FILED, Clerk of the Supreme Court, 07 Sep 2023, **087840**

SUPREME COURT OF NEW JERSEY

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	**On Certification from a Judgment of the Superior Court of New Jersey, Appellate Division**
-v-	:	**DOCKET NO. 087840** **App. Div. Docket No. A-4544-19**
WILLIAM HILL,	:	**SAT BELOW:**
Defendant-Petitioner,	:	**Hon. Thomas W. Sumners, Jr., C.J.A.D.** **Hon. Richard J. Geiger, J.A.D.** **Hon. Ronald Susswein, J.A.D.**

SUPPLEMENTAL BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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PROCEDURAL HISTORY[1]

The State adopts the Procedural History stated in the Appellate Division brief submitted on behalf of William Hill (hereinafter "appellant"), as well as the Procedural History stated in the Appellate Division amicus brief submitted on behalf of the Attorney General of New Jersey as if set forth at length herein.

[1] The State adopts appellant's transcript citations and adds the following:
Db – Defendant's Brief
Dsb – Defendant's Supplemental Brief
AGb – Attorney General Amicus Brief

STATEMENT OF FACTS

The following is largely, but not exclusively, summarized from the Appellate Division's January 23, 2023 decision.

On the morning of 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 to her car one or two minutes later, she saw appellant, whom she did not know, in the driver's seat of her car. (7T153:3-15; 7T156:20 to 157:6; 7T158:8-12; 7T192:23 to 194:6). She ran up to the car, opened the door, "looked [appellant] right in the eye, and said get the hell out of my car." (7T158:18 to 159:23). Appellant refused and put the car into reverse while the door was still open. (7T160:1-5). As the car moved backward, the driver's side door began closing on Ms. Zanatta, so she jumped inside the car into the lap of appellant. (7T161:6-14; 7T165:1-7). She grabbed the steering wheel while her feet were dangling outside the door. (7T161:14-16; 7T168:5-6).

Appellant continued driving erratically while Ms. Zanatta tried to get him out of her car by screaming and hitting him. (7T161:16-18; 7T166:22-25; 7T168:7-9; 7T170:19 to 171:7). Ms. Zanatta was unable to remove the ignition key but after roughly four blocks, she managed to shift the gear into neutral. (7T167:1-7; 7T185:5-17). When the vehicle began to slow down, appellant hit the brakes, pushed Ms. Zanatta aside, jumped out, and ran away. (7T185:15 to 186:18). From start to

finish, the carjacking lasted approximately two minutes. (7T188:9-13).

Ms. Zanatta drove to a police station and provided Harrison Police Department a description of the carjacker approximately thirty minutes after the incident. (7T29:11 to 31:4; 7T34:10-17). She stated he was "very, very scruffy. Like he had hair all over his face, and it was not well maintained." (7T179:12-15). She also said he had "big eyes" and his skin was not "too dark, but he wasn't light skinned." (7T179:16 to 180:2). Finally, she recalled him wearing a red winter "skully" hat, gray hoodie, olive or brown vest, and faded blue jeans. (7T179:20-23). During cross-examination, Ms. Zanatta said she did not notice a scar on appellant's forehead during the carjacking because he had a hat on, "it was dark," and she was "focused on his eyes." (7T217:4-19).

During the trial, the State introduced into evidence video footage and still images from nearby surveillance cameras to show what the suspect was wearing. (7T70:1 to 77:24).

On November 6, 2018, Ms. Zanatta went to the police station to view a photo array. (7T193:9-19). The video of the array procedure was played for the jury. (Da12; 7T109:10 to 122:7). The Sergeant administering the array handed Ms. Zanatta one photo at a time and instructed her to stack the photos on top of one another. (7T120:1-25). Despite the instruction to view the photos sequentially, Ms. Zanatta started looking at the photos simultaneously, comparing one against the

other. (7T128:2-13; 7T130:8 to 131:12). The record indicates Ms. Zanatta at one point "really thought" the man who attempted to steal her car was an individual in a photo that was not appellant. (7T224:21 to 225:1). Ultimately, she selected appellant's photo from the array. (7T121:18 to 122:2). At trial she testified,

> I recognized [appellant] by what I saw in my car. Like, I knew that I . . . I know that I saw the person. You know, I was face to face with him. I know exactly what he looks like. The pictures just didn't look up to date, and so, I . . . when I was looking at all of the pictures, I knew that I recognized him, but there were so many things missing. I was like this is definitely the guy but the facial hair isn't there. You know what I mean? He was so scruffy and it looked like the picture was taken with a flash, so he looked a little bit lighter, but I . . . I just . . . I knew.
>
> [7T192:12-22.]

