applied challenge after concluding that a statute was not facially overbroad).

The First Amendment exception at issue in this case is true threats. "'True threats' of violence is [a] historically unprotected category of communications." Counterman, ___ U.S. at ___, 2023 WL 4187751, at *4 (quoting Black, 538 U.S. at 359). "True threats are 'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence.'" Ibid. (alteration in original) (quoting Black, 538 U.S. at 359).

Although a true threat may instill fear in a listener regardless of the speaker's subjective intent, the Supreme Court held in Counterman that the State must prove a subjective, culpable mens rea to prosecute a true threat. Id. at *4-*6. Without the requirement of subjective mens rea, there would be an intolerable "prospect of chilling non-threatening expression[.]" Id. at *6. "The speaker's fear of mistaking whether a statement is a threat; his fear of the legal system getting that judgment wrong; his fear, in any event, of incurring legal costs—all those may lead him to swallow words that are in fact not true threats." Ibid.

The Court therefore held that the State must prove a mens rea of at least recklessness when prosecuting a true threat. Id. at *7 -*8. Specifically, "[t]he

State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." Id. at *2. A prosecution for true threats cannot be sustained on a negligence standard, under which "liability depend[s] not on what the speaker thinks, but instead on what a reasonable person would think about whether his statements are threatening in nature." Id. at *6 n.5. Because the defendant in Counterman was convicted for sending Facebook messages and "[t]he State had to show only that a reasonable person would understand his statements as threats[,]" his conviction violated the First Amendment. Id. at *8.

Here, as in Counterman, Hill was impermissibly convicted for his allegedly threatening speech without the State being required to prove a constitutionally sufficient mens rea. Hill was prosecuted for witness tampering under N.J.S.A. 2C:28-5(a), which provides:

> 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:
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> (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.
>
> [N.J.S.A. 2C:28-5 (emphasis added).]

As the Appellate Division acknowledged, this underscored language "'criminalizes [the] defendant's failure to apprehend the reaction that his words would have [on] another'" and allows a defendant to be convicted "even if he or she did not intend to impede a proceeding or investigation." Hill, 474 N.J. Super. at 383 (alternations in original) (quoting State v. Pomianek, 221 N.J. 66, 90 (2015)). In other words, to convict Hill of witness tampering, the jury was required to find only that Hill was negligent as to the possibility that his facially innocuous letter would cause the witness to withhold testimony. (8T140-7 to 142-4); see also Model Jury Charges (Criminal), "Tampering with Witnesses and Informants (N.J.S.A. 2C:28-5(a)) (Cases arising after September 10, 2008)" (approved Mar. 16, 2009). This mens rea of negligence was constitutionally insufficient.

The Appellate Division, however, incorrectly believed that Hill's case did not implicate the true-threats doctrine because the witness-tampering statute does not involve "speech directed broadly or to an unspecified class of

persons" but speech directed to "victims, witnesses, or informants." Hill, 474 N.J. Super. at 379. The Appellate Division did not cite any case law to support this supposed distinction. Contrary to the Appellate Division's misguided reasoning, case law makes clear that a prosecution for a defendant's speech may implicate the true-threats doctrine, even when the statute at issue prohibits speech directed at a specific class of individuals.

Indeed, the seminal opinion on the true-threats doctrine addressed a statute that criminalized speech directed at a specific person; the statute at issue made it a crime to make "any threat to take the life of or to inflict bodily harm upon the President of the United States." Watts v. United States, 394 U.S. 705, 705 (1969). The Supreme Court acknowledged that "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence." Id. at 707. Nonetheless, the Court explained that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Ibid. The Court thus held that the government was required to prove that the defendant made a true threat rather than engaged in political hyperbole. Id. at 708. Stated differently, even though the government had a significant interest in protecting the recipient from threatening speech, the protections of the First Amendment still applied.

Likewise, many courts have considered the true-threats doctrine in analyzing the constitutionally of prosecutions based on a defendant's speech under statutes that prohibit interfering with witnesses. See, e.g., State v. Carroll, 456 N.J. Super. 520, 535-45 (App. Div. 2018) (analyzing whether the defendant's Facebook posts qualified as true threats or another First Amendment exception in a prosecution for witness retaliation under N.J.S.A. 2C:28-5(b)); United States v. Colhoff, 833 F.3d 980, 984-86 (8th Cir. 2016) (analyzing whether the defendant's oral statements qualified as true threats in a prosecution for witness tampering under 18 U.S.C. § 1512(b)(1)); United States v. Edwards, 291 F. Supp. 3d 828, 831-34 (S.D. Ohio 2017) (analyzing First Amendment challenges to a prosecution for witness retaliation under 18 U.S.C. § 1513(e) based on the defendant's Facebook messages) ; People v. Johnson, 986 N.W.2d 672, 676-680 (Mich. Ct. App. 2022) (analyzing the true-threats doctrine in a prosecution for witness retaliation based on the defendant's Facebook messages). These defendants' messages were not categorically unprotected speech simply because the prosecutions arose under statutes that addressed speech directed at witnesses.

Similarly, Hill's speech was not unprotected by the First Amendment merely because it was directed at the victim. Even when true threats are directed at a victim or a witness, the State still must prove a constitutionally

sufficient mens rea under the First Amendment and our State Constitution. The Appellate Division therefore wrongly concluded that the true-threats doctrine was inapplicable to this case.

Furthermore, even though the trial court had not issued a no-contact order prohibiting Hill from contacting the victim, Hill, 474 N.J. Super. at 379 n.5, the Appellate Division erroneously focused on whether a court could issue a no-contact order when setting conditions of pretrial release without violating the First Amendment. Without citing any case law in support of its conclusion, the Appellate Division believed that a defendant has no First Amendment right to communicate with a victim because otherwise a court would not be able to impose a no-contact order. Hill, 474 N.J. Super. at 379. This reasoning is incorrect for several reasons.

First, the only question presented by this appeal is whether Hill can be prosecuted solely based on the content of his speech directed towards the victim when there was not any court order prohibiting him from contacting the victim. The answer to this question, as made clear by the case law discussed above, is that Hill can be prosecuted only if his speech qualified as a true threat predicated on a constitutionally sufficient mens rea.

Moreover, a no-contact order is a content-neutral restriction on speech, so a different First-Amendment analysis applies. Because a no-contact order

prohibits a defendant from making any contact with a victim or witness regardless of the content of the communication, it is a content-neutral regulation on free speech. Cf. McCullen v. Coakley, 573 U.S. 464, 479 (2014) (explaining that a restriction is content-based "if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." (internal quotation omitted)). "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997).

