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August 28, 2023

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RESPONSE TO AMICUS CURIAE ON BEHALF OF DEFENDANT-PETITIONER

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,	:	Sat Below: Hon. Thomas W. Sumners, Jr.,
Defendant-Petitioner.	:	C.J.A.D., Hon. Richard J. Geiger, J.A.D.,
	:	Ronald Susswein, J.A.D.
		DEFENDANT IS CONFINED

Your Honors:

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

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TABLE OF CITATIONS

Defendant uses the abbreviations for record citations set forth in his Supreme Court supplemental breif filed on July 6, 2023. He adds the following abbreviations:

Dssb = Defendant's Supreme Court Supplemental Brief Filed on July 6, 2023

Agsb = Attorney General's Supreme Court brief filed on August 18, 202

PRELIMINARY STATEMENT

The Attorney General misconstrues both the facts of this case and First-Amendment case law. Contrary to the Attorney General's claim that Hill was prosecuted based on his conduct and not his speech, the record reflects that the jury considered the contents of Hill's letter to convict him of witness tampering. No exception to the First Amendment, including the speech-integral-to-criminal-conduct exception, allowed Hill to be convicted for his speech based on the exceptionally low mens rea of negligence. Indeed, no other statute in the nation criminalizes witness tampering based on a negligence or recklessness standard.

In addition to avoiding serious constitutional questions, Hill's proposed construction of N.J.S.A. 2C:28-5(a) does not undermine the State's interest in protecting witnesses. In all the examples of witness tampering cited by the Attorney General, the State could easily prove that the defendant knew that the conduct or speech would induce the witness not to testify. The State can also obtain a no-contact order that prohibits a defendant from making any contact with a witness. But here, the trial court had not issued a no-contact order. Instead, the State violated the First Amendment by prosecuting Hill for the contents of his letter based on a constitutionally insufficient a mens rea of negligence. Hill's convictions must be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-petitioner William Hill relies on the procedural history and statement of facts set forth in his Appellate Division brief and Supreme Court supplemental brief. He adds the following:

The Attorney General quotes from an officer reading the redacted letter during the trial. (Agsb6-7; 7T245-14 to 247-19). The officer misspoke when reading the following part of the letter: "I'm writing as 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 don't — the truth, if your wrong, or not sure 100 percent." (7T247-8 to 12 (emphasis added)). The letter actually reads: "Otherwise, please tell the truth, or if you're wrong or not sure 100%." (Da30). The Appellate Division correctly quoted the letter in its opinion. State v. Hill, 474 N.J. Super. 366, 373 (App. Div. 2023).

LEGAL ARGUMENT

Hill relies on all the arguments raised in his previous briefs. He adds the following in response to the Attorney General's arguments.

POINT I

HILL WAS PROSECUTED BASED ON THE CONTENT OF HIS SPEECH.

Contrary to the Attorney General's claim that Hill was prosecuted "based on his conduct—sending a letter to the victim, a stranger, at her home—and not his speech" (Agsb3; see also Agsb23-25), the record reflects that Hill was prosecuted based on the content of his speech. A redacted copy of Hill's letter was admitted into evidence, an officer read the redacted version of letter to the jury, and the jury requested and received a playback of the officer reading the letter during deliberations. (7T196-5 to 200-12; 7T245-14 to 247-19; 8T95-17 to 96-6; 8T162-2 to 164-8). The prosecutor repeatedly urged the jury to consider the content of the letter during his opening statement and summation. (7T13-19 to 15-10; 8T87-2 to 12; 8T89-9 to 91-17). For example, the prosecutor argued to the jurors: "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?" (8T91-1 to 17 (emphases added)).

Accordingly, the record leaves no doubt that the jury considered the content of Hill's letter to convict him of witness tampering based on a mens rea of negligence. Therefore, as explained in Point I(a) of Hill's Supreme Court supplemental brief, Hill's conviction based on the content of his speech violated the First Amendment because it was predicated on a constitutionally insufficient mens rea. The witness-tampering conviction must be reversed.

POINT II

THE SPEECH-INTEGRAL-TO-CRIMINAL-CONDUCT EXCEPTION APPLIES ONLY WHEN A STATUTE CONTAINS A MENS REA OF AT LEAST KNOWLEDGE.