Ms. Zanatta stated she was confident in her identification because she recognized the carjacker's eyes, explaining, "[w]hen you look at someone in the eyes at such a terror -- terrific moment . . . [i]t's something that doesn't leave your head for a long time and you kind of relive that moment. So, I see his face constantly." (7T195:1-5). She also recognized his mouth and nose. (7T195:6). Ms. Zanatta stated she was eighty percent confident in her identification. (7T121:21 to 122:2).

Appellant was arrested on November 27, 2018. (Da7). Following the arrest, Detectives took six photographs of appellant. (Da23-28; 7T81:15 to 83:14). In the arrest photos, appellant is wearing faded jeans, a black jacket, a grey hoodie, and a red skully cap. (Da23-28).

In April 2019, while appellant was awaiting trial, Ms. Zanatta received a two-page letter from him. (7T195:11 to 197:5). The letter was addressed to Ms. Zanatta, sent to her home mailbox, and appellant's name was listed in the return address. (7T197:3-7). At that time, Ms. Zanatta did not know appellant's name, so she opened the letter. (7T197:9-15). As she read it, she realized it was from the man who carjacked her. (7T197:16-18; 7T199:5-7) At trial, a detective from the Hudson County Prosecutor's Office read a redacted version of the letter to the jury:

> Dear Ms. Zanatta,
>
> Now that my missive had [sic] completed its passage throughout the atmosphere and reached its paper destination, I hope and pray it finds its recipient in the very best of health, mentally as well as physically and in high spirits.
>
> I know you're feeling inept to be a recipient of a correspondence from an unfamiliar author but please don't be startled because I'm coming to you in peace. I don't want or need any more trouble.
>
> Before I proceed, let me cease your curiosity of who I be. I am the guy who has been arrested and charged with Car Jacking upon you. You may be saying I have the audacity to write to you and you may report it but I have to get this off my chest, I am not the culprit of this crime.
>
> Ms. 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,
[Appellant]

[Da29-30; 7T245:13 to 247:19.]

Ms. Zanatta testified that receiving the letter at her home address made her terrified to testify because she realized appellant knew where she lived and could go to her house. (7T196:14-16; 7T199:10-19; 7T201:17-23).

Appellant was initially charged by indictment with first-degree carjacking, N.J.S.A. 2C:15-2(a)(1). Following the letter incident, a superseding indictment added a charge of third-degree witness tampering, N.J.S.A. 2C:28-5(a). (Da1-2).

In June 2019, the trial court held a Wade hearing to determine the admissibility of the eyewitness identification. (1T). On July 8, 2019, the trial court issued an oral ruling denying appellant's motion to suppress the victim's identification of appellant as the perpetrator. (2T).

In Fall 2019, appellant was tried before a jury over the course of several days. (5T-10T). In a motion for a judgment of acquittal at the close of the State's case, defense counsel argued 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 [appellant] was trying to threaten Ms. Zanatta, trying to get her to be afraid to come into court." (8T29:22 to 32:5). The prosecutor responded by noting the State did not charge appellant with second-degree witness tampering, which

would require that the actor "employs force or threat of force." (8T32:14-25). Instead, it charged him with third-degree witness tampering. The prosecutor continued that the statute is about "trying to in some way influence someone to change the course of their involvement and/or participation with the criminal justice system," which "they can definitely do . . . through playing on sympathies and empathy." (8T33:1-9). By reading the letter, the prosecutor argued, it is clear that was appellant's intention. (8T33:8-9). Ultimately, the court denied the motion, finding that a reasonable jury "could conclude that a reasonable person would feel somewhat upset whether [appellant] was guilty or not, but the person arrested for carjacking her is now writing to her at her home." (8T37:12 to 38:13). The jury found appellant guilty on both counts. (Da3-4; 10T9:23 to 10:6; 10T10:20 to 13:6).

