To: New Jersey Law Revision Commission
From: Rachael Segal, Legislative Law Clerk
Re: Harassment pursuant to N.J.S. 2C:33-4 subsec. (c) (*State v. Burkert*)
Date: June 11, 2018

M E M O R A N D U M

Executive Summary

In *State v. Burkert*,[1] the New Jersey Supreme Court considered whether the Legislature intended N.J.S. 2C:33-4(c) to criminalize as harassment the creation of lewd flyers that seriously annoyed its subject.[2]

The court determined that the phrases "any other course of alarming conduct"[3] and "acts with purpose to alarm or seriously annoy"[4] as used in N.J.S. 2C:33-4(c) would be construed "as repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfere with that person's reasonable expectation of privacy"[5] when applied to cases based on "pure expressive activity."[6] In doing so, the Court suggested that "the Legislature may decide to amend subsection (c) with other language that conforms to the requirements of our free-speech clauses."[7]

Background

The issue in the case was whether the creation of lewd flyers that serious annoyed the subject it portrayed was constitutionally protected free speech or whether it was criminal harassment under N.J.S. 2C:33-4(c).[8] That statutory section provides that "a person commits a petty disorderly persons offense if, with purpose to harass another, he: ... c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person."[9]

The parties in *State v. Burkert*, Burkert and Halton, were corrections officers whose relationship deteriorated when Burkert read online comments "attributed to Halton's wife that Burkert felt insulted him and his family."[10] Burkert then downloaded a wedding photograph of the

[1] *State v. Burkert*, 231 N.J. 257 (2017).
[2] *Id*. at 271.
[3] N.J.S. 2C:33–4(c).
[4] *Id*.
[5] *Burkert*, 231 N.J. at 284-85.
[6] *Id*. at 283.
[7] *Id*.
[8] *Id*. at 271.
[9] N.J.S. 2C:33–4(c).
[10] *Burkert*, 231 N.J. at 262-263.

Haltons from social media and wrote "degrading and vile dialogue" on copies of the picture.[11] Copies were found "in the employee parking garage and locker room of the Union County Jail."[12] Halton filed three complaints charging Burkert with harassment under N.J.S. 2C:33–4(c).[13] Burkert was found guilty on two complaints by a municipal court judge and, later, a Law Division judge after a trial de novo.[14] The Appellate Division vacated the conviction, determining that, under constitutional free-speech guarantees, the flyers "did not amount to criminal harassment"[15] although they were "unprofessional, puerile, and inappropriate for the workplace."[16]

The New Jersey Supreme Court granted the State's petition for certification.[17] Motions of the Pennsylvania Center for the First Amendment and the American Civil Liberties Union of New Jersey (ACLU–NJ) to participate as amicus curiae were also granted.[18] The State argued that "[t]he harassment statute restricts conduct, not speech,"[19] and that the right to free speech "does not encompass a right to abuse or annoy another person intentionally."[20] The State contended that "speech or writing used as an integral part of the harassing conduct is not entitled to First Amendment protection,"[21] emphasized that the statute required a defendant to act with the purpose to harass "to demonstrate that permissible speech will not fall within the statute's sweep,"[22] and reasoned that Burkert intended for "the flyers to have the same effect as a fight."[23] Burkert argued that "[u]nder the First Amendment, the State cannot prosecute an individual for publicly taunting another, even if done through crude language and with an intent to annoy."[24] Burkert asserted that the flyers constituted an opinion, not conduct, and asked the Supreme Court to "'reaffirm' that 'the mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.'"[25]

Amicus Pennsylvania Center for the First Amendment submitted that the Appellate Division correctly reversed Burkert's conviction.[26] Amicus ACLU–NJ urged the court to "adopt a

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[11] *Id*.
[12] *Burkert*, 231 N.J. at 262-263.
[13] *Id*. at 263.
[14] *Id*.
[15] *Id*.
[16] *Id*. at 269.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*. at 270.
[24] *Id*.
[25] *Id*.
[26] *Id*. ("(1) New Jersey jurisprudence has 'applied the criminal harassment statute only to repeated communication to an unwilling listener, not speech about an unwilling listener'; (2) the flyers at issue conveyed words and pictures—traditional means of speech—and cannot be reclassified as conduct to evade the protections of the First Amendment; (3) the speech here did not fall into the category of speech integral to a criminal offense because the flyers were not ancillary to other conduct—rather, the expressions on the flyers were the only target of the prosecution; (4) speech

'sensible construction' of the language 'purpose to harass' in N.J.S. 2C:33–4(c) that will keep the statute within constitutional bounds."[27] Amicus ACLU–NJ suggested that the court "construe N.J.S.A. 2C:33–4(c) to require that a 'defendant have the conscious object to cause in the victim the fear or apprehension of intrusion into the victim's safety, security, or seclusion.'"[28] The Supreme Court affirmed the Appellate Division's decision.[29]

In making its determination, the Supreme Court in *Burkert* considered the context of the phrases under consideration,[30] and explained that the Court "must construe a statute that criminalizes expressive activity narrowly to avoid any conflict with the constitutional right to free speech."[31] The Court also looked at how courts in other jurisdictions addressed similar statutes to determine the level of precision required. [32] The Court found that "the vaguely and broadly worded standard in N.J.S.A. 2C:33–4(c) does not put a reasonable person on sufficient notice of the kinds of speech that the statute proscribes"[33] and that its vagueness created undue discretion for "prosecuting authorities … to bring charges related to permissive expressive activities."[34]