Of course, the government has an important interest in preventing the intimidation or harassment of crime victims and potential witnesses. See State v. Ramirez, 252 N.J. 277, 299-303 (2022) (discussing the Sexual Assault Victim's Bill of Rights, the Crime Victim's Bill of Rights, and the Victim's Rights Amendment). To advance this interest, the Criminal Justice Reform Act "empowers judges to direct defendants on pretrial release to 'avoid all contact with an alleged victim of the crime' and 'with all witnesses.'" State v. McCray, 243 N.J. 196, 216 (2020) (quoting N.J.S.A. 2A:162-17(b)(1)(b), (b)(1)(c)). Courts may impose these conditions when necessary "'to reasonably assure' that defendants will appear in court when required, will not

endanger 'the safety of any other person or the community,' and 'will not obstruct or attempt to obstruct the criminal justice process.'" Id. at 206 (quoting N.J.S.A. 2A:162-15).

A court may also issue a protective order when it finds that a defendant or another person connected to a criminal proceeding "has violated or is likely to violate [the witness-tampering statute], [the hindering statute] or [the compounding statute] in regard to the pending offense" or "has injured or intimidated or is threatening to injure or intimidate any witness in the pending offense or member of the witness' family with purpose to affect the testimony of the witness." N.J.S.A. 2C:28-5.1. These findings must be "made upon a preponderance of evidence adduced at a hearing." N.J.S.A. 2C:28-5.4. The protective order may provide that the defendant or other person not commit these offenses, "maintain a prescribed geographic distance from any specified witness or victim," or "have no communication with any specified witness or victim, except through an attorney under any reasonable restrictions which the court may impose." N.J.S.A. 2C:28-5.1(a) to (c).

A violation of a no-contact order can be prosecuted under the contempt statute, N.J.S.A. 2C:29-9. McCray, 243 N.J. at 217; see also N.J.S.A. 2C:28-5.2(b). Moreover, even if a defendant has a basis to challenge the validity a no-contact order, compliance with the order "is required, under pain of

penalty, unless and until an individual is excused from the order's requirements." State v. Gandhi, 201 N.J. 161, 190 (2010).

When these statutory standards are satisfied, a court will almost always be able to impose a no-contact order without violating the First Amendment.[8] Such a content-neutral restriction, imposed when there is a specific finding that the defendant will interfere with a witness or obstruct the judicial process, likely will be sufficiently tailored to advance the government's important interest in preventing witness intimidation and harassment. Correspondingly, a prosecution for obstruction when a defendant purposefully or knowingly violates a no-contact order would not offend the First Amendment.

By contrast, when a witness-tampering prosecution is based on a defendant's speech, the defendant is being punished for the content of his speech. The State is prosecuting the defendant because the content of his speech allegedly communicates to the witness to testify falsely or withhold testimony. And the State may criminalize the content of speech only if the speech at issue falls into one of the limited categories of speech that is

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[8] The victim in Counterman obtained a protective order against Counterman after he continued to message her via Facebook after she blocked him. People v. Counterman, 497 P.3d 1039, 1043 (Colo. App. 2021). It does not appear that Counterman claimed the protective order violated the First Amendment. The Supreme Court did not discuss the protective order in its opinion, suggesting that it did not find this fact to be significant in the constitutional analysis.

constitutionally proscribable. In these ways, the Appellate Division failed to recognize the analytical distinctions between a court issuing a no-contact order preventing a defendant from contacting a victim and the State prosecuting a defendant for witness-tampering based on the content of his speech.

In short, the Appellate Division wrongly concluded that the true-threats doctrine and Counterman were inapplicable to this case simply because the State has an interest in preventing witness intimidation and harassment. Instead, Counterman controls the outcome here. Hill was convicted for witness tampering exclusively based on the content of his speech when there was no court order preventing him from making that speech. To sustain a conviction in these circumstances, the First Amendment required the State to prove, at a minimum, that Hill was reckless as to the threatening nature of his speech.[9]

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[9] To the extent non-threatening speech could induce a witness to testify falsely or engage in another illegal action, the speech-integral-to-criminal-conduct exception might apply. See Hansen, ___ U.S. at ___, 2023 WL 4138994, at *11 (describing this exception). This exception requires an intentional mens rea. Ibid. ("Speech intended to bring about a particular unlawful act has no social value; therefore, it is unprotected."); United States v. Williams, 553 U.S. 285, 298 (2008) ("Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities.").

Because the jury was instructed that it could convict Hill based on mens rea of negligence (8T140-7 to 142-4), Hill's witness-tampering conviction must be reversed. Even under plain error review, a conviction must be reversed if the jury is not properly instructed on an essential element of the offense, including the requite mens rea. See State v. Grate, 220 N.J. 317, 329-333 (2015); State v. Federico, 103 N.J. 169, 176 (1986). Therefore, at a minimum, Hill's witness-tampering conviction must be reversed.

B. To remedy the constitutionally insufficient mens rea and to avoid declaring the witness-tampering statute facially overbroad, the knowing mens rea in N.J.S.A. 2C:28-5(a) should be construed to require that the defendant knows that his speech or conduct would cause a witness to testify falsely.

As explained above, the negligence mens rea is N.J.S.A. 2C:28-5(a) is constitutionally insufficient as applied to witness-tampering prosecutions like the present matter, in which the State prosecutes a defendant based on his speech. In such prosecutions, it would be more than permissible judicial surgery to inject a recklessness standard into the statute because neither the plain text of N.J.S.A. 2C:28-5(a) nor the Code's rules of construction support such an interpretation. See Pomianek, 221 N.J. at 91 (distinguishing between "minor judicial surgery" and improper "judicial transplant"). Moreover, because conduct constituting witness tampering will by its very nature communicate a message to witnesses, N.J.S.A. 2C:28-5(a)'s negligence

standard will reach a substantial amount of constitutionally protected speech and expressive conduct, rendering the statute facially overboard.