Defense counsel renewed the argument in a post-verdict motion for a new trial. (11T26:9 to 27:2). In response, the prosecutor argued

> [T]here's no condition that the defendant has to expressly state what his purpose is. That's the parallel to every other crime we have where we have to determine the mens rea. We determine it based on the actions. So, the State wants to make clear that what it's saying -- not the wording necessarily, what the letter says, "I know where you live," but implicit messaging and based on the standard of what could a reasonable person find in terms of the verdict?
>
> And so, the jurors, being that reasonable person, could they could to the conclusion that the implicit messaging, i.e. the intent of the defendant, is to say the following: "I know where you live." Yes, of course they

> could, because he puts her address on the letter. That's how the letter got there. So, now could she know that? Yes. Could that have been his intent? Could a reasonable person [] have found that? Of course, they could have. He put it there.
>
> Could they have -- a reasonable person have found he's saying to her, "I know what you look like." Of course, they could. In the letter, he specifically says I watched you make the identification . . . He's not saying I see you in court. He's saying I watched the discovery of you picking out the person who did this to you. So, there is the second point, the implicit messaging. "I know where you live, I know what you look like," and then he expressly . . . ends it with "stay out of trouble," something to that point.
>
> So, taking those three things together, could a reasonable person make the inference or come to the conclusion that it was his intent to do -- to influence her in a way that the witness tampering statute is designed to protect? Sure. Of course it could. Just as much as any reasonable person could ever make an inference as to the mens rea of any of the crimes we have, whether it be attempted murder, whether it be -- whatever. The point being, it's always -- it's always a case where we have evidence of actions and then ask the juries to make inferences based on the intent from those actions.
>
> [11T30:10 to 32:4.]

The court again denied the motion, opining that

> "[H]ere we have some woman who is the victim of a crime. She gets a letter from someone who she doesn't know at her home address telling her he knows about the case, he's the defendant, be good, stay out of trouble, could you please think about this?
>
> I would think that a reasonable person would be

> concerned whether -- Ms. Zanatta knows that [appellant] was arrested by the police . . . That's what she knows. And then she gets a letter from the guy: please reconsider. Would a reasonable person be concerned and think that someone is asking them to inform or -- testify or inform falsely? Yes. That's a jury question. Yes. A reasonable person might think they're being asked to change their story, retract their story when they get a letter from someone at -- and it's at her home address. It's not like he published it in the Jersey Journal. I don't know who the victim is in this case, but if you are, please think about this and don't go in and testify because I'm not guilty.
>
> It's addressed to her at her home. So, that would seem to be somewhat concerning. To me, it doesn't matter to me, but it could be concerning to a reasonable person.
>
> [11T39:16 to 41:1.]

On June 10, 2020, the trial judge sentenced appellant to a twelve-year term of imprisonment subject to the No Early Release act, N.J.S.A. 2C:43-7.2, on the carjacking conviction. The judge imposed a consecutive three-year term of imprisonment on the witness tampering conviction. (11T66:4-23).

LEGAL ARGUMENT

POINT I

THE WITNESS TAMPERING STATUTE INVOLVES KNOWING CONDUCT, NOT PURE SPEECH OR EXPRESSIVE CONDUCT, AND THE CASE LAW ON THE TRUE THREATS DOCTRINE IS INAPPLICABLE HERE.

Appellant first argues his witness-tampering conviction "was entirely based on the content of his speech," and, therefore, the conviction violated his right to free speech. (Dsb16). Specifically, appellant contends his "witness-tampering conviction rested upon a constitutionally insufficient mens rea to prosecute a true threat." (Dsb15). Indeed, appellant premises his argument upon the idea that this case involves the "true threat" exception to the First Amendment protection of free speech. (Dsb18). As such, he relies heavily on the recent United State Supreme Court decision in Counterman v. Colorado, No. 22-138, __ U.S. __, __ (2023), which held that the State must prove a mens rea of at least recklessness, not negligence, when prosecuting a true threat. (Dsb18-19).

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech…." U.S. Const. amend. I. This provision applies to the states under the Due Process Clause of the Fourteenth Amendment. Article I, paragraph 6 of the New Jersey Constitution states: "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."

"Where, as here, claimants challenge the validity of a statute under the First Amendment, '[t]here are two quite different ways in which a statute . . . may be considered invalid "on its face" – either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad."'" Binkowksi v. State, 322 N.J. Super. 359, 369 (App. Div. 1999) (citing Members of the City Counsel v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984)). "Either way, in advancing a facial challenge to the constitutionality of a statute, the challenger confronts 'a heavy burden.'" Ibid. (quoting Rust v. Sullivan, 500 U.S. 173, 183 (1991) (recognizing that a claimant making a facial challenge must establish that no set of circumstances exists under which the Act would be valid)).

