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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae American Civil Liberties Union of New Jersey (ACLU-NJ) is a private non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 12,000 members and donors and tens of thousands supporters throughout the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is comprised of approximately 500,000 members and donors nationwide with millions of supporters nationwide.

The ACLU has appeared many times in this and other courts to defend the rule of law and the principles of individual liberty embodied in the United States Constitution. The ACLU-NJ respectfully submits this brief in order to assist the Court in addressing whether the "defendant's admission during his plea allocution to cursing and using off-color language in such a way as to debauch a child's morals provides an adequate factual basis to establish child neglect under N.J.S.A. 9:6-3?"[1] Further, the ACLU-NJ provides the Court with an analysis of the unconstitutionality of N.J.S.A. 9:6-1(d) and 9:6-3 both facially and as applied to Mr. Tate.

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[1] See List of Supreme Court Appeals, available at http://www.judiciary.state.nj.us/calendars/sc_appeal.htm

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACLU-NJ relies on the Statements of Procedural History in the briefs submitted by the State and Mr. Tate, and accepts the facts as stated in the decision of the Appellate Division, highlighting the following:

Mr. Tate pleaded guilty to fourth degree child abuse, in violation of N.J.S.A. 9:6-3. During his plea allocution, Mr. Tate acknowledged that between September 1, 1999 and November 30, 1999, "he was the foster father of a thirteen-year-old boy and that he cursed and used off-color language in the child's presence in such a way as to debauch the child's morals." State v. Tate, A-2322-10T1 (App. Div. May 28, 2013)(slip op. at 2).

Mr. Tate subsequently filed a motion to withdraw his guilty plea, which the trial court denied. The Appellate Division affirmed the decision, holding "we agree with the judge that by acknowledging that his actions occurred during a three month period and constituted child neglect as it tended to debauch a child's morals, [Mr. Tate] admitted to the habitual nature of his conduct. . . . [Mr. Tate] was unequivocal in stating that he committed the child neglect offense by engaging in language that tended to debauch a child's morals, hardly a result that comes from one profane word. We are convinced that, in the context of

the circumstances of the plea colloquy, [Mr. Tate] provided a factual basis for his guilty plea." Slip op. at 8-9.

SUMMARY OF ARGUMENT

The statutes under which Mr. Tate pled guilty are unconstitutional both facially and as applied to Mr. Tate. Offensive and non-obscene profane language, while not necessarily favored by society, is entitled to protection by the First Amendment of the United States Constitution and Article 1, Paragraph 6 of the New Jersey Constitution. N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d) criminalize the use of non-obscene profanity. The statutes are therefore unconstitutionally overbroad and any conviction under such law must be vacated.

The statutes are also unconstitutionally vague because they provide no measure by which to determine what type of language is "profane" and could result in a conviction. As written, the two statutes can be viewed as authorizing punishment for a parent merely cursing at the television every week during a football game or swearing while stuck in traffic each morning with his child in the car. Indeed, Mr. Tate was penalized for the mere use of "curse words" and "off-color language." But not all curse words and off-color language are created equal or fall into the constitutionally unprotected category of obscenity.

Since the laws applied here make it a crime to use profane language, and since the use of profane language alone cannot be made a crime, the laws are unconstitutionally overbroad on their

face. This Court should strike down the laws and vacate Mr. Tate's conviction.

Even if the statutes could be applied constitutionally, this Court should reverse the lower courts and grant Mr. Tate's motion to withdraw his guilty plea because the record does not contain a sufficient factual basis to sustain a conviction. The statutes at issue, N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d), clearly require the "habitual use of profane language" as an element of the crime, but Mr. Tate did not admit that his use of "curse words" and "off-color language" was habitual. He did not state how often he used such language at all. The lower courts erroneously held that by admitting that his language could debauch the morals of his foster child, Mr. Tate by default admitted that the speech was habitual because such debauchery "was hardly a result that comes from one profane word." However, it is easy to hypothesize numerous situations where one or two instances of severely obscene, sexually inappropriate language used towards a child could debauch that child's morals. Such infrequent use of such language would not be "habitual," however, and habitual use is what N.J.S.A. 9:6-1(d) requires. Moreover, Mr. Tate's factual basis did not state what language he actually used, but merely concluded that it was "curse words" and "off-color language." Without admitting that the actual content of language that could be deemed profane, obscene or

indecent, and without admitting how often he used the language, Mr. Tate's plea lacked a factual basis and thus his motion to withdraw his guilty plea should have been granted.

