STATE OF NEW JERSEY, vs. CONSTANCE DAYS-CHAPMAN, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CRIMINAL PART ATLANTIC COUNTY INDICTMENT NO. 24-09-02900

BRIEF OF DEFENDANT CONSTANCE DAYS-CHAPMAN IN SUPPORT OF HER MOTION TO DISMISS THE INDICTMENT

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PRELIMINARY STATEMENT

This case stands alone. Never has any teacher, administrator, public official—anyone—been charged with official misconduct for failing to report alleged child abuse. The State's prosecution of Constance Days-Chapman is the first in the history of the official misconduct statute. The outrageousness of the State's prosecution leaps off the page. In no particular order: (1) the State has remade a disorderly persons offense, failure to report alleged child abuse, into a second-degree crime; (2) in doing so, the State is seeking to treat more harshly the individual who failed to report the alleged abuse (Days-Chapman) than the purported abusers (Mayor Small and Superintendent Dr. Small); (3) Days-Chapman's crime, according to the State, is not failing to report the alleged abuse to the Division of Child Protection and Permanency ("DCP&P"), as required by statute—because she did, but rather not reporting it directly to DCP&P's specific hotline number; and (4) the State seeks this harsh penalty against Days-Chapman alone, even though there were at least two other employees of Atlantic City High School who knew of the alleged abuse, but did not call the DCP&P hotline number or contact DCP&P at all.

The State's Indictment is plainly unfair. It is also plainly unconstitutional. The State has taken a disorderly persons offense and unilaterally elevated it to a second-degree crime. That is a violation of Days-Chapman's constitutional right to due process notice and fair warning. No person could know that her failure to report child abuse could lead to a mandatory five years in jail when, according to the Legislature, failure to report abuse is not even a crime (it is a petty offense). It is also a violation of Days-Chapman's right to equal protection under the law. Failure to report abuse by a public educator is a second-degree crime, according to the State; the same failure to report by a private educator is no crime at all. There is no rational basis that justifies the State's differential treatment.

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Days-Chapman is also immune from prosecution. The Legislature has provided absolute immunity to anyone who reports abuse to DCP&P. Days-Chapman reported the alleged abuse to a supervisor at DCP&P between January 23–25, 2024. The State has the phone records showing her report. The State seeks to impose additional requirements, such as calling a specific DCP&P hotline number, that the Legislature never included in the immunity provision. Having made the report to DCP&P, Days-Chapman is entitled to statutory immunity from prosecution, and the Indictment must be dismissed.

The problems with the Indictment do not end there. Each specific offense charged is also fatally deficient for failing to allege a violation of the statute. To begin with, a generally applicable duty imposed on every person in New Jersey, such as the reporting requirement of N.J.SA. 9:6-8.10, is not related to public office or a duty inherent in a public office within the meaning of the official misconduct statute. Counts 1, 2, 4, and 5 fail for this reason.

Similarly, the State failed to allege an unauthorized-use-of-official-function violation of official misconduct in Count 6 because Days-Chapman had two conflicting and irreconcilable duties: (1) she had a duty to report the allegations to her supervisor, Dr. Small, the designated reportee for the Atlantic City Public Schools; and (2) an equally applicable duty not to tell Dr. Small, the parent of J.S., about the allegations. Performing a mandatory duty cannot be unauthorized conduct within the meaning of the official misconduct statute.

Count 3 is facially invalid because the "legal duty" in second-degree endangering the welfare of a child requires a relationship of parent/guardian and child. Courts have declined to extend the "legal duty" requirement to a principal, teacher, or other professional.

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Next, hindering a prosecution (Count 7) requires that an individual "suppress" evidence "by way of concealment," which courts have interpreted to require an affirmative act, like destruction of evidence, and not just mere failure to disclose information.

Finally, with no valid charges for official misconduct, the pattern of official misconduct charge (Count 8) must be dismissed.

* * *

The prosecution of Constance Days-Chapman is dangerous, ill-conceived, and flat wrong. The State is looking to send Days-Chapman to jail for years because she reported alleged child abuse to a DCP&P supervisor rather than a DCP&P hotline number. And the State seeks that punishment even though DCP&P investigated the allegations and determined that it was safe for J.S. to remain with her parents—where she remains still today. The punishment the State seeks against Days-Chapman for not reporting the alleged abuse is greater than the punishment it seeks against the alleged abusers. Absurd. The prosecution of Days-Chapman is a plain example of prosecutorial abuse and selective prosecution. No other public-school educator, including other educators in this case, has been indicted for official misconduct for failing to report alleged child abuse. But no other public-school educator is Mayor Small's campaign manager or the chairperson of the Atlantic City Democratic Committee, as Days-Chapman is. The Indictment must be dismissed.

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RELEVANT FACTS

According to the State, on January 22, 2024, Atlantic City High School guidance counselor Jonathan Rivera and his supervisor, Laurie Carter, met with Days-Chapman to discuss a report of alleged abuse by a student, J.S. (T 37:14–19; 39:14 to 41:18) (Certification of Lee Vartan, Esq., Ex. 5.)[1] J.S. is the daughter of Mayor Small and Dr. Small. J.S., without identifying the alleged abuser, had informed Rivera that she experienced an isolated episode of abuse. (T 39:14 to 40:4.) Rivera then informed Carter; neither called DCP&P. (T 42:14–16; 46:13–19.) Instead, according to the State, the two of them met with Days-Chapman on January 22 and 23. (T 41:7–18.)