"Conduct does not constitute speech simply because the actor intends to convey a message thereby." Id. at 370 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)). "Otherwise, 'an apparently limitless variety of conduct [could] be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" Ibid. "Indeed, '[v]irtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression.'" Ibid. (quoting Spence v. Washington, 418 U.S. 405, 417 (1974) (Rehnquist, J., dissenting)). "Whether conduct is 'sufficiently

imbued with elements of communication' depends largely on the context in which the conduct occurs and on whether the actor has '[a]n intent to convey a particularized message . . . [as well as] . . . the likelihood . . . that the message would be understood by those who viewed it.'" Id. at 371 (quoting Roulette v. City of Seattle, 97 F.3d 300, 303 (9th Cir. 1996) (en banc)).

Further, there are certain limited categories of speech that are criminalized, including "speech that is integral to criminal conduct." State v. Burkert, 231 N.J. 257, 281 (2017) (citing United States v. Alvarez, 567 U.S. 709, 717 (2012)). "With respect to speech 'integral to criminal conduct,' the 'immunity' of the First Amendment will not extend to 'a single and integrated course of conduct' that violates a valid criminal statute." State v. B.A., 458 N.J. Super. 391, 408 (App. Div. 2019) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949)). "The First Amendment also does not bar states from enacting laws that punish expressive activity when 'substantial privacy interests are being invaded in an essentially intolerable manner.'" Id. at 408-09 (quoting Burkert, 231 N.J. at 282). "Freedom of speech does not encompass a right to abuse or annoy another person intentionally." Id. at 409 (quoting State v. Saunders, 302 N.J. Super. 509, 519 (App. Div. 1997)).

Here, the witness-tampering statute on its face prohibits conduct, not speech. It bans a person from "knowingly engag[ing] in conduct. N.J.S.A. 2C:28-5(a)

(emphasis added). Any regulation of speech under the statute is therefore incidental and discussion of pure speech exceptions, like the true threats doctrine, is unnecessary. Indeed, appellant ran afoul of the witness tampering statute not because of anything specifically written in the content of the letter. Rather, it was for engaging in a course of conduct that involved sending the letter to his victim's home before the trial, making it clear he knew who she was and where she lived. The appropriate analysis pursuant to the statute therefore involved whether a reasonable person, embodied by the jury, would believe this action would cause the victim to engage in one of the five enumerated scenarios and hinder the prosecution of appellant. Ultimately, that reasonable person determined appellant's conduct would cause one of those scenarios and found him guilty of witness tampering.

POINT II

THE WITNESS TAMPERING STATUTE IS NOT FACIALLY OVERBROAD IN PROSCRIBING CONDUCT BECAUSE THE IMPORTANT GOVERNMENT INTEREST IN PREVENTING INTIMIDATION OF, AND INTERFERENCE WITH, POTENTIAL WITNESSES OR INFORMERS IN CRIMINAL MATTERS OUTWEIGHS ANY INCIDENTAL REGULATION OF SPEECH.

The focus of this appeal is whether the witness tampering statute is unconstitutionally overbroad.

"The overbreadth concept 'involves substantive due process considerations concerning excessive governmental intrusion into protected areas.'" State v. Badr, 415 N.J. Super. 455, 468 (App. Div. 2010) (quoting Karins v. Atl. City, 152 N.J. 532, 544 (1998)). "The evil of an overbroad law is that in proscribing constitutionally protected activity, it may reach farther than is permitted or necessary to fulfill the state's interests." Ibid. (quoting Town Tobacconist v. Kimmelman, 94 N.J. 85, 126 n. 21 (1983)). The question becomes "whether the challenged 'enactment reaches a substantial amount of constitutionally protected conduct.'" Ibid. (quoting In re Petition of Soto, 236 N.J. Super. 303, 324 (App. Div. 1990)). "If it does not, then the overbreadth challenge must fail." B.A., 458 N.J. Super. at 407 (quoting Saunders, 302 N.J. Super. at 517). The doctrine balances two competing social costs – the chilling effect on constitutionally protected speech and the invalidation of a law that "in some of its applications is perfectly constitutional." States v. Williams, 553 U.S. 285, 292 (2008).