Hill agrees with the Attorney General that some common examples of witness tampering would qualify for the speech-integral-to-criminal-conduct exception to the First Amendment. (Agsb13-15; Agb18). But this exception applies only when the statute at issue contains a mens rea of "specific intent, presumably equivalent to purpose of knowledge." Counterman v. Colorado, 143 S. Ct. 2106, 2118 (2023). In other words, the defining featuring that makes speech unprotected under this exception is that the speech "is intended to induce or commence illegal activities." United States v. Williams, 553 U.S. 285, 298 (2008) (emphasis added). So, if N.J.S.A. 2C:28-5(a) is analyzed under this exception, the statute must be construed to contain a knowing mens rea as to the results of the defendant's speech to pass constitutional muster.

The Supreme Court's opinions make clear that this exception applies only when a statute requires at least knowledge as to the capacity for the defendant's speech to induce criminal conduct. For example, in Williams, the Supreme Court explained that "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." 553 U.S. at 298.[1] In upholding a federal statute that prohibited the solicitation of child pornography, the Court emphasized that "the statute includes a scienter requirement. The first word of § 2252A(a)(3)—'knowingly'—applies to both of the immediately following subdivisions . . . ." Id. at 294. The Court also found it significant that the statute "contains . . . a subjective element: The defendant must 'intend' that the listener believe the material to be child pornography, and must select a manner of 'advertising, promoting, presenting, distributing, or soliciting' the material that he thinks will engender that belief—whether or not a reasonable person would think the same." Id. at 296. The Court's emphasis on these features of the statute

[1] Furthermore, "Congress may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that Congress has criminalized. To qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as antitrust conspiracy, extortion, or in-person harassment." United States v. Sryniawski, 48 F.4th 583, 588 (8th Cir. 2022) (internal citations omitted).

underscores that the speech-integral-to-criminal-conduct exception requires the statute to contain a specific-intent element as to the results of the defendant's speech.

Consistent with its analysis in Williams, the Supreme Court has only applied the speech-integral-to-criminal-conduct exception to uphold laws with a mens rea of at least knowledge as to the capacity for the defendant's speech to induce criminal conduct. United States v. Hansen, 143 S. Ct. 1932, 1946-47 (2023) (narrowly construing a statute to prohibit only "the purposeful solicitation and facilitation of specific acts known to violate federal law" and concluding that "[t]o the extent that clause (iv) reaches any speech, it stretches no further than speech integral to unlawful conduct."); Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388 (1973) (solicitation of unlawful employment); Cox v. Louisiana, 379 U.S. 559, 560 (1965) (picketing near courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer"); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (picketing with the "sole, unlawful immediate objective . . . to induce [others] to violate the Missouri law").

The cases cited by the Attorney General about this exception also follow this principle. In Friend v. Gasparino, 61 F.4th 77, 90 (2d Cir. 2023), the Court of Appeals for the Second Circuit held that the defendant's speech "did not fall within" the speech-integral-to-criminal-conduct exception because the defendant "was not acting in coordination with lawbreakers such that he could be said to have been engaged in a conspiracy to commit violations and evade detection." In United States v. Milk, 66 F.4th 1121, 1134-35 (8th Cir. 2023), the Court of Appeals for the Eight Circuit rejected a First-Amendment challenge to a conviction under the federal obstruction-of-justice statute where the defendant "engaged in conduct that was intended to discourage a witness from testifying, or to convince him to change his testimony . . . ." Accordingly, these cases also show that the speech-integral-to-criminal-conduct exception applies only when a conviction is based on the defendant's specific intent that his speech will induce criminal activity.

Counsel is unaware of any case in which the Supreme Court, or any court, has applied the speech-integral-to-criminal-conduct exception to uphold a criminal statute the allows for a conviction based on the defendant's negligence as to the capacity for his speech to induce criminal activity. The lack of such cases in unsurprising, because "[w]ith few exceptions, "'wrongdoing must be conscious to be criminal.'" Ruan v. United States, 142

S. Ct. 2370, 2376 (2022) (quoting Elonis v. United States, 575 U.S. 723, 734 (2015)). Indeed, other than N.J.S.A. 2C:28-5, no statute in the nation criminalizes witness tampering based on a negligence or recklessness standard.[2]

In sum, speech is unprotected under the speech-integral-to-criminal-conduct exception only when the speaker intends or knows that the speech will induce criminal conduct. For N.J.S.A. 2C:28-5(a) to qualify for the speech-integral-to-criminal-conduct exception, the statute must be construed to require that the defendant knew that this speech was of a nature to cause the witness to