According to the State, on January 23, 2024, after the second meeting with Rivera and Carter, Days-Chapman called Bianca Dozier, a supervisor with DCP&P, and spoke with her about the alleged abuse for approximately thirty minutes. (T 57:2–4; 57:25 to 58:13.) During the call, at the direction of Dozier, Days-Chapman chronicled the support services made available by the high school to J.S. (Vartan Cert., Ex. 3, at 2.) Following this conversation, Days-Chapman and Dozier spoke three more times between January 24 and 25 about J.S.'s report, including one conversation that was approximately twenty minutes. (Id. at 4–6.) Days-Chapman had no other phone conversations with Dozier in the weeks preceding or following her report to Dozier. (Id.)

DCP&P first reported to the Smalls' home on January 24, 2024, to investigate the allegations. (Vartan Cert., Ex. 2, at 1–2.) At that time, DCP&P concluded that these allegations of abuse by the parents were "unfounded" or "not established." (Id.) DCP&P never took any action against the Smalls; J.S. remains in her home with her parents today.

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[1] The numbered exhibits have been filed under seal to protect restricted information. The lettered exhibits do not contain such information and have been filed publicly on the docket.

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From the beginning, DCP&P recognized that this investigation was different, and that special attention needed to be given to it. On January 24, a supervisor at DCP&P e-mailed the Special Victims Unit saying, "Please let me know if you would like us to hold off on responding today. Dad is the mayor of AC and mom is superintendent of AC Public Schools." (Vartan Cert., Ex. 1.) DCP&P itself viewed the matter in such a way that "hold[ing] off on responding" was a viable option given the circumstances. (See id.) In fact, five minutes after DCP&P sent this e-mail to the Special Victims Unit, Dozier called Days-Chapman, and the two had their twenty-one-minute conversation. (Id.; Vartan Cert., Ex. 3, at 6.)

Notwithstanding Days-Chapman's report of the alleged abuse to a supervisor at DCP&P, on September 11, 2024, the Atlantic County Prosecutor's Office returned an eight-count indictment against Days-Chapman. (Vartan Cert., Ex. A.) The Indictment alleges: four counts of second-degree official misconduct for failing to make a report to DCP&P and law enforcement (Counts 1, 2, 4, and 5); second-degree endangering the welfare of a child for failing to make a report of child abuse (Count 3); second-degree official misconduct for notifying the Superintendent of the Atlantic City Public Schools, who was the child's mother (Count 6); third-degree hindering a prosecution for failing to make a report of child abuse (Count 7); and second-degree pattern of official misconduct (Count 8).

On September 17, 2024, the ACPO indicted Mayor Small and Dr. Small, charging them with second-degree endangering the welfare of a child, and charging Mayor Small alone with third-degree terroristic threats and third-degree aggravated assault.

Days-Chapman faces multiple counts with a mandatory minimum sentence of five years; the Smalls do not face a single charge with such harsh punishment. Days-Chapman faces charges for failing to report abuse that DCP&P immediately investigated within two days of the report and

determined to be "unfounded" and "not established" at the time. In fact, DCP&P's investigation proceeded only after a supervisor at DCP&P suggested "hold[ing] off on responding" to the referral. Even after other allegations by J.S. of potential abuse, DCP&P has determined that J.S. should remain in her home with her parents. J.S. remains with her parents today.

LEGAL ARGUMENT

POINT ONE

THE PROSECUTION IS PRECLUDED BY N.J.S.A. 9:6-8.13 IMMUNITY.

Title 9 contains broad immunity for anyone who reports potential child abuse to DCP&P. This explicitly includes protection from criminal liability. Days-Chapman's report to Bianca Dozier, a supervisor at DCP&P, qualifies Days-Chapman for immunity from this prosecution as a matter of law, thereby requiring dismissal of the Indictment with prejudice. At a minimum, the State's failure to instruct and charge the grand jurors on the immunity provision violates State v. Hogan and requires dismissal of the Indictment without prejudice.

N.J.S.A. 9:6-8.13 provides that:

> Anyone acting pursuant to this act in the making of a report under this act shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such person shall have the same immunity with respect to testimony given in any judicial proceeding resulting from such report.

The Appellate Division has held that this immunity "shall be broadly and liberally construed." F.A. by P.A. v. W.J.F., 280 N.J. Super. 570, 572 (App. Div. 1995). A broad application of the immunity provision is necessary because Title 9 imposes a universal requirement to report. Id. at 582.

The statute also contains language about granting immunity to individuals "who report[] or cause[] to report in good faith." N.J.S.A. 9:6-8.13. The statute does not demand perfection in reporting to cloak the reporter in immunity. Yet, that is how the State presented the case to the grand jury here. The State added numerous requirements to the obligation to report that are simply not mandated by Title 9. And, even assuming the facts as alleged by the State to be true, these additional requirements have no bearing on Days-Chapman's statutory right to immunity under N.J.S.A. 9:6-8.13.