To remedy this constitutionally insufficient mens rea and to avoid declaring the witness-tampering statute facially overbroad, the knowing mens rea contained in N.J.S.A. 2C:28-5(a) should be construed to apply both to the defendant's conduct and to the results of the defendant's conduct. In other words, the State would be required to prove not only that the defendant knew he engaged in the charged speech or conduct but also that he knew that this speech or conduct was of a nature to cause the witness to engage in one of the actions prohibited by the statute. This reading of the witness-tampering statue is supported by N.J.S.A. 2C:2-2(c)(1), which sets forth a presumption that a statute's scienter requirement applies to all material elements. Moreover, this construction avoids vagueness issues with the reasonable-person standard set forth in N.J.S.A. 2C:28-5(a). And a greater mens rea of knowledge may be required to prosecute a true threat under more expansive free speech protections in the State Constitution. Because the witness-tampering statute is readily susceptible to this narrow construction, this Court should adopt the construction to avoid all these constitutional issues.

"Unless compelled to do otherwise, courts seek to avoid a statutory interpretation that might give rise to serious constitutional questions." State v.

Johnson, 166 N.J. 523, 540 (2001). "Provided that a statute is 'reasonably susceptible' to an interpretation that will render it constitutional, we must construe the statute to conform to the Constitution, thus removing any doubt about its validity." Burkert, 231 N.J. at 277 (quoting State v. Profaci, 56 N.J. 346, 350 (1970)).

In line with principles of constitutional avoidance, courts "must construe a statute that criminalizes expressive activity narrowly to avoid any conflict with the constitutional right to free speech." Id. at 277. Courts often narrow criminal laws touching on free speech by presuming that a scienter requirement "applie[s] to each of the statutory elements that criminalize otherwise innocent conduct." United States v. X-Citement Video, 513 U.S. 64, 72 (1994); see also Elonis v. United States, 575 U.S. 723, 734-37 (2015) (collecting cases applying this principle). The Supreme Court "ha[s] interpreted statutes to include a scienter requirement even where the statutory text is silent on the question" and "even where 'the most grammatical reading of the statute' does not support one." Rehaif v. United States, 139 S. Ct. 2191, 2197 (2019) (quoting X-Citement Video, 513 U.S. at 70). For example, in Elonis, despite the omission of an explicit mens rea in the statute's text, the Court narrowly construed a threat-based statute to require that "the defendant transmits a communication for the purpose of issuing a threat, or with

knowledge that the communication will be viewed as a threat." Elonis, 575 U.S. at 740 (emphases added) (construing 18 U.S.C. § 875).

The New Jersey Criminal Code contains rules of construction that reinforce the common law's presumption of a scienter requirement. Relevant here, N.J.S.A. 2C:2-2(c)(1) provides: "When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears." See also N.J.S.A. 2C:2-2(c)(3) ("A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as [requiring a knowing mens rea]."). "The Code defines '[m]aterial element' as 'an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (1) the harm or evil[ ] . . . sought to be prevented, or (2) the existence of a justification or excuse.'" Grate, 220 N.J. at 331 (alterations in original) (quoting N.J.S.A. 2C:1-14(i)). Courts often apply N.J.S.A. 2C:2-2(c)(1)'s gap-filler provision to find scienter requirements that are not explicitly set forth in a statute. See, e.g., State v. Munafo, 222 N.J. 480, 488-89 (2015); Grate, 220 N.J. at 331-33; State v. Majewski, 450 N.J.

Super. 353, 360-63 (App. Div. 2017); State v. Eldakroury, 439 N.J. Super. 304, 307-310 (App. Div. 2015).

Here, consistent with N.J.S.A. 2C:2-2(c)(1)'s gap-filler provision, the knowing mens rea contained in the witness-tampering statute should be construed to apply both to the conduct element of the statute and the results element of the statute. Regarding the conduct element, the defendant must "knowingly engage in [the] conduct" underlying the offense. N.J.S.A. 2C:28-5(a). Regarding the results element, the defendant must be "aware that it is practically certain that his conduct will cause" a witness to engage in one of the actions specified by the witness-tampering statue. See N.J.S.A. 2C:2-2(b)(2) ("A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result."). And the reasonable-person element in the statute would remain: the jury would also need to find that "a reasonable person would believe [the defendant's conduct] would cause a witness" to engage in one of the acts prohibited by the statute. N.J.S.A. 2C:28-5(a); see also Carroll, 456 N.J. Super. at 539-541 (construing the witness-retaliation statute, N.J.S.A. 2C:28-5(b), to require both a subjective mens rea and an objective element, such that "a defendant must intend to do harm by conveying a threat that would be

believed; and the threat must be one that a reasonable listener would understand as real").

This construction would avoid rendering N.J.S.A. 2C:28-5(a) unconstitutionally overboard, as all prosecutions would require the State to prove a constitutionally sufficient mens rea: that the defendant knew the threatening nature of his speech would cause a prohibited result. Without such a mens rea, however, N.J.S.A. 2C:28-5(a) would reach a substantial amount of constitutionally protected speech and expression. By its very nature, speech or conduct constituting witness tampering will communicate a message to witnesses – such as a threat to induce the witness to withhold testimony. It would be a rare case where a defendant could cause a witness to withhold testimony from conduct alone without any speech or expression. In other words, it is the threatening message encompassed in a defendant's speech or expressive conduct that is the wrongdoing prohibited by the witness-tampering statute. And if the State were required to prove only a mens rea of negligence as to the results of the defendant's speech or conduct, as would be required under the Appellate Division's interpretation of N.J.S.A. 2C:28-5(a), it would violate the First Amendment for the State to prosecute such speech or expressive conduct.

To be sure, sometimes a witness-tampering prosecution will primarily be based on a defendant's non-expressive conduct rather than speech, such as when a defendant assaults a witness. See N.J.S.A. 2C:28-5(a) ("Witness tampering is a crime of the second degree if the actor employs force or threat of force). But in such cases, it will be easy for the State to prove that the defendant knew his conduct would cause a prohibited result. And more importantly, there is a variety of speech that could be unconstitutionally prosecuted if the statute is not construed to have a knowing mens rea. For example, a defendant might appear on national television and explain that he is innocent of an offense or why the prosecution is unjust. A defendant might write a song or make a social media post, explaining the same sentiments. Under the Appellate Division's interpretation of the statute, such speech could be prosecuted because a reasonable person could believe that this speech would induce a witness not to testify, even if the defendant had no subjective knowledge (or conscious disregard of a substantial risk) that his speech would be viewed as causing the witness to engage in a prohibited result. Such prosecutions, however, would be plainly unconstitutional under Counterman.