[2] 18 U.S.C. § 1513; Ala. Code § 13A-10-124; Alaska Stat. Ann. §§ 11.56.540, 11.56.545; Ariz. Rev. Stat. Ann. § 13-2804; Ark. Code Ann. § 5-53-110; Cal. Penal Code § 136.1; Colo. Rev. Stat. Ann. § 18-8-707; Conn. Gen. Stat. Ann. § 53a-151; Del. Code Ann. tit. 11, § 1263; D.C. Code Ann. § 22-722; Fla. Stat. Ann. § 914.22; Ga. Code Ann. § 16-10-93; Haw. Rev. Stat. Ann. § 710-1072; Idaho Code Ann. § 18-2604; 720 Ill. Comp. Stat. Ann. 5/32-4a; Ind. Code Ann. § 34-47-2-3; Iowa Code Ann. § 720.4; Kan. Stat. Ann. § 21-5909; Ky. Rev. Stat. Ann. § 524.050; La. Stat. Ann. § 14:129.1; Me. Rev. Stat. tit. 17-A, § 454; Md. Code Ann., Crim. Law § 9-305; Mass. Gen. Laws Ann. ch. 268, § 13B; Mich. Comp. Laws Ann. § 750.122; Minn. Stat. Ann. § 609.498; Miss. Code. Ann. § 97-9-115; Mo. Ann. Stat. § 575.270; Mont. Code Ann. § 45-7-206; Neb. Rev. Stat. Ann. § 28-919; Nev. Rev. Stat. Ann. § 199.230; N.H. Rev. Stat. Ann. § 641:5; N.M. Stat. Ann. § 30-24-3; N.Y. Penal Law §§ 215.10 to 215.17; N.C. Gen. Stat. Ann. § 14-226; N.D. Cent. Code Ann. § 12.1-09-01; Ohio Rev. Code Ann. § 2921.04; Okla. Stat. Ann. tit. 21, § 455; Or. Rev. Stat. Ann. § 162.285; 18 Pa. Stat. and Cons. Stat. Ann. § 4952; 11 R.I. Gen. Laws Ann. § 11-32-5; S.C. Code Ann. § 16-9-340; S.D. Codified Laws § 22-11-19; Tenn. Code Ann. § 39-16-507; Tex. Penal Code Ann. § 36.05; Utah Code Ann. § 76-8-508; Vt. Stat. Ann. tit. 13, § 3015; Va. Code Ann. § 18.2-460; Wash. Rev. Code Ann. § 9A.72.120; W. Va. Code Ann. § 61-5-27; Wis. Stat. Ann. § 940.42 to 940.43; Wyo. Stat. Ann. § 6-5-305.

engage in a crime. In other words, application of the speech-integral-to-criminal-conduct exception further supports Hill's proposed construction of N.J.S.A. 2C:28-5(a).

Moreover, Hill's witness tampering conviction cannot be upheld under the speech-integral-to-criminal-conduct exception because the jury was required to find that Hill was only negligent as to the possibility that his speech (the letter) would induce the victim to engage in illegal activity (offer false testimony, refuse to testify in violation of subpoena, etc.). Indeed, as argued in Point I(c) of Hill's supplemental brief, the State presented insufficient evidence from which the jury could find, beyond a reasonable doubt, that Hill possessed a mens rea of knowledge or even recklessness with respect to possibility that his letter would cause a prohibited result. His letter did not ask the victim to withhold testimony or testify falsely; it told the victim to disregard the letter if she was sure of her identification, or "please tell the truth, or if you're wrong or not sure 100%." (Da30). The letter, read as a whole, reflected Hill's proclamation of his innocence and desire to have the witness think about her identification, not speech directed at inducing illegal conduct. See State v. Speth, 323 N.J. Super. 67, 81 (App. Div. 1999) ("Clearly, it is not a crime for anyone under investigation to want the investigation stopped."); State v. Krieger, 285 N.J. Super. 146, 152 (App. Div.

1995) ("A mere request for investigational or testimonial assistance ought not to be criminalized on the basis that it might be construed as an effort to suppress evidence of a crime"). For these reasons, Hill's witness-tampering conviction must be reversed, and the witness-tampering charge must be dismissed with prejudice.

POINT III

HILL'S PROPOSED CONSTRUCTION OF N.J.S.A. 2C:28-5(a) AVOIDS SEVERAL CONSTITUTIONAL QUESTIONS AND DOES NOT BURDEN THE STATE'S INTEREST IN PROTECTING WITNESSES.