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During the grand jury presentment, the State repeatedly highlighted Days-Chapman's failure to call a specific hotline phone number as a key factor—if not the single most important factor—in her alleged failure to report.

> **Q:** Is there any other telephone number designated by DCP&P that an employee of the school district can officially call?
>
> **A:** No.
>
> **Q:** So it's just the hotline?
>
> **A:** Correct.
>
> [T 42:8–13.]
>
> . . .
>
> **Q:** And then she called Dozier on Dozier's personal cell phone?
>
> **A:** Yes.
>
> **Q:** So no notification was made to DCP&P about any abuse on the abuse hotline on January 23rd, 2024 either?
>
> **A:** No.
>
> [T 72:18–23.]
>
> . . .
>
> **Q:** We confirmed you said this previously, but DCP&P confirmed that Chapman has never made a notification to the abuse hotline regarding [J.S.] ever?
>
> **A:** Correct.
>
> [T 67:22 to 68:1.]

But this testimony is legally inaccurate and misled the grand jurors. There is no statutory requirement to "officially call" a specific number. (See T 42:8–13.) Indeed, the reporting statute says the report should be made "to the Division of Child Protection and Permanency by telephone or otherwise." N.J.S.A. 9:6-8.10 (emphasis added).

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The Legislature simply did not require individuals to call a specific hotline number to be protected by blanket immunity, but the State nevertheless seeks to impose that requirement on Days-Chapman. Not only is calling the hotline not mandated, but the statute explicitly contains a catchall "or otherwise," allowing a report to be made by means other than the telephone. The ACPO cannot invent its own elements of a crime when the Legislature has spelled them out explicitly.

Additionally, the State elicited testimony that Days-Chapman did not give J.S.'s name to Dozier in the thirty-one-minute conversation between the two on January 23, 2024.[2] (T 58:3 to 59:6.) But this is not a requirement. While N.J.S.A. 9:6-8.10 lists information that should be included in a report, the statute notes that providing such information is not always possible. That said, on January 24, 2024, Dozier and Days-Chapman did have a twenty-one-minute conversation about J.S. (T 60:17–20; Vartan Cert. Ex. 3, at 7.)

The State also repeatedly charged the grand jury that Days-Chapman had an obligation to make a report immediately. But the Appellate Division has explicitly held that N.J.S.A. 9:6-8.13 immunity does not lapse if the report is not made "immediately." "Immunity will not be withheld merely because the reporter did not act 'immediately.' The requirement of reporting 'immediately' was intended to protect children from the potentially serious consequences of delay. We glean no legislative intent that the failure to act immediately will necessarily strip immunity from the reporter." F.A., 280 N.J. Super. at 578. Days-Chapman and Dozier spoke on January 23 and

[2] Days-Chapman disputes the State's characterization of the January 23 phone conversation. J.S. was discussed between Days-Chapman and Dozier. But, for purposes of this motion to dismiss, Days-Chapman accepts the State's facts as true.

January 24 about conduct that was reported on January 22. Days-Chapman's statutory immunity did not lapse during this brief period. See id.

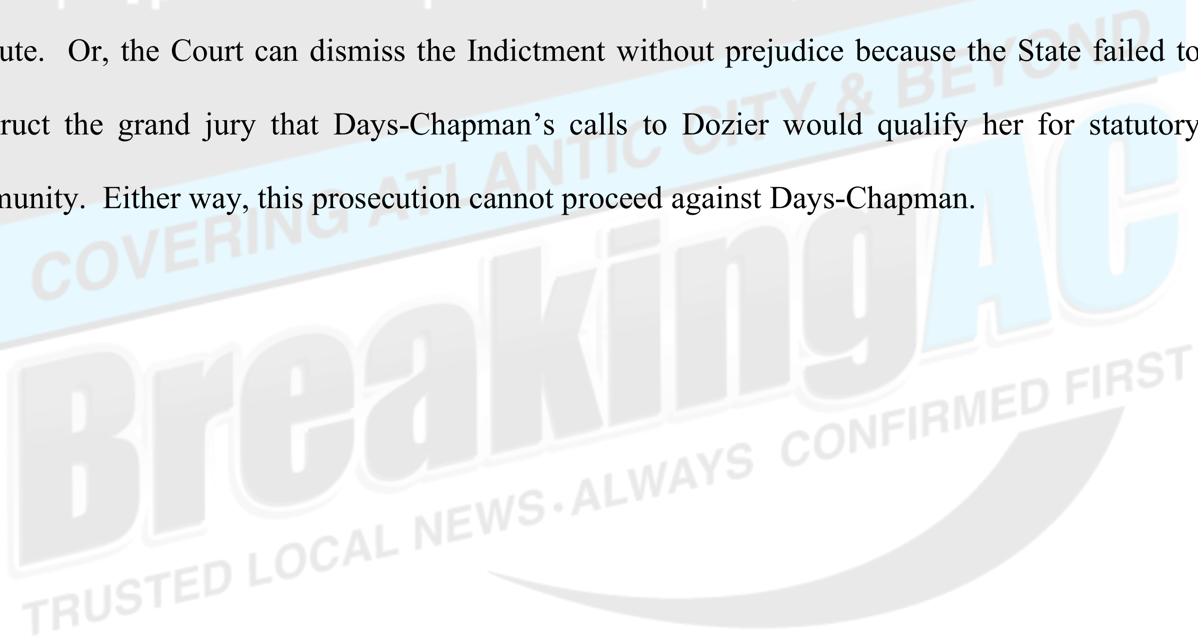
The facts adduced by the State demonstrate that Days-Chapman spoke with a supervisor at DCP&P, Dozier, about alleged abuse of a student multiple times over three days. The State may not like the method in which Days-Chapman made her report and may have preferred that she used the hotline. But Days-Chapman's actions fall within the scope of the "broad[]" immunity afforded by the Legislature under N.J.S.A. 9:6-8.13. See F.A., 280 N.J. Super. at 572. The State cannot add additional requirements onto a statutory immunity that the Legislature did not impose. Days-Chapman's reports to Dozier are sufficient as a matter of law to invoke the broad criminal immunity of N.J.S.A. 9:6-8.13. Because Days-Chapman is immune from criminal liability, the Indictment must be dismissed with prejudice.