But as described above, the witness-tampering statute is reasonably susceptible to a construction that avoids such constitutional overbreadth. Accordingly, to avoid overbreadth and ensure all prosecutions are based on a

constitutionally sufficient mens rea, the Court should apply N.J.S.A. 2C:2-2(c)(1)'s gap-filler provision and construe the knowing mens rea to apply to the results of defendant's speech and conduct. At a minimum, this narrow construction should be applied in cases in which the State seeks to prosecute witness-tampering based on a defendant's speech or expressive conduct.

This narrow construction would also avoid vagueness problems with the reasonable-person standard in the witness-tampering statute. A statute is facially vague in violation of the Due Process Clause of Fourteenth Amendment if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited . . . ." Pomianek, 221 N.J. at 84 (quoting United States v. Williams, 553 U.S. 285, 304 (2008)). A statute is vague as applied when it "lack[s] sufficient clarity respecting the conduct against which it is sought to be enforced." State v. Lenihan, 219 N.J. 251, 267 (2014) (quotation omitted).

For example, in Pomianek, the Supreme Court facially invalidated a portion of New Jersey bias-crime statute that allowed a defendant to "be convicted of bias intimidation if the victim 'reasonably believed' that the defendant committed the offense on account of the victim's race[,]'" even if the defendant "has no motive to discriminate," 221 N.J. at 69, 86 (quoting N.J.S.A. 2C:16-1(a)(3)). The Court held that the statute was unconstitutionally vague because "defendant here could not readily inform himself of a fact and,

armed with that knowledge, take measures to avoid criminal liability." Id. at 88. This is because "[t]he defendant may be wholly unaware of the victim's perspective, due to a lack of understanding of the emotional triggers to which a reasonable person of that race, religion, or nationality would react." Id. at 89.

Without a knowing mens rea, the witness-tampering statute would suffer from similar vagueness problems as the bias-intimidation statute because a defendant's liability would depend wholly upon a reasonable person's reaction without any subjective mens rea of the defendant. But if a defendant were required to know that the nature of his speech was likely to cause a prohibited result, then a defendant would be on notice of the illegality of his speech. See Lenihan, 219 N.J. at 267 ("[V]agueness may be mitigated by a scienter requirement, especially when a court examines a challenge claiming that the law failed to provide adequate notice of the proscribed conduct." (quotation omitted).

Furthermore, to avoid the vagueness issue that occurred in Pomianek, the Court should make clear that the reasonable-person standard in N.J.S.A. 2C:28-5(a) is a purely objective standard that relies on the objective perspective of the fact finder, not a subjective test under which a defendant's culpability is determined from the perspective of the specific victim who was targeted. The Appellate Division so construed the witness-tampering statute,

reasoning that liability under the statute "does not depend on the victim's subjective reaction." Hill, 474 N.J. Super. at 383-85. Hill agrees that this construction would be constitutional if the witness-tampering statute also contained a knowing mens rea as to the results of the defendant's conduct. To be clear, Hill also does not seek a categorical rule barring the use of a reasonable-person standard in a criminal statute, so long as the statute also contains a subjective mens rea as to the defendant's culpability.

Nonetheless, Hill emphasizes that here, the jury was not instructed that the reasonable-person standard was entirely objective and did not depend on the victim's reaction. (8T140-7 to 142-4). The model jury charge does not provide any guidance on how jurors should employ this standard. Model Jury Charges (Criminal), "Tampering with Witnesses and Informants (N.J.S.A. 2C:28-5(a)) (Cases arising after September 10, 2008)" (approved Mar. 16, 2009). Based on the structure of the statute and the jury instructions, the jury could have easily believed that the reasonable person was to be judged from the victim's perspective. This is particularly so because the jurors inappropriately heard that the letter made the victim scared to testify. (7T199-10 to 19, 7T201-17 to 23). Therefore, the jurors likely misapplied the reasonable-person standard in Hill's case. Hill respectfully suggests that the model charge be amended to correct these deficiencies.

In addition to avoiding overbreadth and vagueness problems, Hill's proposed mens rea of knowledge may also be required under the New Jersey Constitution, which provides broader protections than the First Amendment. The Court has repeatedly emphasized that Article One, Paragraph Six of the New Jersey Constitution is "broader than practically all others in the nation" and "offers greater protection than the First Amendment[.]" Mazdabrook, 210 N.J. at 492 (quoting Green Party v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000)); see also State v. Schmid, 84 N.J. 535, 553-60 (1980). Accordingly, although a mens rea of reckless is sufficient to prosecute true threats under the Federal Constitution, a greater mens rea of knowledge may be required under our State Constitution.[10]

Finally, Hill notes that Gandhi does not foreclose his proposed construction of the witness-tampering statute. In that case, the defendant was prosecuted for stalking after he, among other thing, repeatedly sent sexually graphic, threatening messages to the victim, made unwanted phone calls, and showed up at the victim's house without permission several times, all in violation of no-contact orders. Gandhi, 201 N.J. at 168-174. The defendant did not raise any constitutional challenges to the stalking statute, but instead

[10] The Court is confronted with this issue in the pending appeal in State v. Fair, 252 N.J. 243 (2022).

contended that under the plain language of N.J.S.A. 2C:12-10(b), the jury instruction on the stalking charge "was insufficient because it did not explicitly require the jury to find that a defendant had the conscious object to induce, or awareness that his conduct would cause, fear of bodily injury or death in his victim." Id. at 169. The Court rejected this argument and held that, considering the grammatical construction of the statute and its legislative history, the statute did not require that the defendant have purpose or knowledge with respect to the results of his actions. Id. at 187.

Gandhi is distinguishable for several reasons. For one, the "task in Gandhi was statutory interpretation and not constitutional adjudication." Pomianek, 221 N.J. at 88 n.8. Many of the defendant's actions in Gandhi were conduct-based, and the defendant did not raise any free-speech challenges to the statute.

Moreover, there are fundamental textual difference between the witness-tampering statute and the stalking statute. The stalking statute specifically defines "course of conduct" to include "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" – all conduct that is clearly wrongful in itself and

that lacks any expressive purpose implicating free speech. N.J.S.A. 2C:12-10(a)(1). To the extent the stalking statute criminalizes speech and expression, it does so in terms that clearly limit its reach to true threats. See N.J.S.A. 2C:12-10(a)(1) (prohibiting "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"). The witness-tampering statute, by contrast, does not contain any definitions so cabining its reach. For these reasons, the Court's holding in Gandhi does not undermine Hill's proposed construction of the witness-tampering statute.