LEGAL ARGUMENT

I. MR. TATE'S MOTION TO WITHDRAW HIS PLEA SHOULD BE GRANTED BECAUSE N.J.S.A. 9:6-3 AND N.J.S.A. 9:6-1(d) VIOLATE BOTH ARTICLE 1, PARAGRAPH 6 OF THE NEW JERSEY CONSTITUTION AND THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Both the state and federal constitutions protect an individual's right to free expression and prohibit criminalizing, except in very limited circumstances, the mere utterance of words. In the case at bar, Mr. Tate pled guilty to N.J.S.A. 9:6-3, which makes it a fourth-degree crime for a person having the "care, custody or control of any child" to "abuse" the child. Among the many acts that may constitute "abuse" is: "the habitual use . . . by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language." N.J.S.A. 9:6-1(d) (emphasis added). Because they implicate the right to free expression, the statutes, when read in conjunction, must pass muster under the First Amendment of the United States Constitution and Article I of the New Jersey Constitution.[2] Based on the analysis below, it is clear that they do not.

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[2] The New Jersey Constitution (1947), Art. 1, par. 6, provides affirmative speech protections much broader than the First Amendment by guaranteeing that "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."

A. Non-Obscene Profanity is Protected by the First Amendment

It is well-established that speech may not be made a crime solely because it is offensive to others. See, e.g., State in Interest of H.D., 206 N.J. Super. 58 (App. Div. 1985). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989)(citations omitted). See also Cohen v. California, 403 U.S. 15, 25 (1971)(holding that, "so long as the means are peaceful, the communication need not meet standards of acceptability). As a general rule, laws that have criminalized the "mere utterance of words," such as N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d), have been found to be unconstitutionally overbroad. See, e.g., Karlan v. City of Cincinnati, 416 U.S. 924 (1974)(finding ordinance overbroad where it criminalized words that were "rude" and was not limited to words "by which their very utterance inflict injury or tend to incite an immediate breach of the peace"); Carico Invs., Inc. v. Tex. Alcoholic Bev.

See Borough of Sayreville v. 35 Club L.L.C., 208 N.J. 491, 494 (2012)("So greatly do we in New Jersey cherish our rights of free speech that our Constitution provides even broader protections than the familiar ones found in its federal counterpart."); Green Party of New Jersey v. Hartz Mountain Indus., Inc., 164 N.J. 127, 145 (2000) ("New Jersey's Constitution's free speech provision is an affirmative right, broader than practically all others in the nation[.]")

Comm'n, 439 F. Supp. 2d 733, 749 (S.D. Tex. 2006)(law banning the display of "immoral, indecent, lewd, or profane" material was unconstitutionally overbroad and vague). But see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(noting that "fighting words," fraud, defamation, incitement, speech integral to criminal conduct, and obscenity are exemptions to protected speech).

More importantly, the U.S. Supreme Court has long held that non-obscene profanity is constitutionally-protected speech. See e.g., Carey v. Population Servs., Int'l, 431 U.S. 678, 701 (1977)("At least where obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Cohen v. California, supra, 403 U.S. 15. Indeed, the U.S. Supreme Court specifically reversed a New Jersey decision pertaining to an overbroad law that criminalized profane and indecent language. In State v. Rosenfeld, 62 N.J. 594 (1973), the defendant was convicted under a statute that prohibited the public use of "loud and offensive or profane or indecent language." The Appellate Division upheld the conviction on the basis of State v. Profaci, 56 N.J. 346 (1970), in which our Supreme Court had previously held that the statute was not overbroad because the law served two purposes: 1) "to preserve the peace" and 2) "to protect the sensibilities