Contrary to the Attorney General's assertion, Hill does not concede that N.J.S.A. 2C:28-5(a) does not target speech or expressive conduct. (Agsb12). Myriad witness-tampering prosecutions in New Jersey have arisen from a defendant writing a letter to a potential witness. See, e.g., State v. Williams, No. A-0434-15T4, 2017 WL 2472361 (App. Div. June 8, 2017) (defendant wrote a letter to a victim in which he "sought to portray himself as a hard-working, good person who was the victim of misidentification, and he asked the victim to look at the incident report and the arrest report attached to his letter [which showed a height discrepancy with the culprit] and consider

whether she had correctly identified him").[3] Many prosecutions have also arisen from a defendant speaking to a witness. See, e.g., State v. Mancine, 124 N.J. 232, 241-42, (1991); State v. Jackson, 460 N.J. Super. 258, 267Div. 2019), aff'd o.b., 241 N.J. 547 (2020); State v. Ravi, 447 N.J. Super. 261, 294-95 (App. Div. 2016) (texts to witness); Speth, 323 N.J. Super. at 79-83; Krieger, 285 N.J. Super. at 149; State v. Crescenzi, 224 N.J. Super. 142, 146 1252 (App. Div. 1988).[4] Prosecutions for witness tampering and witness intimidation have also been predicated on the content of social media posts. See, e.g., State v. Carroll, 456 N.J. Super. 520, 528-31 (App. Div. 2018) (Facebook posts).[5] As shown by all these examples, witness-tampering prosecutions often involve speech.

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[3] See also State v. Maxwell, No. A-4242-17, 2021 WL 1499848, (App. Div. Apr. 16, 2021); State v. Estrada, No. A-3763-19, 2021 WL 5183340 (App. Div. Nov. 9, 2021), State v. Martin, No. A-0926-16T4, 2018 WL 3077107 (App. Div. June 22, 2018); State v. Celestine, No. A-2803-14T1, 2017 WL 1833469 (App. Div. May 8, 2017); State v. Vauters, No. A-3503-13T3, 2015 WL 9703473 (App. Div. Jan. 15, 2016); State v. Chase, No. A-1209-12T2, 2015 WL 4770503 (App. Div. Aug. 14, 2015), State v. Shepherd, No. A-2427-08T4, 2014 WL 3818680 (App. Div. Aug. 5, 2014).

[4] See also State v. T.F., No. A-3484-18, 2021 WL 3121382 (App. Div. July 23, 2021); State v. E.P., No. A-4616-08T4, 2010 WL 5376878 (App. Div. Nov. 8, 2010).

[5] State v. Dutton, No. A-1293-19, 2022 WL 2154423 (App. Div. June 15, 2022); State v. Santos, No. A-5266-17T4, 2019 WL 6977896 (App. Div. Dec. 20, 2019); State v. Young, No. A-1849-17T2, 2018 WL 6272933 (App. Div. Dec. 3, 2018).

Accordingly, N.J.S.A. 2C:28-5(a)'s negligence mens rea could lead a jury to convict even if the defendant lacks any subjective knowledge that his speech would cause a witness to withhold testimony. (Dssb33-34). For example, a witness might appear on television or post on social media about why he is innocent or how a prosecution is unjust. The Attorney General incorrectly claims that these scenarios do "not fit the elements of the witness-tampering law, because there is no tampering in this hypothetical." (Agsb17). Similarly, the Attorney General asserts that Hill could not have been prosecuted for witness tampering if he used the same words in an open letter in the newspaper. (Agsb25).

The Attorney General's position, however, is not based on the plain text of the witness-tampering statute. N.J.S.A. 2C:28-5(a) does not contain a requirement that the conduct or speech at issue be directly communicated to a witness rather than to the general public. The Attorney General's atextual limitation on the statute's reach cannot save it from overbreadth. See United States v. Stevens, 559 U.S. 460, 480 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of noblesse

oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").[6]

Regardless, Hill's constitutional avoidance arguments do not rise and fall with whether this Court concludes that N.J.S.A. 2C:28-5(a) is unconstitutionally overbroad on its face. Rather, consistent with New Jersey jurisprudence on constitutional avoidance, Hill's proposed mens rea of knowledge seeks to avoid substantial constitutional questions that would arise if this mens rea is not adopted. In New Jersey, "we have adopted in our jurisprudence a cognate of the 'constitutional doubt' doctrine . . ." State v. Johnson, 166 N.J. 523, 540 (2001). Under the constitutional doubt doctrine, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Id. at 534 (quotation omitted). Consequently, "[u]nless compelled to do otherwise, courts seek to avoid a statutory interpretation that might give rise to serious constitutional questions." Id. at 540 (quotation omitted).