At a minimum, the State's failure to instruct the grand jury on the immunity provision of N.J.S.A. 9:6-8.13 violates State v. Hogan, 144 N.J. 216 (1996). The State has an obligation to charge grand jurors on all relevant law. By failing to charge the immunity provision, the State deprived the grand jury of the opportunity to assess whether Days-Chapman's multiple conversations with Dozier were sufficient to immunize her conduct. See State v. Eldakroury, 439 N.J. Super. 304, 309 (App. Div. 2015) (affirming trial court's dismissal of indictment where prosecutor's presentation to grand jury improperly "relieved the State of the burden of proving defendant's mens rea as to an essential element of the offense").

Additionally, the legal instructions given to the grand jurors about Days-Chapman's statutory duties were inaccurate and incomplete. See State v. Wade, No. A-2855-21, 2022 WL 14177222, at *5 (App. Div. Oct. 25, 2022) (granting defendant leave to appeal, finding that prosecutor's legal statements to grand jury were "inartful" and "inaccurate," holding that dismissal

of the indictment was warranted, and reversing trial court's denial of motion to dismiss). The State's focus on Days-Chapman's failure to call the hotline number during the grand jury presentment warrants dismissal of the Indictment under Hogan. Presenting inaccurate instructions on legal requirements to lay grand jurors, such as the State did here by indicating that calling the hotline was a requirement of the statute, necessitates dismissal. See State v. Brady, 452 N.J. Super. 143, 166 (App. Div. 2017) ("[T]he prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty.").

The Indictment against Days-Chapman must be dismissed. The Court can dismiss the Indictment with prejudice because Days-Chapman has legal immunity explicitly granted by statute. Or, the Court can dismiss the Indictment without prejudice because the State failed to instruct the grand jury that Days-Chapman's calls to Dozier would qualify her for statutory immunity. Either way, this prosecution cannot proceed against Days-Chapman.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POINT TWO

THE INDICTMENT IS UNCONSTITUTIONAL.

A. Days-Chapman has been deprived of due process notice and fair-warning that violating N.J.S.A. 9:6-8.14 constituted second- and third-degree criminal conduct when the Legislature explicitly made punishment for failure to report child abuse a disorderly persons offense.

In N.J.S.A. 9:6-8.14, the Legislature put all New Jersey citizens on notice that the failure to report alleged child abuse was a disorderly persons offense. That proclamation was deliberate and unambiguous. The sole exception the Legislature created to this rule is that if the abuse deals with sexual abuse, then the failure to report is a fourth-degree crime. The Legislature could have imposed a heightened requirement on public school employees who failed to report—but the Legislature did not do so.

No reasonable person could therefore have constitutional notice and fair warning that a failure to report could constitute a second-degree offense with a five-year mandatory minimum sentence. Days-Chapman has been deprived of due process because the State has unilaterally elevated a legislatively mandated disorderly persons offense, which is a non-criminal petty offense, into second- and third-degree crimes. As a result, the Indictment must be dismissed.

More than 200 years ago, Chief Justice Marshall explained that criminal laws must be narrowly construed based on "the plain principle that the power of punishment is vested in the legislative, not in the judicial department." United States v. Wiltberger, 18 U.S. 76, 95 (1820). The Legislature—not prosecutors—has the sole power "to define a crime and ordain its punishment." See id. (alterations omitted).

The State's action strays greatly from this long-held principle. The Legislature enacted a specific punishment—disorderly persons offense—for failing to report alleged child abuse. The Legislature affirmatively exercised "the power of punishment" in defining the offense. See id.

The State cannot now come to this Court seeking to have that punishment increased to a five-year mandatory minimum by pursuing an alternative statute with enhanced punishment. It is the Legislature's job to specifically define the scope of crimes and their punishment, not "clever prosecutors." Dubin v. United States, 599 U.S. 110, 129–30 (2023).

This is not a situation, for example, in which the State is taking a third-degree offense and upgrading it to a second-degree offense. Rather, the Legislature made failure to report a disorderly persons offense—meaning, failure to report is not criminal conduct. See N.J.S.A. 2C:1-4(b)(1). Thus, the State is taking something that is not a crime and unilaterally remaking it into a crime with a mandatory five-year minimum sentence.