of those persons within hearing of the person uttering the language." Id. at 353. The N.J. Supreme Court denied certification. 59 N.J. 435 (1971). On application to the U.S. Supreme Court, it was ordered that the judgment of affirmance be vacated and the case remanded for reconsideration in the light of Cohen v. California, supra, 403 U.S. 15 (1971), and Gooding v. Wilson, 405 U.S. 518 (1972). Ultimately, after the remand, the N.J. Supreme Court found that the statute "may not be utilized to punish speech which solely is offensive to the sensibilities of the hearer." Rosenfeld, supra, 62 N.J. at 459. See also State in Interest of H.D., supra, 206 N.J. Super. at 58 (reversing prosecution under similar statute and holding "there is no valid statutory authority for prosecutions based upon the public use of coarse or abusive language which does not go beyond offending the sensibilities of a listener"); Halpin v. City of Camden, 310 Fed. Appx. 532, 534 (3d Cir. 2009)("[N]o officer could have an objectively reasonable belief that he could arrest someone simply for using foul language when the statute had been found unconstitutional more than 20 years before.").

While laws that merely regulate non-obscene profanity have been held valid, non-obscene profanity may not be criminalized even where the listener is a child. See, e.g., People v. Boomer, 655 N.W.2d 255 (Mich. Ct. App. 2002)(holding statute

unconstitutional where it criminalized non-obscene speech where defendant fell out of his canoe and loudly uttered a stream of profanities, including the F-word, in front of very young children), appeal denied 653 N.W.2d 406 (2002); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 875 (1997)(holding Communication Indecency Act was unconstitutional where it criminalized "knowing" transmission of "obscene or indecent" messages to any recipient under 18 years of age); Rosen v. California, 416 U.S. 924 (1974)(holding statute unconstitutional where it criminalized the use of "any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner"). Compare FCC v. Pacifica Found., 438 U.S. 726 (1978)(upholding the Federal Communications Commission's power to regulate indecent radio broadcasts involving the radio play of George Carlin's infamous "filthy words" monologue).

In short, merely saying curse words, even in front of children on multiple occasions, cannot be a crime unto itself. However, the statute as currently written allows for that. Indeed, in the present case, the only information known is that Mr. Tate used non-obscene profanity in front of a child (i.e., the plea colloquy does not set forth that Mr. Tate used obscene rather than profane language). Such speech is protected by the U.S. and New Jersey Constitutions. For this reason, and those

argued below, the Court should reverse his conviction and strike down the statutes.

B. N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d) are Unconstitutionally Overbroad and Vague

Laws restricting freedom of speech must be neither vague nor overbroad. In re Rachmiel, 90 N.J. 646, 655-656 (1982)(citing Matter of Hinds, 90 N.J. 604, 617-18 (1982)). Statutes that are substantially overbroad or vague on their face must be invalidated. Town Tobacconist v. Kimmelman, 94 N.J. 85, 118 (1983); Houston v. Hill, 482 U.S. 451, 458, appeal dismissed and cert. denied, 483 U.S. 1001 (1987). Laws that impose criminal penalties or impede First Amendment interests are strictly scrutinized to ensure they are not unconstitutionally overbroad or vague. Ibid.; Karins v. City of Atlantic City, 152 N.J. 532, 541-42 (1998). The laws at issue here do not pass strict scrutiny.

The doctrine of overbreadth is rooted in substantive due process considerations and "focuses primarily on whether the restriction, even if clearly articulated, encompasses more than is absolutely necessary and essential to protect the governmental interest." In re Rachmiel, supra, 90 N.J. at 656 (citing Hinds, supra, 90 N.J. at 618; Grayned, supra, 408 U.S. at 115). A statute is unconstitutionally overbroad when "the

language of the statute, given its normal meaning, is so broad that sanctions may apply to conduct protected by the Constitution." State v. Mortimer, 135 N.J. 517, 530 (1994)(finding harassment statute was not overbroad because it did not "reach[] a substantial amount of constitutionally-protected conduct," but rather only proscribed harassing conduct unprotected by the Constitution).