In sum, to remedy the constitutionally insufficient mens rea and to avoid declaring the witness-tampering statute facially overbroad, a knowing mens rea should be construed to apply both to the defendant's conduct and to the results of the defendant's conduct. N.J.S.A. 2C:28-5(a) is reasonably susceptible to this construction when applying N.J.S.A. 2C:2-2(c)(1)'s gap-filler provision. Moreover, this construction avoids vagueness issues and may be required under more expansive free speech protections in the State Constitution. For all these reasons, Hill's proposed construction of the statute should be adopted.

C. The witness-tampering charge should be dismissed with prejudice because the evidence is insufficient to establish that Hill knew that it was practically certain that his polite, facially innocuous letter would cause the victim to engage in one of the actions specified by the witness-tampering statue.

In denying Hill's motions for a judgment of acquittal and for a new trial, the trial court relied on the constitutionally insufficient negligence standard in N.J.S.A. 2C:28-5(a). (8T34-24 to 38-13; 11T26-3 to 41-1). Even though the court found "there's nothing in the letter that is threatening." (8T34-24 to 35-1; 8T37-6 to 7) and that "maybe Mr. Hill didn't intend that . . . she testify or inform falsely" (11T39-4 to 7), the trial court found that the evidence was sufficient to submit the witness-tampering charge to the jury. Under the proper construction of the witness-tampering statute advanced above, the motion for a judgment of acquittal should have been granted because the evidence was insufficient to establish that Hill knew that it was practically certain that his polite, facially innocuous letter would cause the victim to engage in one of the actions specified by the witness-tampering statue.

"The due process requirements of both our Federal and State Constitutions . . . mandate that our courts vacate a conviction based on evidence from which 'no rational trier of fact could find guilt beyond a reasonable doubt.'" State v. Lodzinski, 249 N.J. 116, 157 (2021) (quoting Jackson v. Virginia, 443 U.S. 307, 317 (1979)). On a motion for a judgment of

acquittal at the close of the State's case, the trial court considers "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 459 (1967). An appellate court reviews the denial of a motion for a judgment of acquittal de novo. Lodzinski, 249 N.J. at 145.

"[G]iving the State the benefit of reasonable inferences does not 'shift or lighten the burden of proof, or become a bootstrap to reduce the State's burden of establishing the essential elements of the offense charged beyond a reasonable doubt.'" Id. at 144 (quoting State v. Brown, 80 N.J. 587, 592 (1979)). "Speculation, moreover, cannot be disguised as a rational inference." Id. at 144-45.

Here, there was insufficient evidence from which a rational jury could reasonably infer that Hill knew that it was practically certain that his polite, facially innocuous letter would cause the victim to engage in one of the actions specified by the witness-tampering statue. Importantly, there was not a court order that put Hill on notice that he should not contact the victim. Moreover, there is simply no language in Hill's letter that could be rationally

characterized as threatening, coercive or suggestive that the victim testify falsely or withhold her testimony. To the contrary, the letter explicitly states that Hill was "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%." (Da29-30, 7T244-5 to 247-19). Even giving the State favorable inferences, this language and the remainder of the letter cannot reasonably be interpreted to reflect that Hill knew that it was practically certain that his letter would cause the victim to testify falsely or withhold testimony.

Hill's letter further emphasized that he was "coming to you in peace" and did not "want or need any more trouble." (Da29-30, 7T244-5 to 247-19). Read as a whole, the letter reflects a claim of innocence and an earnest desire for the victim to think critically about her identification. While the tone of Hill's letter could be considered unsophisticated or naïve, no reasonable jury could interpret this letter to find that Hill was practically certain that the letter would cause the victim to testify falsely or engage in another result specified by the statute. Even assuming for the sake of argument that the evidence was sufficient to satisfy a mens rea of negligence (as the Appellate Division found), it would be purely speculative for a jury to conclude that Hill's letter reflected a knowing mens rea (or even a reckless mens rea). See Lodzinski,

249 N.J. at 158 (discussing how the State's evidence was insufficient for the jury to infer a purposeful or knowing mens rea).

As a result, the motion for a judgement of acquittal should have been granted. Under the appropriate construction of the witness-tampering statute, the evidence was insufficient as a matter of law for a rational jury to find that Hill knew that his facially innocuous letter would cause the victim to engage in a result prohibited by the statute. Hill's witness-tampering charge, therefore, should be dismissed with prejudice. See Watts, 394 U.S. at 708 (directing the entry of a judgment of acquittal because the statement could not reasonably be interpreted as a true threat).

D. Hill's 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.

As described above, the jury instructions on witness-tampering contained a constitutionally insufficient mens rea of negligence, which made the jury more likely to conclude that Hill's letter constituted a crime. The witness-tampering charge should have been dismissed for insufficient evidence, but instead the jury likely considered Hill's polite letter as wrongful behavior that scared Zanatta. As such, the jury likely viewed the letter and the improper witness tampering charge as evidence of guilt on the underlying

carjacking. Considering 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 due to the prejudice injected by the constitutional errors in presenting the witness tampering charge to the jury.

In determining whether a constitutional error is harmful, "an appellate court must determine whether the error impacted the verdict" and may affirm only if the error "was harmless beyond a reasonable doubt.'" State v. Weaver, 219 N.J. 131, 154 (2014) (quoting Chapman v. California, 386 U.S. 18, 24 (1965)); see also R. 2:10-2 (reversal is required when the error is "clearly capable of producing an unjust result"). "When assessing whether defendant has received a fair trial, we must consider the impact of trial error on defendant's ability fairly to present his defense, and not just excuse error because of the strength of the State's case." State v. Jenewicz, 193 N.J. 440, 473 (2008).

In this case, an assessment of harm must begin with the fact that the State's evidence as to the identity of the carjacking was weak and filled with flaws. As set forth at length in the statement of facts, Zanatta's initial description of the culprit had many discrepancies with the still images of the

culprit from the surveillance videos: dark pants (not faded blue jeans); a black hat (not a red hat); and a black jacket (not a brown or olive vest over a grey sweatshirt). (See 8T117-4 to 14 (instructing the jury to consider the witness' "prior description of the perpetrator" and "the accuracy of any description the witness gave after observing the incident and before identifying the perpetrator" when assessing the reliability of the identification")). She did not estimate the culprit's height, weight, or age, or the color of the culprit's beard (Hill's beard is primarily grey). Although Hill has a noticeable facial scar between his eyebrows, Zanatta did not see any scars on the culprit's face.

