FILED, Clerk of the Supreme Court, 26 Jul 2023, **087840**

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:
Defendant-Petitioner.	:	
		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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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

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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, "<u>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</u>."[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. <u>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.</u>
>
> <u>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</u>

[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:
>
> (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

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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

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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.

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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,

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Attorney for Defendant-Appellant

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Attorney ID: 303312019

Dated: July 6, 2023

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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 ____________

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■ 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: ______

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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 [signature], J.S.C.
Paul M. DePascale