The "void for vagueness" doctrine comes into play when statutory prohibitions are not clearly defined." Id. (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). A law is void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." Town Tobacconist, supra, 94 N.J. at 118 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). Vagueness in any law "creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution." State v. Hoffman, 149 N.J. 564, 581 (1997). See also State v. Lashinsky, 81 N.J. 1, 17-18 (1979)("It is important to emphasize that vagueness in this sense is essentially a procedural due process concept grounded in notions of fair play.").

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a

> substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.
>
> [State v. Badr, 415 N.J. Super. 455, 467-468 (App. Div. 2010) (quoting Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-495 (1982). See also Town Tobacconist v. Kimmelman, supra, 94 N.J. at 98.]

On their face, N.J.S.A. 9:6-1(d) and N.J.S.A. 9:6-3 together punish not just "obscene" language, but also non-obscene profanity. The statutes are thus unconstitutionally facially overbroad because they "reach[] a substantial amount of constitutionally protected conduct." State v. Mortimer, supra, 135 N.J. at 530. The statutes do not meet constitutional requirements because they do not clearly articulate a boundary between expression which is protected and expression which is not.

They are also overbroad as applied to Mr. Tate. While it is firmly established that "obscene" speech is generally outside the bounds of First Amendment protection, see Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 124 (1989), there is

nothing in Mr. Tate's plea that would suggest his language could be characterized as "obscene" language or conduct and thus not subject to constitutional protections.

In Miller v. California, 413 U.S. 15 (1973), the Supreme Court outlined the narrow constitutional definition of "obscenity." In order for a law that bans obscenity to survive a constitutional challenge, a court must ask "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ;(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U.S. at 24 (internal citations omitted). Accord Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501 (1985). Mr. Tate pled guilty only to using "curse words" and "off-color language" in front of a child, and there was nothing in his plea to suggest that his language appealed to prurient interests or described sexual conduct in a patently offensive way. There is nothing in his plea to suggest that his off-color language was sexual in nature at all. Applying the Miller test, Mr. Tate's language constituted, at most, non-obscene profanity that is protected by the First Amendment. Thus, the statute was

applied to Mr. Tate in a manner that swept too broadly and violated the Constitution by criminalizing protected speech.

Statutes that penalize the mere use of "profane," "obscene," or "indecent" language, as N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d) do, are always fraught with difficulties. See, e.g., Dombrowski v. Pfister, Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)("A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms."). Not only are they often overly broad, encompassing protected speech (as is the case here), but they are inherently vague. Individuals within our population have vastly different concepts of words that are considered "profane" and "indecent" and what words are not. As eloquently stated by the United States Supreme Court: "[O]ne man's vulgarity is another's lyric." Cohen v. California, supra, 403 U.S. at 25. Yet given the current wording of the statutes, no parent can be certain whether or not their "lyrics" will be viewed by a prosecutor as action constituting a crime.

The statutes in question therefore lead persons of "of common intelligence" to "guess at its meaning and differ as to its application." Town Tobacconist, supra, 94 N.J. at 118. Under these statutes, it is unclear whether a parent or guardian could be convicted for frequently using profanity such as "damn"

in front of their teenager, even though it would be hard to argue that such use is out of the ordinary or harmful. A father who screams profanities at the television every week during Monday Night Football with his child in the room is certainly using "profane" language in a "habitual" manner, but it is obvious that a conviction for such conduct would not serve the purpose of the child abuse and neglect statutes and would clearly be unconstitutional.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., __ U.S. __, 132 S.Ct. 2307, 2317 (2012)(holding FCC regulation unconstitutionally vague because it did not give network notice that fleeting expletives and momentary nudity could be considered actionable indecency). Yet given N.J.S.A. 9:6-1(d) and N.J.S.A. 9:6-3, a parent can never be certain whether or not using curse words (or certain curse words and not others) in front of their children will result in criminal prosecution.