Moreover, several factors substantially undermined the reliability of Zanatta's out-of-court identification. In accordance with State v. Henderson, 208 N.J. 208 (2011), the jury was instructed how these aspects undermined the reliability of Zanatta's identification. (8T112-11 to 124-1). Specifically, the following factors all casted doubt on the reliability of the identification:

- 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. (See 8T115-18 to 21 ("Even under the best viewing conditions, high levels of stress can reduce an eyewitness' ability to recall or make an accurate identification."); 8T115-12 to 15 ("In evaluating the reliability of the identification, you should assess the witness' opportunity to view the person who committed the offense at the time of the offense."); (8T116-17 to 20 ("Inadequate lighting can reduce the reliability of an identification.")).

- During the array procedure, she simultaneously compared the photographs, repeatedly wavered when asked to express her level

of confidence in her identification, and picked the photograph she thought looked the most like the culprit. (See 8T118-24 to 119-15 (explaining that sequential lineups are preferable to simultaneous lineups because "[s]cientific data has illustrated that sequential lineups produce a lower rate of mistaken identifications" and "[s]cientific studies have shown that witnesses have a tendency to compare one member of a lineup to another, making relative judgments about which individual looks most like the suspect. This relative judgment process explains why witnesses sometimes mistakenly pick someone out of a lineup when the actual suspect is not even present.").

- At one point, she really thought a filler was the culprit.

- She said Hill's photograph had lighter skin and different facial hair than the culprit.

- Her identification was cross-racial. (8T118-9 to 14 ("Research has shown that people may have greater difficulty in accurately identifying members of a different race. You should consider whether the fact that the witness and the defendant are not of the same race may have influenced the accuracy of the witness' identification.")).

- She thought she remembered the culprit's eyes, but all six photographs in the array are black men with dark brown eyes.

- Ultimately, she was only eighty percent certain of her identification.

And the State presented no other evidence to establish the carjacker's identity.

Given all these deficiencies in the State's evidence on identity, the jury had a clear basis to acquit Hill of carjacking. The jury, however, likely viewed Hill's letter and the corresponding witness-tampering charge as evidence of guilt as to the carjacking, particularly given the ways in which the prosecution

presented the evidence of witness tampering. In his opening statement, the prosecutor argued that the fact that Zanatta chose to report Hill's letter to the police reflected that she had a "fixed memory" of the culprit's appearance and that she had never "in any way wavered" from her identification. (7T13-19 to 15-10). In summation, the prosecutor argued 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 instead emphasized the negligence standard to the jurors by urging them to consider "[w]hat is a reasonable person to take from [the letter]?" (8T87-4 to 91-14). And the jury inappropriately heard that the letter made Zanatta scared to testify, without being given any jury instructions to explain that the reasonable-person standard was purely objective and not dependent on the victim's subjective reaction. (7T199-10 to 19, 7T201-17 to 23). In these ways, the prosecution's presentation of the witness-tampering charge to the jury inexorably linked the witness tampering to the underlying carjacking and amplified the harm of the constitutional errors.

Given the weaknesses in the State's case, the jury would have been substantially more likely to acquit Hill of carjacking if it were not presented with the constitutionally infirm witness-tampering charge predicated on a negligence mens rea, the prosecution's arguments exacerbating the constitutional errors, and the Zanatta's improper testimony about being afraid

after receiving Hill's letter. See Federico, 103 N.J. at 177 (reversing all the defendant's convictions due to an error in the jury instructions on first-degree kidnapping, including "the convictions that are unrelated to the kidnapping count"); State v. Ravi, 447 N.J. Super. 261, 287, 291-93 (App. Div. 2016) (reversing convictions on ten unrelated counts where the jury was presented with charges of bias intimidation under a statute later deemed unconstitutional because inadmissible evidence as to the victim's state of mind "irreparably tainted the jury verdict as a whole"). Under these circumstances, there is a reasonable probability that the constitutional errors in presenting the witness-tampering charge to the jury impacted the carjacking conviction, and the errors cannot be declared harmless beyond a reasonable doubt. At bottom, the constitutional errors in presenting the witness tampering charge deprived Hill of a fair trial. As a result of all the prejudice injected by the improper presentation of the witness-tampering charge to the jury, Hill's carjacking conviction should be reversed.

CONCLUSION

For the reasons set forth in Point I(A), Hill's witness-tampering conviction must be reversed because he was unconstitutionally prosecuted for his speech based on a mens rea of negligence. As described in Point I(B), the witness-tampering statute should be construed to require that the defendant knows that his speech or conduct would cause a witness to engage in a prohibited result. For the reasons set forth in Point I(C), Hill's witness-tampering charge should be dismissed with prejudice because the evidence was insufficient to prove that Hill knew that his letter would cause a result prohibited by the statute. And for the reasons set forth in Point I(D), Hill's carjacking conviction should be reversed because the substantial prejudice in presenting a constitutionally deficient witness-tampering charge to the jury impacted the jury to convict Hill of carjacking despite the State's weak evidence on identity.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: /s/ John P. Flynn
JOHN P. FLYNN
Assistant Deputy Public Defender
Attorney ID: 303312019

Dated: July 6, 2023

State of New Jersey v. William Hill, Defendant SBI Number: 543941B Date of Birth: 06/30/1970	Superior Court of New Jersey Law Division: Criminal Part Hudson County **Pretrial Detention Motion Order** Complaint/Ind. #: W2018-000242-0904 Complaint/Ind. #: _____ Complaint/Ind. #: _____

Findings

The State having filed a motion for pretrial detention, and after conducting a hearing,

1. Probable Cause Established for Murder or any Crime for Which Defendant would be Eligible for an Ordinary or Extended Term of Life Imprisonment:

   ■ The Court finds that the State has established probable cause that the eligible defendant committed the charged predicate offense based on:

   ☐ The testimony of _____, **AND/OR**

   ☐ The probable cause affidavit or preliminary law enforcement incident report marked as Exhibit S-_____, **AND/OR**

   ■ Other evidence State's proffer/Stipulation, **OR**

   ☐ Defendant has been indicted for the described predicate offense(s) **AND**

2. ■ Defendant has failed to rebut the presumption of pretrial detention by a preponderance of the evidence,

   OR

   ☐ Defendant was able to rebut the presumption, but the State demonstrated by clear and convincing evidence that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions would reasonably assure:

   ☐ defendant's appearance in court when required, **AND/OR**

   ☐ the protection of the safety of any other person or the community **AND/OR**

   ☐ that the defendant will not obstruct or attempt to obstruct the criminal justice process

   AND THEREFORE PRETRIAL DETENTION OF THE DEFENDANT IS HEREBY ORDERED.