The United States Supreme Court has held courts must "exercise[] restraint" in "assessing the reach" of criminal statutes. Marinello v. United States, 584 U.S. 1, 6–7 (2018) (quotation omitted). This is done both out of deference to the legislature, whose role is to explicitly set the contours of criminal statutes, and out of constitutional protections mandating "that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." Id. at 7 (quotation omitted).

Our Supreme Court has taken the same approach. "[A] statute shall not be extended by tenuous interpretation beyond the fair meaning of its terms lest it be applied to persons or conduct beyond the contemplation of the Legislature." State v. Provenzano, 34 N.J. 318, 322 (1961). Strict construction of criminal statutes is necessary "to narrowly confine the scope of the conduct covered, or the penalty applicable to such conduct, so as to avoid fundamental unfairness which might result when those penalized could arguably be said to have misunderstood positive law, or, more realistically, so as to avoid the unfairness of arbitrary enforcement." State v. Maguire, 84 N.J. 508, 514 n.6 (1980).

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Indeed, our Legislature has explained that its criminal statutes must be applied in a way that "give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction" and that "differentiate on reasonable grounds between serious and minor offenses." N.J.S.A. 2C:1-2(a)(4), (5).

Here, all fair warning about the "sentence[] authorized" based on "the nature of the conduct proscribed" is that failing to report alleged child abuse is non-criminal conduct—a disorderly persons offense under N.J.S.A. 9:6-8.14. See N.J.S.A. 2C:1-2(a)(4). The Legislature explicitly "differentiate[d]" the punishment for such an offense. See N.J.S.A. 2C:1-2(a)(5). The State, however, improperly seeks to circumvent "the legislative plan" and elevate failure to report to a second-degree criminal offense with a five-year mandatory minimum. See State v. Gill, 47 N.J. 441, 444 (1966).

This is the kind of "unreasonable result" that the Legislature has prohibited and that the United States and New Jersey Supreme Courts have implemented protections against. There can simply be no fair warning that failure to report is subject to second-degree penalties when the Legislature explicitly warned that failure to report is a disorderly persons offense. See United States v. Lanier, 520 U.S. 259, 266 (1997).

Lest the State attempt to distort Days-Chapman's argument in its opposition, let us be clear that Days-Chapman does not raise an argument that reporting is not a requirement imposed by the Legislature. Nor does she minimize the legislative intent of protecting the welfare of children. We know failure to report is against the law because the Legislature said so (N.J.S.A. 9:6-8.14). We know the importance to which the Legislature viewed reporting as a means to protect children because the Legislature enacted a robust statutory scheme governing this conduct (N.J.S.A. 9:6-8.8 through 8.20). There is no ambiguity there. In 1971, the Legislature amended Title 9 "to

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provide for the protection of children under 18 years of age who have had serious injury inflicted upon them by other than accidental means." N.J.S.A. 9:6-8.8(a).

Days-Chapman's objection is to the State ignoring and disregarding this legislative intent by superimposing criminal offenses and punishment for failure to report that the Legislature clearly never intended when adopting a petty offense. The State asks this Court to read a five-year mandatory minimum into N.J.S.A. 9:6-8.14 when the Legislature unambiguously chose a disorderly persons offense. This Court cannot "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment or engage in conjecture or surmise which will circumvent the plain meaning of the act." DiProspero v. Penn, 183 N.J. 477, 49 (2005) (citations and quotation omitted).

A statutory principle relevant to due process notice that must be applied here is that specific statutory language controls over general statutory language. State v. Gomes, 253 N.J. 6, 28 (2023); 2B Sutherland Statutory Construction § 51:5; see also State v. Gaeta, A-0201-12T4, 2013 WL 3716838, at *4 (App. Div. July 17, 2013) (rejecting State's argument to broadly apply general law and holding that "the specific provisions governing operation of an ATV control application of the more general motor vehicle statutes"); State v. Watson, A-1603-13T3, 2015 WL 1809111, at *5 (App. Div. Apr. 22, 2015) (same).

For example, the absence of fair warning and notice is especially salient when a broadly applicable rule—such as N.J.S.A. 9:6-8.10—is used as the basis for an official misconduct charge. The Appellate Division has spoken directly on this issue, holding that using "general and generic rules" that "apply across-the-board to all [public] employees" as the basis for an official misconduct charge, "does not provide the criminal defendant with the necessary constitutional

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protections" of due process. State v. Thompson, 402 N.J. Super. 177, 201–03 (App. Div. 2008); see also discussion of Thompson, infra, Point III.A.1(a).

The Legislature could have enacted the requirement the State seeks to impose: that public school administrators and teachers are subject to a heightened penalty for failure to report. But the Legislature did not. The Legislature recently amended the statute to impose a heightened punishment but only when the failure to report involved sexual abuse. L. 2019, c. 40, § 2, enacted at N.J.S.A. 9:6-8.14. So, the Legislature is well-aware of how to grade punishments for different types of failure to report. It would thus be up to the Legislature—not the ACPO—to amend failure to report, N.J.S.A. 9:6-8.14, to include a heightened punishment for public-school officials. It is the sole province of the legislative branch to write laws, including punishment for crime; the executive branch can only enforce the laws as written. Efforts by the ACPO to redefine statutory punishments violate the State Constitution. See N.J. Const., art. III, § 1 ("No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others . . . .").