Though N.J.S. 2C:33–4(c) allows "conviction of a person who acts with the purpose to 'seriously annoy' another person, under the corresponding MPC provision a conviction may be premised only on 'alarming conduct.' Unlike its MPC counterpart, N.J.S.A. 2C:33–4(c) is not restricted to conduct that serves 'no legitimate purpose of the actor.'"[35]

However, speech cannot be made criminal "merely because it annoys, disturbs, or arouses contempt."[36] Unlike other jurisdictions that "struck down overly broad and vague harassment statutes,"[37] the Court attempted to "conform subsection (c) of N.J.S.A. 2C:33–4 'to the Constitution in a way that the Legislature would have intended.'"[38] Finding the legislative intent

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does not lose its First Amendment protection, however vulgar the content, even when its purpose is simply to offend; and (5) Burkert's speech was no less deserving of constitutional protection because the matters addressed were personal rather than political.")

[27] *Id*. at 270-271.

[28] *Burkert*, 231 N.J. at 270-271.

[29] *Id*. at 263.

[30] *Id*. at 271 ("[W]e do not read [statutory words] in a vacuum, but rather 'in context with related provisions so as to give sense to the legislation as a whole.' " (quoting *DiProspero v. Penn*, 183 N.J. 477, 492 (2005)).); See also *State v. Crawley*, 187 N.J. 440, 452 (2006).

[31] *Burkert*, 231 N.J. at 277.

[32] *Id*. at 278.

[33] *Id*. at 280.

[34] *Id*.; See also *Id.* ("The circularity of the language of N.J.S.A. 2C:33–4, moreover, does not place limits on the statute.").

[35] *Id*. at 280 (citing N.J.S.A. 2C:33–4(c)).

[36] *Id*. at 281; See *Houston v. Hill*, 482 U.S. 451, 461 (1987) (stating that speech cannot be punished unless it is "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949))); cf. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001).

[37] *Burkert*, 231 N.J. at 284.

[38] Id. (citing *State v. Natale*, 184 N.J. 458, 485–86 (2005)).

was to "address harassment by action rather than communication,"[39] the Court attempted to construe the statute as constitutional by "[n]arrowly reading the terms alarm and annoy"[40]

To conform the statute with Constitutional free speech rights, the Court "construe[d] the terms 'any other course of alarming conduct' and 'acts with purpose to alarm or seriously annoy' as repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfere with that person's reasonable expectation of privacy."[41] Determining that "[s]ubsection (c) was never intended to protect against the common stresses, shocks, and insults of life that come from exposure to crude remarks and offensive expressions, teasing and rumor mongering, and general inappropriate behavior,"[42] the Court found that "[a]lthough Burkert displayed appalling insensitivity, he did not engage in repeated unwanted communications with Halton that intolerably interfered with his reasonable expectation of privacy."[43]

Justice Solomon, concurring in part and dissenting in part, agreed that N.J.S. 2C:33–4(c) "required clarification because subsection (c)'s language is impermissibly vague when viewed through the lens of First Amendment free speech protections,"[44] but found that "Burkert's conduct violates the harassment statute."[45] Justice Solomon found that "'repeated' conduct, as generally understood by a person of ordinary intelligence, is conduct done more than once."[46] He noted a potentially illustrative parallel with "the common law tort of intrusion upon seclusion"[47] to find that "Halton had a reasonable expectation of privacy in his personal relationship with his wife"[48] including "the expectation that his personal life would not be brought into his place of employment for all of his co-workers, and possibly inmates, to see, discuss, and ridicule."[49] Since the communications were "unwanted" by Halton, repeated, and interfered with his reasonable expectation of privacy, Justice Solomon found that Burkert's conduct was prohibited by N.J.S. 2C:33–4(c) under the majority's interpretation.[50]

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[39] Id. at 284; See MPC § 250.4 cmt. 6.
[40] *Burkert*, 231 N.J. at 285; See *Cesare v. Cesare*, 154 N.J. 394, 404 (stating that "provision in N.J.S.A. 2C:33–4(a) prohibiting conduct communicated in any manner likely to cause annoyance or alarm encompasses, for constitutional reasons, only those modes of communicative harassment that 'are also invasive of the recipient's privacy' " (quoting *State v. Hoffman*, 149 N.J. 564, 583 (1997)).
[41] *Burkert*, 231 N.J. at 284-285.
[42] *Id*. at 286.
[43] *Id*. at 287.
[44] *Id*.
[45] *Id*.
[46] *Id*. at 289; See *State v. Goodwin*, 224 N.J. 102, 112 (2016) (noting that, in construing statutes, courts "ascribe to the statutory words their ordinary meaning and significance" and view those words in context (quoting *State v. Crawley*, 187 N.J. 440, 452 (2006))).
[47] *Burkert*, 231 N.J. at 291; *Hennessey v. Coastal Eagle Point Oil Co.*, 129 N.J. 81, 94 (1992).
[48] *Burkert*, 231 N.J. at 291.
[49] *Id*.
[50] *Id*.

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether defining "purpose to . . . annoy" and "course of . . . conduct" in N.J.S. 2C:33–4(c), inserting "repeated" before "alarming conduct," or modifying it in some other limited way, would aid in constitutionally interpreting the provision and potentially obviate the need for additional litigation regarding the issue addressed in *State v. Burkert.*