Mr. Tate pled guilty to using "curse words" and "off-color language," both of which have become common place language in the contemporary society. If N.J.S.A. 9:6-1(d) and N.J.S.A. 9:6-3 are held constitutional and Mr. Tate's conviction stands, going forward all parents who spew profanities while stuck in

morning traffic each day, who curse each and every year when taxes are due, or who get a little too animated during baseball season could be convicted of a fourth-degree crime. A law that is written so overbroad and vague as to allow someone to be sentenced for using non-profane obscenity - mere "curse words" - is bound to have an effect on others and "inhibit the exercise of constitutionally protected rights." Hoffman Estates, supra, 455 U.S. at 499. A conviction under such a law cannot stand.

C. N.J.S.A. 9:6-3 and N.J.S.A. 9:6-1(d) Have Long Raised the Concerns of Criminal Law Scholars

The overwhelming overbreadth and vagueness of New Jersey's child endangerment and abuse statutes have long been highlighted by both practitioners and scholars. In 1971, the New Jersey Criminal Law Revision Commission issued a final report that heavily criticized Title 9 and declared that the definition of "abuse" was "potentially too imprecise for criminal prosecution." State v. N.I., 349 N.J. Super. 299, 310 (App. Div. 2002); Final Report of the New Jersey Criminal Law Revision Commission, Vol. II at 259 (1971) ("We are not happy with the breadth of, nor the precision of the definitions of, abuse, abandonment, cruelty and neglect in N.J.S.A. 9:6-1.")(emphasis added).

A leading commenter of New Jersey's criminal code has predicted the very problem at issue here:

> Unfortunately, the two definitions of abuse and neglect [in Title 9] are not consistent . . . . Note that the 1971 Commission Commentary . . . offers the opinion that the definitions are really too broad and imprecise to be useful for criminal prosecutions. . . . N.J.S.A. 9:6-3, would appear to be of no assistance in defining abuse or neglect, since it merely makes criminal those acts defined in 9:6-1. The imprecise definitions may create particular difficulty if there are ever prosecutions for using foul language in front of a child, see 9:6-1(d), or failing to supply adequate education though financially able to do so, see 9:6-8.21c(4)(a). The reported decisions have involved clearer issues, however.
>
> [John M. Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:24-4 (2012)(emphasis added).]

Another flaw with N.J.S.A. 9:6-1(d) and N.J.S.A. 9:6-3 is that they do not contain scienter requirements, which could help mitigate the vagueness problem. See State v. Saunders, 302 N.J. Super. 509, 517 (App. Div. 1997). Our courts have held that N.J.S.A. 2C:2-2c(3) serves as a "gap filler" and requires the State to prove that a defendant acted "knowingly" to convict him under N.J.S.A. 9:6-3. However, as Mr. Cannel points out,

> [W]hen sexual activity is involved, it need only be shown that the defendant engaged in the sexual activity knowingly, not that he knew of the risk of impairing the morals of the child." State v. Bryant, 419 N.J. Super. 15, 27-28 (App. Div. 2011). This interpretation seems appropriate under the facts of State v. Bryant; Bryant was originally charged with sexual assault and agreed to plead to a charge under this section. **It is less clear how well it would**

apply where nudity or conversation or pictures were involved.

[Cannel, supra, New Jersey Criminal Code Annotated, comment 2 on N.J.S.A. 2C:24-4 (2012) (emphasis added).

N.J.S.A. 9:6-1(d) penalizes the "habitual" use of "profane" language used in front of a child. The application of the "knowingly" mental state to cases involving mere profane language habitually used in front of a child is extremely problematic. It essentially creates a strict liability for the use of profanity in front of a child, without any requirement that it cause harm or any knowledge requirement by the defendant that the language used would debauch the morals of a child.