The Legislature prohibited the conduct at issue in a single, specific statute. Our Supreme Court has warned that courts "cannot disregard . . . a clear expression of the intent of the Legislature." State v. Schubert, 212 N.J. 295, 314 (2012). The State and this Court are bound by the legislative determination that failure to report alleged child abuse is a disorderly persons offense. Elevating that disorderly persons petty offense to second- and third-degree criminal conduct and a mandatory five-year minimum term in prison violates constitutional principles of due process notice and fair warning.[3] The Indictment must be dismissed.

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[3] This Court also cannot apply a statute in such a way that would render a large swath of duly enacted legislation off the books entirely. State v. Barclay, 479 N.J. Super. 451, 464 n.4 (App. Div. 2024), certif. denied, 259 N.J. 306 (2024) ("It is a well-accepted maxim of statutory

B. Days-Chapman has been deprived of equal protection because there is no rational basis justifying a five-year mandatory minimum prison term for public-school employees who allegedly fail to report abuse, but limiting private-school employees who engage in the identical conduct to a disorderly persons offense.

Every individual in the State of New Jersey has a mandatory obligation to report potential child abuse. N.J.S.A. 9:6-8.10. This duty to report "is required of every citizen." State v. Hill, 232 N.J. Super. 353, 356 (Law. Div. 1989). The failure to make such a report is a disorderly persons offense. N.J.S.A. 9:6-8.14. According to the State though, the failure of a public-school employee to report potential child abuse is official misconduct. The State is thus creating classifications: a public-school employee who fails to report is subject to a mandatory five-year minimum prison term, but a private-school employee who engages in the identical conduct and fails to report is subject to a disorderly persons offense that contains a maximum sentence of six months. Because there is no rational basis for the State's differential treatment of public-school

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construction that courts strive for an interpretation that does not render any statutory language inoperative, superfluous, void, or insignificant." (cleaned up)).

The State's use of heightened offenses to govern failure to report would render N.J.S.A. 9:6-8.14 a nullity for the entirety of New Jersey's public-school system. If the State has its way, the disorderly persons offense would apply only to private-school teachers and administrators, while the official misconduct statute would govern the far more numerous public-school teachers and administrators.

Moreover, legislative enactments governing failure to report abuse of vulnerable populations are not just limited to children. The Legislature has passed similar laws protecting other classes. See, e.g., N.J.S.A. 30:1B-43 (inmates); N.J.S.A. 30:4-3.20 (psychiatric hospital patients); N.J.S.A. 30:6D-75(c) (individuals with developmental disabilities); N.J.S.A. 52:27G-7.1(f) (long-term care facility patients). The State's application of heightened penalties would not only render N.J.S.A. 9:6-8.14 obsolete, but it would also render these provisions obsolete too when a public official fails to report potential abuse at a public facility. The official misconduct statute cannot be read so broadly to effectively supersede and replace these other statutory schemes.

and private-school employees, especially not one that justifies the substantial penalty gap between the two classes, the State's action is unconstitutional in violation of the equal protection clause.[4]

The Equal Protection Clause of the Fourteenth Amendment mandates that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (quotation omitted).

"Although the phrase equal protection does not appear in the New Jersey Constitution, it has long been recognized that Article I, paragraph 1, of the State Constitution, like the fourteenth amendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike." State v. Lagares, 127 N.J. 20, 34 (1992) (quotation omitted). "Although conceptually similar, the right under the State Constitution can in some situations be broader than the right conferred by the Equal Protection Clause." Doe v. Poritz, 142 N.J. 1, 94 (1995).

"Equal protection does not preclude the use of classifications, but requires only that those classifications not be arbitrary." Id. at 91. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne, 473 U.S. at 446. "[R]ational basis review is by no means toothless—[a] necessary corollary to and implication of rationality as a test is that there will be situations where

[4] The Court can avoid resolving this constitutional question by narrowly interpreting the official misconduct statute and holding that failure to report is not an inherent duty related to the public office of a public-school employee because it is a broadly applicable duty imposed on every individual in New Jersey. See State v. Burkert, 231 N.J. 257, 277 (2017) (applying principle of constitutional avoidance to interpret criminal statute narrowly); see also discussion, infra, Point III.A.1(a).

proffered reasons are not rational." Heffner v. Murphy, 745 F.3d 56, 79 (3d Cir. 2014) (quotation omitted).

Equal protection applies to criminal statutes and the imposition of punishment. United States v. Batchelder, 442 U.S. 114, 123–24 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants."). "[T]he constitutional principles of due process and equal protection demand that the exercise of the [police] power be devoid of unreason and arbitrariness, and the means selected for the fulfillment of the policy bear a real and substantial relation to that end." State v. Chun, 194 N.J. 54, 102 (2008) (quoting Katobimar Realty Co. v. Webster, 20 N.J. 114, 123 (1955)).

When a criminal statute creates a classification between offenders, "the governmental action must be rationally related to the achievement of a legitimate state interest." Lagares, 127 N.J. at 34. Meaning, different classes of individuals can be treated differently by criminal law only where there "is some rational connection between the classification of offenders and a proper legislative purpose." Id. Disparate treatment in criminal statutes violates equal protection where "the classification rests on grounds wholly irrelevant to achievement of the State's objective." State v. Smith, 58 N.J. 202, 206–07 (1971).