"Facial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.' It is, in fact, 'an exception to our traditional rules of practice.'" Binkowski, 322 N.J. Super. at 375 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)). "Hence, '[t]o prevail, respondents must demonstrate a substantial risk that application of the provision will lead to the suppression of speech.'" Id. at 376 (quoting National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998)). "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." Virginia v. Hicks, 539 U.S. 113, 124 (2003).

Indeed, "as the behavior at issue 'moves from "pure speech" towards conduct . . . the exception attenuates." Ibid. "[P]articularly where conduct and not merely speech is involved," the "overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 613; accord United States v. Stevens, 559 U.S. 460, 473 (2010); Williams, 553 U.S. at 292; Dempsey v. Alston, 405 N.J. Super. 499, 510 (App. Div. 2009). The United States Supreme Court has long recognized that while some broadly worded laws regulating conduct "may deter protected speech to some unknown extent, there comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State

from enforcing the statute against conduct that is admittedly within its power to proscribe." Broadrick, 413 U.S. at 615. "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." Taxpayers for Vincent, 466 U.S. at 801; accord New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 66 (1980)).

As the Supreme Court has explained: "When 'speech' and 'nonspeech' elements are combined in the same course of conduct, sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." O'Brien, 391 U.S. at 376 (holding purpose of statute was to criminalize conduct of destroying draft cards and was unrelated to suppression of free speech). Further, "[t]he United States Supreme Court 'has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied.'" Binkowski, 322 N.J. Super. at 377 (quoting Parker v. Levy, 417 U.S. 733, 760 (1974)). "[E]ven if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct….'" Ibid. (ellipses in original).

Thus, "[t]he 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" Williams, 553 U.S. at 303 (quoting Taxpayers for Vincent, 466 U.S. at 800); accord Alston, 405 N.J. Super. at 510. Instead, where a statute regulates conduct and not speech on its face, it should be invalidated as overbroad only when it burdens substantially more speech than necessary to advance its substantial government interest. See Turner Broad. Sys., Inc. v. F.C.C. (Turner I), 512 U.S. 622, 662 (1994); Turner Broad. Sys., Inc. v. F.C.C. (Turner II), 520 U.S. 180, 189, 213-14 (1997) (citing O'Brien, 391 U.S. at 377).

The Appellate Court addressed a similar overbreadth challenge to New Jersey's stalking statute, N.J.S.A. 2C:12-10, in B.A. The defendant in B.A. argued the statute was overbroad because its definition of "course of conduct" used the phrase "communicating to or about, a person." 458 N.J. Super. at 407 (quoting N.J.S.A. 2C:12-10(a)(1)). In response, the Appellate Court determined

> "course of conduct" and the phrases used within its definition "cannot be considered in isolation from the balance of the statute, which clearly limits its reach[.] Those limitations existed then and now in the statute: the speech or conduct has to be "directed at a specific person"; the conduct has to be engaged in "purposefully or knowingly" by the defendant; the statute limits the nature of the prohibited activity to a course of conduct that "would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress"; the "emotional distress" must be "significant"' and the "fear" is objectively based, meaning the fear

> "which a reasonable victim, similarly situated, would have under the circumstances."
>
> Although the 2009 amendment to the definition of course of conduct added additional protections for victims, it did not do so in a way that extended it to a "substantial amount of constitutionally protected conduct[]" because of the other limitations in the statute. Defendant's analysis fails to take these restrictions into consideration. Thus, we reject defendant's facial overbreadth challenge; it is neither "real" nor "substantial" when "judged in relation to the statute's plainly legitimate sweep."
>
> [B.A., 458 N.J. Super. at 408 (internal citations omitted).]

Additionally, in State v. Crescenzi, the Appellate Court rejected a vagueness and overbreadth challenge to a predecessor version of the witness tampering statute. 224 N.J. Super. 142, 148 (App. Div. 1988). Regarding overbreadth, the Appellate Court held "the statute furthers the important governmental interest of preventing intimidation of, and interference with, potential witnesses or informers in criminal matters and easily meets the test of weighing the importance of this exercise of speech against the gravity and probability of harm therefrom." Ibid. The Court noted that when balancing "the public interest in discovering the truth in official proceedings" against a party's right to speak to a particular witness, the party's right "is miniscule." Ibid. (citing Kilgus v. Cunningham, 602 F.Supp. 735, 739-40 (D.N.H. 1985)).