Because of these deep flaws with the law, the Law Revision Commission's Tentative Draft Report of December 18, 2013, recommends a major reorganization of the child abuse and neglect statutes based on the criticism noted above and confusion in case law. Notably, it recommends deleting N.J.S.A. 9:6-3 altogether and substantially alters N.J.S.A. 9:6-1(d) such that it contains no mention of "profane, indecent, or obscene" constituting abuse. Tentative Report Relating to Title 9--Child Abuse and Neglect, New Jersey Law Revision Commission, 259 (Dec. 18, 2013), available at http://www.lawrev.state.nj.us/children/t9childabuseandneglectTR121813.pdf. Accordingly, if the Commission's recommendations are adopted by the Legislature,

going forward the use of "profane, indecent, or obscene" language will no longer criminally punished. However, we are not there yet. Therefore the Court must address the constitutionality of the statutes as they now stand. As they now stand, the statutes - in vague and overly broad terms - allow for the criminalization of mere profanity, and are thus unconstitutional.

II. DEFENDANT'S PLEA ALLOCUTION LACKED A FACTUAL BASIS

Even if there were a constitutionally-sound application of the statutes at issue, this Court should reverse because the factual basis provided for the plea was insufficient.

New Jersey's Rules of Court require that a defendant's guilt plea be supported by a "factual basis." R. 3:9-2. The trial court must be "satisfied from the lips of the defendant that he committed the acts which constitute the crime." State v. Barboza, 115 N.J. 415, 422 (1989)(quoting State v. Stefanelli, 78 N.J. 418, 439 (1979)). The factual basis 'must obviously include defendant's admission of guilt of the crime or the acknowledgement of facts constituting the essential elements of the crime.'" State ex rel. T.M., 166 N.J. 319, 333 (2001).

Our Model Jury Charges clearly provide the elements required to establish a violation of N.J.S.A. 9:6-3. To establish such, the State must prove that:

> 1. That the victim was a child.
>
> 2. That the defendant was a [parent] [guardian] [person having the care, custody or control] of the child.
>
> 3. That the defendant knowingly [abused] . . . the victim.
>
> . . .
>
> The third element that the State must prove beyond a reasonable doubt is that defendant knowingly abused (name of child) by . . .

. . .

(d) habitually using, in the hearing of (name of child) profane, indecent or obscene language.

[Model Criminal Jury Charges, "Abuse/Abandonment/Cruelty/Neglect of Child (Parent/Guardian/Person Having Control)".]

As argued above, the statute's use of "habitual" and "profane" are unconstitutionally undefined and Mr. Tate's factual basis did nothing to clarify those terms. Rather, he merely agreed to a recitation of the statute without describing the frequency of his actual use of "curse words" and "off color language" to determine that it was habitual. And he did so without describing his actions sufficiently so as to ensure that the words used actually were within the range of unprotected (rather than constitutionally-protected) speech.

First, the Appellate Division erred in holding that the acknowledgment that Mr. Tate's "curse words" and "off-color language" occurred during a three-month period and "tended" to debauch the morals of the child satisfied the "habitual" use of profane language element of the crime. State v. Tate, supra, slip op. at 8-9. Simply put, Mr. Tate never expressed that his actions were habitual. Indeed, there could be instances where "off-color language" is used even on just one occasion (rather than habitually) and it would debauch the morals of a child. For example, if a defendant engaged in sexually inappropriate

and obscene language (which is not set forth in Mr. Tate's plea colloquy) aimed at a child just one time, it could debauch the morals of a child. But such infrequent use of such language would not be habitual, and habitualness is what the statute requires. Mr. Tate did not admit to any habitual use of such language, only that he used curse words and off-color language while foster parenting a child from September 1, 1999, to November 30, 1999. His mere conclusory statement that his use of such language was done in a way that would debauch the child's morals does not provide the actual factual basis necessary to meet the statute's requirements. Indeed, the Appellate Division clearly was forced to inject multiple assumptions into the conclusory statement given by Mr. Tate in order to extrapolate out of it the facts required to uphold the plea. Id. The factual basis is thus inadequate in part because it does not indicate whether Mr. Tate cursed and used off-color language once a day, once a week, once a month, or "habitually."