Certainly, the State has a legitimate interest in generally protecting the welfare of children and mandating reports of potential child abuse. But the State's theory here seems to be the State has a legitimate interest to protect public-school students to a greater degree than private-school students. The Legislature imposed a requirement that all child abuse be reported by everyone. The State has no legitimate interest in imposing higher penalties where the failure to report

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involved a public-school student than it would where the potential abuse involved a private-school student.

More critically, penalizing public-school employees for their failure to report more harshly than their private school counterparts is "wholly irrelevant" to achieving the general objective of protecting children. See Smith, 58 N.J. at 206–07. There is just no "rational connection" between the grossly disparate sentencing classification between public- and private-school employees and the legislative purpose of protecting the welfare of children. See Lagares, 127 N.J. at 34; see also Secure Heritage, Inc. v. City of Cape May, 361 N.J. Super. 281, 304–05 (App. Div. 2003) (finding state interest to be "legitimate," but concluding that government classification to achieve that end was "arbitrary").[5]

Even assuming some disparate treatment between public- and private-school employees would have a rational basis, the distinction imposed here exceeds any rational basis. Perhaps a slight variation in offenses, such as treating private-school employees with a disorderly persons offense, but subjecting public-school employees to a fourth-degree offense, would survive a rational basis analysis. But this is no slight variation here. The distinction is not only a second-degree offense compared to a disorderly persons offense, but a second-degree offense that contains a mandatory minimum of five years. Thus, a private-school employee is subject to six months at most for failing to report alleged abuse, but a public-school employee must be sentenced

[5] Aside from the public- and private-school employee distinction, Days-Chapman has been deprived of equal protection as a "class of one," that is "she has been intentionally treated differently from other[] similarly situated" public school employees, and "there is no rational basis for the difference in treatment." Willowbrook, 528 U.S. at 564. It does not appear that any other public servant, whether school employee or not, has been charged with official misconduct for failing to report alleged child abuse. Days-Chapman is truly in a "class of one" by herself.

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to at least five years in prison. The substantial gap and differential treatment have no rational basis.

C. The decision to charge second- and third-degree crimes rather than a disorderly persons offense was an arbitrary and capricious one that violates principles of fundamental fairness.

Principles of fundamental fairness compel a narrow construction where the Legislature explicitly defines criminal conduct in a single, specific statute, yet prosecutors seek to invoke a more general crime to impose a harsher penalty. At its core, a prosecutor's decision to circumvent the express intent of the Legislature is an arbitrary and capricious one that mandates judicial intervention.

"The fundamental fairness doctrine is an integral part of the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, which protects against arbitrary and unjust government action." State v. Njango, 247 N.J. 533, 537 (2021). "The 'one common denominator' in our fundamental fairness jurisprudence is 'that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.'" Id. at 548–49 (quoting Doe, 142 N.J. at 109). Fundamental fairness "promotes the values of fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals." State v. Vega-Larregui, 246 N.J. 94, 132 (2021) (quotation omitted).

The Supreme Court has explained that fundamental fairness "is intended to provide a remedy" for "inequitable and arbitrary decisionmaking." Njango, 247 N.J. at 550. Thus, fundamental fairness has been used to "impose[] limitations on governmental actions." State v. Melvin, 248 N.J. 321, 348 (2021) (quoting State v. Cruz, 171 N.J. 419, 429 (2002)). For example, in Njango, the Supreme Court "conform[ed]" the statute at issue "in a way that the Legislature would likely have intended" where no other remedy was available to the defendant. Njango, 247 N.J. at 550

Here, it is fundamentally unfair for the Legislature to declare that failure to report potential child abuse is a disorderly persons offense, then have prosecutors unilaterally attempt to increase the punishment for failure to report to a second- or third-degree crime. There has been an unambiguous and clear legislative pronouncement in N.J.S.A. 9:6-8.14 that failure to report is a disorderly persons offense. Elevating an offense specifically delineated by the Legislature to be a disorderly persons offense (and non-criminal) to a criminal offense with a mandatory five-year prison term is "an absurd result that the Legislature could not have had in mind." See Njango, 247 N.J. at 550.

It is true that prosecutorial charging decisions are generally owed deference, but this deference is "not absolute." State v. Di Frisco, 118 N.J. 253, 266 (1990). "Judicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions." State v. Vasquez, 129 N.J. 189, 196 (1992). A defendant who can demonstrate that a prosecutor's "exercise of discretion was arbitrary and capricious would be entitled to relief." Id. Judicial review is necessary to "prevent the legislative goal of uniformity in sentencing from being undermined by unreviewable prosecutorial discretion." Id.