Consistent with this principle, Hill proposes that the Court employ the ordinary rule of statutory construction set forth in N.J.S.A. 2C:2-2(c)(1) to

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[6] By its literal terms, the witness-tampering statute would criminalize a scenario in which a defense investigator negligently influenced a witness not to testify while interviewing the witness for trial preparation.

avoid several constitutional questions that would otherwise arise with the witness-tampering statute.[7] As discussed, Hill's proposed construction (with a mens rea of knowledge as to the results element) would avoid the serious question of whether N.J.S.A. 2C:28-5(a) is unconstitutionally overbroad by ensuring that all prosecutions entail a constitutionally sufficient mens rea. (Dssb29-35). At a minimum, Hill's proposed construction would avoid as-applied challenges in prosecutions based on the defendant's speech or expressive conduct, as in the present case. (Dssb34-35).

Hill's proposed construction also avoids significant vagueness issues with the statute. To be clear, contrary to the Attorney General's suggestion, Hill does not seek a categorical rule barring the use of a reasonable-person standard in a criminal statute. Vagueness arises when a criminal statute uses a reasonable-person standard without also containing a subjective mens rea as to the results of the defendant's speech or conduct, as was the case in Pomianek. State v. Pomianek, 221 N.J. 66, 89 (2015) ("It bears repeating that no other bias-intimidation statute in the nation imposes criminal liability based on the victim's reasonable perceptions."). Indeed, all the statutes cited in the

[7] As described in Hill's supplemental brief (Dssb38-40), State v. Gandhi does not undermine this proposed construction, because Gandhi was a rare case in which the Court found a "contrary intent" to depart from N.J.S.A. 2C:2-2(c)(1)'s presumption of a scienter. State v. Gandhi, 201 N.J. 161, 187 (2010).

Appellate Division's opinion, State v. Hill, 474 N.J. Super. 366, 385-386 (App. Div. 2023), contain such a scienter element in addition to the reasonable person element. The scienter element militates against potential vagueness in those statutes. Similarly, reading a mens rea of knowledge into the results of element of N.J.S.A. 2C:28-5(a) avoids the serious question of whether the statute would be unconstitutional without such a scienter element.

In addition to avoiding all these constitutional questions, Hill's proposed construction does not undermine the State's interest in protecting witnesses and preventing interference with the judicial process. The requirement of a knowing mens rea would not burden the State's ability to prosecute witness tampering. In all the examples presented by the Attorney General (including assaulting a witness, destroying a witness's property, conspicuously driving past a witness's house, or persistently calling a witness and hanging up), the State could easily prove that the defendant knew that the conduct would induce the witness not to testify.

Moreover, a trial court has statutory authority to issue no-contact order that prevents a defendant from making any contact with a witness, and the State can prosecute a defendant for contempt if he violates a no-contact order. (Dssb23-27). The State can also move for a protective order relieving the prosecution of its obligation under the criminal discovery court rules to supply

a victim's residential address to defense counsel and the defendant. State v. Ramirez, 252 N.J. 277 (2022). The societal interests that the State seeks to protect, therefore, do not depend on interpreting N.J.S.A. 2C:28-5(a) to allow the State to obtain a conviction based on mere negligence.

The apparent reason that the State seeks the exceptionally low burden of negligence to prosecute Hill for sending his innocuous letter is because it knows it cannot prove a higher standard to the jury. Perhaps the State dropped the ball in not seeking a no-contact order to prevent Hill from contacting the victim. But the State's lack of diligence is not a reason to disregard the First Amendment and uphold the witness-tampering conviction based on a plainly insufficient mens rea. Hill's witness-tampering conviction must be reversed, and the witness tampering charge must be dismissed with prejudice. And for the reasons set forth in Point I(D) of Hill's supplemental brief, Hill's carjacking conviction must also be reversed because the prejudicial presentation of the witness tampering charge was clearly capable of influencing the jury to convict Hill of carjacking despite the victim's unreliable out-of-court identification.

CONCLUSION

For the reasons set forth in Point I(A) of Hill's supplemental brief and Points I and II of this response brief, 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) of Hill's supplemental brief and Point III of this response brief, the witness-tampering statute should be construed to require a mens rea of knowledge. For the reasons set forth in Point I(C) of Hill's supplemental brief, 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) of Hill's supplemental brief, Hill's carjacking conviction should be reversed because the substantial prejudice in presenting a constitutionally deficient witness-tampering charge impacted the jury to convict Hill of carjacking despite the State's weak evidence on identity.

Respectfully submitted,

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Dated: August 28, 2023