Further, Mr. Tate did not identify the specific words or language that he used so that the court could properly determine that the language actually was "profane, obscene, or indecent" and violated the statute. As argued above, in order for a statute to constitutionally proscribe the mere use of words, it must fall into one of the few exceptions to First Amendment protection. The only constitutional application of the statutes

would be for charges based on the habitual use of "obscene" words, which would be guided by the strict test outlined in Miller, supra, 413 U.S. 15. But Mr. Tate only pled guilty to using "curse words" and "off-color language." Not all curse words could be considered obscene and not all language that could debauch the morals of a child would be "curse words" or "off-color language." Some certainly may;[3] thus a proper factual basis requires a defendant to admit to the actual words used and the context in which they were used to determine whether the language truly was habitual and obscene and likely to debauch the morals of the child. Perhaps Mr. Tate used sexually-obscene language that would fall outside of constitutional protections and could be criminalized, but the factual basis he provided to the lower court does not provide information sufficient to make that assessment.

Because Mr. Tate's plea was accepted without an adequate factual basis, the Appellate Division's decision should be reversed. State v. Barboza, 115 N.J. 415, 420 (1989). Mr. Tate's motion to withdraw his plea should be granted and his plea, the judgment of conviction, and his sentence must be

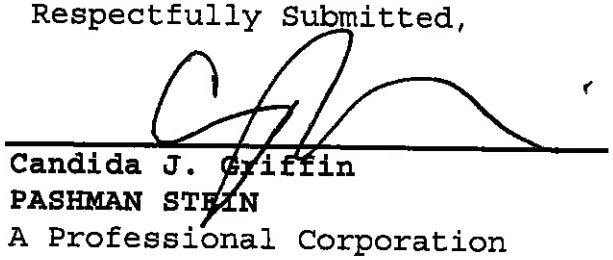
[3] Similarly, certainly language that is extremely sexual in nature and otherwise deemed sexually inappropriate could debauch the morals of a child, even if the speaker used non-profane, non-obscene language that was technical and scientific.

vacated. Ibid. Mr. Tate should be allowed to re-plead or to proceed to trial. Ibid.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the Law Division and Appellate Division, declare N.J.S.A. 9:6-1(d) and N.J.S.A. 9:6-3 unconstitutional, and enter and Order vacating Mr. Tate's conviction. Alternatively, the Court should grant Mr. Tate's motion to withdraw his guilty plea so that he may re-plead or proceed to trial.

Respectfully Submitted,



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SUPREME COURT OF NEW JERSEY
DOCKET NO. A-46-13 (072754)

STATE OF NEW JERSEY, Plaintiff/Respondent, v. JOHN TATE, Defendant/Appellant,	**Criminal Action** On Certification from the Superior Court, Appellate Division No. A-2322-10T1 Sat Below: Judges Hayden and Lisa, J.J.A.D. **CERTIFICATION OF SERVICE**

I HEREBY CERTIFY that on February 24, 2014 an original and nine copies of the Notice of Motion to Appear as *Amicus Curiae* and Participate in Oral Argument, *Amicus* Brief, and Certification of Edward Barocas was sent for filing via hand delivery to the Clerk, Supreme Court of New Jersey, Hughes Justice Complex, 25 W. Market St., PO Box 970, Trenton, NJ 08625-0970. One copy of each of these documents also was served via hand delivery to Fredric M. Knapp, Acting Morris County Prosecutor, Morris County Prosecutor's Office, 10 Court Street, Morristown, NJ 07960, and Michael Pastacaldi, Esq., Designated

Counsel, Office of the Public Defender, 31 Clinton Street, 9th Floor, Newark, New Jersey, 07102.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

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By: _____
CANDIDA J. GRIFFIN

Dated: February 24, 2014