Since Crescenzi was decided, the witness tampering statute was amended to "ensure that tampering with a witness or informant is applied as broadly as possible."

Sen. Judiciary Comm. Statement to A. 1598 4 (L. 2008, c. 81). But, as the Appellate Court found below, "[t]he societal interest in preventing intimidation of, and interference with, potential witnesses or informers in criminal matters remains an important governmental objective." State v. Hill, 474 N.J. Super. 366, 378 (App. Div. 2023) (citing State v. Ramirez, 252 N.J. 277, 301 (2022)). The Appellate Court concluded "[n]othing in the 2008 amendments undermines the rationale supporting the conclusion we reached in Crescenzi regarding overbreadth." Ibid.

Here, appellant has not satisfied the heavy burden of showing that the witness-tampering statute is facially overbroad. As discussed in Point I, the witness-tampering statute, on its face, prohibits conduct, not speech. N.J.S.A. 2C:28-5(a) (banning a person from "knowingly engag[ing] in conduct"). Therefore, appellant has the burden of demonstrating the overbreadth of the statute is "not only [] real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Broadrick, 413 U.S. at 613. Further, any regulation of speech under the statute is incidental, and the statute may be invalidated as overbroad only if it burdens substantially more constitutionally protected speech than necessary to advance its substantial governmental interest "in preventing intimidation of, and interference with, potential witnesses or informers in criminal matters." Broadrick, 413 U.S. at 615; Turner I, 512 U.S. at 662; Turner II, 520 U.S. at 189, 213-14, 218; Crescenzi, 224 N.J. Super. at 148.

Appellant focused his supplemental brief on erroneously suggesting the witness-tampering statute proscribes pure speech rather than conduct, and, therefore, he failed to demonstrate how this conduct-based statute burdens substantially more constitutionally protected speech than necessary to advance the substantial governmental interest recognized by the Appellate Courts in Crescenzi and Hill.

Even after our Legislature broadened the reach of the statute in 2008, the governmental interest did not change or diminish. Hill, 474 N.J. Super. at 378. Further, as with the stalking statute, the totality of the witness-tampering statute sufficiently limits its reach here. In rejecting an overbreadth challenge to the stalking statute, the B.A. Court listed various ways in which the statute contained built-in limitations to keep it sufficiently tailored. 458 N.J. Super. at 408. Here, the witness-tampering statute also contains limitations preventing overreach, including: (1) the person must believe an official proceeding or investigation is pending or about to be instituted; (2) the person must knowingly engage in the proscribed conduct; (3) the victim must be a witness or informant in that official proceeding or investigation; and (4) a reasonable person must believe the conduct would cause the witness or informant to engage in one of five enumerated actions. N.J.S.A. 2C:28-5(a).

There is no justification for finding this statute facially overbroad because there has been no showing that it burdens substantially more speech than necessary. Further, as applied in this case, the statute also validly proscribed appellant's conduct

because a reasonable person, or jury, could fairly believe that sending a letter to the victim's home, indicating he knew where she lived and who she was, would cause her to engage in one of the five enumerated actions that would negatively impact the substantial interest in preventing interference with this criminal matter. But even if appellant's conduct did touch on speech considerations, the overwhelmingly "important governmental interest in regulating the nonspeech element" should "justify incidental limitations" on speech here. O'Brien, 391 U.S. at 376.

In sum, the witness-tampering statute must be upheld so long as it promotes "important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." Turner II, 520 U.S. at 189 (citing O'Brien, 391 U.S. at 377). Preventing witness tampering is a paramount state interest, and appellant has not and cannot show that the statute imposes the requisite burden on speech. The statute therefore is not facially overbroad. Further, appellant ran afoul of the witness-tampering statute when he sent the letter to his victim's home, making clear he knew who she was and where she lived. Any speech considerations were incidental here and should not prevent the witness-tampering statute from applying in this case and furthering the substantial government interest in preventing intimidation of, and interference with, potential witnesses in criminal matters.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the Appellate Court's decision finding the witness-tampering statute not overbroad and upholding appellant's conviction and sentence be **AFFIRMED**.

Respectfully submitted,

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