3. ☐ **THE MOTION FOR PRETRIAL DETENTION IS DENIED.** Based upon the reasons set forth on the record, the court does not find by clear and convincing evidence that no amount of monetary bail, non-monetary conditions or combination of monetary bail and conditions will reasonably assure: (a) defendant's appearance in court when required, (b) the protection of the safety of any other person or the community and (c) that the defendant will not obstruct or attempt to obstruct the criminal justice process. **THE DEFENDANT IS HEREBY ORDERED RELEASED AS SET FORTH IN THE PRETRIAL RELEASE ORDER.**

Reasons for Pretrial Detention, if Ordered

■ The nature and circumstances of the offense charged.

■ Offense(s) charges Carjacking

☐ Particular circumstances _____

■ The weight of the evidence against the defendant, considering the admissibility of any evidence sought to be excluded.

- ☐ Personal observation of law enforcement officer(s) _____
- ■ Statements of witness(es) Victim ■ Recorded
- ☐ Statements of defendant _____ ☐ Recorded
- ☐ Video
- ☐ Audio
- ☐ Physical evidence (specify):

_____

_____

■ The history and characteristics of the defendant, including the defendant's:

- ■ character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse.

  Defendant refused interview

  _____
- ■ criminal history as reflected in the PSA
- ☐ record concerning appearance at court proceedings as reflected in the PSA

■ At the time of the offense or arrest, the defendant was on the following:

- ■ probation for offense(s) Joyriding
- ☐ parole for offense(s) _____
- ☐ other release pending trial, sentencing, appeal or completion of sentence for offense(s)

  _____

■ The nature and seriousness of the danger to any other person or the community that would be posed by the defendant's release, if applicable.
Elevated risk of violence flag

☐ The nature and seriousness of the risk of obstructing or attempting to obstruct the criminal justice process that would be posed by the defendant's release, if applicable.

- ☐ Potential for witness intimidation _____
- ☐ Potential destruction of evidence _____
- ☐ Other: _____

■ The release recommendation of the pretrial services program obtained using a risk assessment instrument.

- ■ Release not recommended
- ☐ Other: _____

Further Reasons for Pretrial Detention (if any)

Defendant has failed to rebut the presumption.

State represented by: _____

Defendant represented by: _____

Attachments:

☐ Complaint-Warrant (CDR2) (also available in case jacket)

If Pretrial Detention Is Ordered,

☐ The Court has directed that defendant be afforded reasonable opportunity for private consultation with counsel.

☐ Defendant has been advised of his/her right to appeal this Order within 7 days pursuant to *R.* 2:9-13.

Date: 12·6·18

Paul M. DePascale, J.S.C.

Paul M. DePascale

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

State of New Jersey
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JOSEPH E. KRAKORA
Public Defender

January 26, 2024

The Honorable Chief Justice
and Associate Justices
Supreme Court of New Jersey
P.O. Box 970
Trenton, New Jersey 08625

Re: State of New Jersey v. William Hill
Supreme Ct. Docket No. 087840

LETTER IN LIEU OF A FORMAL BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION

Your Honors:

Please accept this letter in lieu of a more formal brief in support of defendant-appellant William Hill's motion for reconsideration of the Court's January 18, 2024 judgment, to the extent the Court did "not disturb defendant's conviction for carjacking under N.J.S.A. 2C:15-2(a)(1)." State v.

Hill, ___ N.J. ___, ___ (2023) (slip op. at 32).[1] Hill respectfully submits that reconsideration is warranted because neither this Court nor the Appellate Division applied the constitutionally required test to determine whether the First-Amendment error during Hill's trial requires reversal of the carjacking conviction: whether "the State could show 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). To ensure that Hill receives an "adequate and effective" appeal as guaranteed by the Due Process Clause of the Fourteenth Amendment, Evitts v. Lucey, 469 U.S. 387, 392 (1985), this Court should either evaluate whether reversal of the carjacking conviction is required under the Chapman standard or remand the matter to the Appellate Division to consider this issue.

It is well-settled that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman, 386 U.S. at 24; see also State v. Weaver, 219 N.J. 131, 154 (2014) (explaining that under Chapman, "an appellate court must determine whether the error impacted the verdict"). The Chapman standard

[1] Dma = appendix to letter in support of motion for reconsideration
Dma1-36 = State v. Hill, ___ N.J. ___ (2023).

applies even when the constitutional error is subject to plain error review. See, e.g., State v. Greene, 242 N.J. 530, 554 (2020) (applying Chapman standard when a constitutional issue was subject to plain error review); State v. Camacho, 218 N.J. 533, 554 (2014) (same); State v. Simon, 79 N.J. 191, 208 (1979) (same). "Consistent 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, 508 U.S. at 279. "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." Ibid.

Accordingly, the question here is whether the jury's verdict on the carjacking charge was surely unattributable to its consideration of the content of Hill's letter, without being instructed that the "State was required to prove that defendant intended the letter to cause A.Z. to testify falsely" for the letter to constitute witness tampering. Hill, ___ N.J. at ___ (slip op. at 30). The Court's opinion in this matter, however, neither applies the Chapman standard nor provides reasons in support of the Court's decision not to disturb the carjacking conviction. Because this failure to apply the Chapman standard

deprived Hill of his due process right to an adequate and effective appeal, the Court should grant the motion for reconsideration, address this issue, and vacate the carjacking conviction because the First-Amendment error cannot be declared harmless beyond a reasonable doubt as to the jury's verdict.

For three principal reasons, the trial record shows that the First-Amendment error likely impacted the jury's carjacking verdict. First, the constitutionally insufficient jury instructions made it much more likely that the jurors would view Hill's facially innocuous letter as criminal wrongdoing that was reflective of consciousness of guilt as to the carjacking.[2] 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. If the jurors had been required to consider whether Hill intended A.Z. to lie or withhold her testimony, as opposed to tell the truth, they might have found that he sent the letter in protestation of his innocence. Without such an instruction regarding Hill's intent, however, the jurors might have assumed that because Hill sent

[2] Specifically, the jury was erroneously instructed that Hill's letter constituted witness tampering if he were negligent as to the possibility that his letter would induce A.Z. to testify falsely, rather than being instructed that "the State was required to prove that defendant intended the letter to cause A.Z. to testify falsely . . . ." Hill, ___ N.J. at ___ (slip op. at 30).

such a letter, he must have been trying to cover up the carjacking. In this way, the First-Amendment error in the jury charge on witness tampering made the jury more likely to consider Hill's letter as reflecting consciousness of guilt as to the underlying carjacking.

The Court has found that improper evidence and jury instructions on consciousness of guilt requires reversal under the Chapman standard. State v. Ingram, 196 N.J. 23, 49-50 (2008). And the Court has reversed all of a defendant's convictions even when an instructional error pertained solely to one charge when the instructional error may have impacted the jury's consideration of the remaining charges. State v. Federico, 103 N.J. 169, 177 (1986) (reversing all the defendant's convictions due to a non-constitutional error in the jury instructions on first-degree kidnapping, including "the convictions that are unrelated to the kidnapping count"); State v. Collier, 90 N.J. 117, 123-24 (1982) (reversing the defendant's rape conviction based on a constitutional error in the jury instructions on contributing to the delinquency of a minor). Because the First-Amendment instructional error may have influenced the jury to conclude that Hill displayed a consciousness of guilt in his facially innocuous letter, the error was not harmless beyond a reasonable doubt as to the jury's carjacking verdict.

Second, this general prejudice caused by the instructional error was

exacerbated by the specific ways in which the State used the content of Hill's letter to bolster A.Z.'s shaky identification and suggest Hill's consciousness of guilt.[3] As this Court found, the prosecution employed "a consistent strategy . . . to refer the jury to the text of the letter itself." Hill, ___ N.J. at ___ (slip op. at 29). In his opening statement, the prosecutor 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." (7T14-8 to 15-2).

The prosecutor built upon this "fixed memory" theme in summation, arguing that after receiving the letter, A.Z. still testified at the trial because the truth "never wavered" and she "knows what she saw." (8T92-6 to 15). The prosecutor also argued that while cross-racial misidentification is a problem "societally speaking," it was not an issue in this case because A.Z. would not

[3] It is irrelevant whether the content of Hill's letter could have been admitted as a statement of a party opponent in a trial solely on the carjacking count without an accompanying witness tampering charge. The question under Chapman does not call for consideration of a hypothetical, alternative trial; the issue is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." Sullivan, 508 U.S. at 279.

misidentify the culprit after viewing him while she was hanging out of her car and fighting him. (8T60-6 to 16). And the prosecutor urged the jury to consider Hill's letter as consciousness of guilt. He 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 he emphasized the negligence standard by asking the jurors to consider "[w]hat is a reasonable person to take from [the letter]?" (8T87-4 to 91-14).

This Court has already found that Hill was prosecuted based upon the content of his letter in light of the prosecution's strategy and the fact that the jury received a playback of the letter during deliberations. Correspondingly, there is a reasonable possibility that in considering the content of the letter, the jurors were persuaded by the prosecutor's arguments regarding A.Z.'s alleged fixed memory and Hill's alleged consciousness of guilt. Considering the ways in which the State used the content of Hill's letter to bolster A.Z.'s weak identification and to argue Hill's consciousness of guilt, therefore, the State cannot show beyond a reasonable doubt that the First-Amendment error did not impact the carjacking verdict.

Third, the constitutional error is not harmless beyond a reasonable doubt as to the carjacking conviction because the State's evidence on the identity of the culprit was "far from overwhelming." See Greene, 242 N.J. at 554. No

physical or forensic evidence directly tied Hill to the crime. The suspect's face is indiscernible in the surveillance video footage and in the still images that the State contended showed the culprit. (Defendant's Appellate Division appendix at Da 13 to 15). Furthermore, as detailed in defendant's supplemental brief (Dsb6-9), there are multiple discrepancies in A.Z.'s initial description of the culprit's clothing, the clothing worn by the suspect in the surveillance footage, and the clothing that Hill was wearing when he was arrested. 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 see a scar on the culprit's face. (See Da 23, 26, and 27 (showing a scar between Hill's eyebrows); 7T217-4 to 218-2 (A.Z. testified that she did not see a scar on the culprit's face) 8T53-23 to 25 (defense counsel argued in summation that the A.Z. did not notice the scar)).

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 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. In Henderson, this Court identified all these factors as weighing against the reliability of an identification. State v. Henderson, 208 N.J. 208, 231-35, 289-93 (2011), see also The Innocence Project, DNA Exonerations in the United States (available online) (noting that 69% of DNA exonerations from 1989-2020 involved eyewitness misidentification). There is a real possibility that an innocent person has been convicted based on a mistaken, cross-racial identification.

This Court held that Hill's trial did not comport with the protections of the First Amendment. The First-Amendment instructional error made the jury more likely to consider Hill's facially innocuous letter as consciousness of guilt as to the carjacking. The State used the content of the letter to bolster A.Z.'s weak identification and to argue that Hill's letter reflected a consciousness of guilt. On a trial record that presents such a clear risk of a mistaken identification, the First-Amendment error may have impacted the jury's carjacking verdict and therefore cannot be deemed harmless beyond a reasonable doubt. For these reasons, this Court should grant reconsideration and reverse the carjacking conviction.

Alternatively, if the Court concludes that assessing the propriety of the carjacking conviction is beyond the scope of the Court's limited grant of certification, then the matter should be remanded to the Appellate Division to address this issue in the first instance. Although Hill raised the issue of whether the carjacking conviction should be reversed in Point I(b) of his Appellate Division brief, the Appellate Division did not reach this issue because it concluded that no First-Amendment violation had occurred. Therefore, as this Court commonly does, it would be appropriate to remand the matter to the Appellate Division to consider this previously unaddressed issue. See, e.g., State v. Erazo, 254 N.J. 277, 305 (2023) (remanding to the Appellate Division to consider unaddressed sentencing issue).

In sum, reconsideration is warranted to provide Hill his due process right to "a fair opportunity to obtain an adjudication on the merits of his appeal." Evitts, 469 U.S. at 405. Neither this Court nor the Appellate Division applied the Chapman test to determine whether the First-Amendment error during Hill's trial requires reversal of the carjacking conviction. Hill respectfully submits that this Court should either evaluate whether reversal of the carjacking conviction is required under the Chapman standard or remand the matter to the Appellate Division to consider this issue.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 2:11-6(a), I certify that this motion for reconsideration is submitted in good faith and not for the purpose of delay.

Dated: January 26, 2024

/s/ John P. Flynn
JOHN P. FLYNN