This prosecution demonstrates the type of arbitrary and capricious decision that warrants judicial intervention. First, this appears to be the first prosecution of its kind in the nearly fifty-year history of these statutes, where a failure to report charge was the basis for official misconduct. And this is not a hypothetical situation either. In the present matter, only Days-Chapman has been indicted for official misconduct, but at least two other public officials failed to report the alleged abuse according to the State's own presentment. Jonathan Rivera and Laurie Carter knew of the alleged abuse on January 22, 2024. (T 37:20 to 40:4; 41:13–18.) Neither called the hotline. Yet these two public-school employees were not indicted for official misconduct. N.J.S.A. 9:6-8.10

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makes no distinction between principals and guidance counselors, and N.J.S.A. 2C:30-2 applies to all "public servants." Furthermore, nothing absolves school employees of the responsibility to report suspected abuse if another school employee "indicate[s] she would take the responsibility of contacting DCP&P." (T 47:4–5.) Why does Rivera and Carter informing Days-Chapman, who is not an employee at DCP&P, absolve them of criminal culpability, but Days-Chapman telling Dozier, who is a supervisor at DCP&P, not absolve her of criminal culpability?[6]

Second, the punishment sought against Days-Chapman is not proportional to any alleged harm. Days-Chapman faces a mandatory five-year prison sentence for failing to report alleged abuse, but J.S.'s parents, who are alleged to have abused J.S., face less harsh penalties. Under the State's theory of prosecution, an individual who fails to report child abuse is more culpable than the individual who directly inflicted the harm on the child.

Third, the prosecution against Days-Chapman appears to be solely motivated by a desire to convict Mayor Small and Dr. Small. Nearly immediately upon the return of the indictment against Days-Chapman, the State presented Days-Chapman with a cooperation agreement. The State would allow Days-Chapman to enter PTI in exchange for Days-Chapman providing evidence against Mayor Small and Dr. Small. (Vartan Cert., ¶ 2.)

Fourth, the prosecution appears to stem from prior disagreements between Dr. Small and the Atlantic County Prosecutor's Office. On December 20, 2023, Atlantic County Prosecutor William Reynolds sent a letter to Dr. Small in her role as Superintendent of the Atlantic City Public

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[6] For a stark example of the arbitrary and disparate treatment at the core of this prosecution, the Court need look no further than the juxtaposition of the State's allegations against Days-Chapman and its description of Rivera's conduct. During the presentment, the State heavily relied on the fact that Days-Chapman did not contact DCP&P through the hotline—something she is not statutorily required to do, see supra Point I. (See T 10:5–7; 31:7–11; 42:5–13; 72:21–23.) But the State seemed to justify Rivera's failure to contact DCP&P through the hotline because of his concerns that his name would be associated with the report. (T 42:14 to 43:11.)

Schools. (Vartan Cert., Ex. D.) Prosecutor Reynolds accused the Board of Education of adopting a policy that "jeopardizes student safety and has the practical effect of hindering law enforcement and child protection investigations." (Id. at 1.) The letter cited a "specific recent example" where "Atlantic City School officials would not permit Detectives from our Agency to speak with a student." (Id. at 2.) In a response dated January 3, 2024, Dr. Small denied the Board of Education ever adopted the policy identified. (Id. at 4.) Dr. Small concluded her response by rather bluntly telling Prosecutor Reynolds:

> In the future, prior to directing me to immediately cease any practice, please contact my office to seek clarity regarding the accuracy of your claim. I would also ask that if there is a matter of importance impacting the safety of Atlantic City Public School students, please do not wait over two months to communicate that concern to me. The safety of Atlantic City students is my priority.

(Id.) Months later, Dr. Small was indicted, and the Atlantic County Prosecutor's Office sought to leverage charges against Days-Chapman to compel Days-Chapman to provide inculpatory evidence against Dr. Small and her husband.

Combined, these circumstances demonstrate that prosecuting Days-Chapman for failure to report as second- and third-degree crimes, rather than a disorderly persons offense, is an arbitrary and capricious decision by the State. No deference is thus owed to the prosecutors. Days-Chapman is entitled to relief from this "inequitable and arbitrary decisionmaking" by the State—the dismissal of the Indictment. See Njango, 247 N.J. at 550.

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POINT THREE

EACH OF THE INDIVIDUAL COUNTS OF THE INDICTMENT IS FACIALLY DEFICIENT.

Aside from the legal defects identified above that are fatal to the Indictment as a whole, each of the individual counts charged has deficiencies that require dismissal of that count. In most cases, the State has simply charged a crime based on alleged conduct that falls well outside the statutory language of the offense.

The overriding goal in judicial analysis of the scope of statutes is "to discern and effectuate the Legislature's intent." Schubert, 212 N.J. at 314 (quoting State v. Hupka, 203 N.J. 222, 231 (2010)). Our Supreme Court has long held that the main "goal" is "effectuating the legislative plan as it may be gathered from the enactment 'when read in the full light of its history, purpose and context.'" Gill, 47 N.J. at 444 (quoting Lloyd v. Vermeulen, 22 N.J. 200, 204 (1956)). Courts must avoid interpreting a statute in a way that leads to "unreasonable results." Id.

A. Official Misconduct.

1. Subsection (b), Non-Performance of Duty (Counts 1, 2, 4, and 5).

Non-performance of an official duty rises to official misconduct where an individual "knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office." N.J.S.A. 2C:30-2(b). The conduct alleged—that Days-Chapman failed to report potential child abuse—falls outside the scope of the statute. The duty to report is a duty imposed on every person in the State of New Jersey; it is not a duty related to or inherent in a public office. Additionally, the State's instruction to the grand jurors on inapplicable and irrelevant law that imposed no duty on Days-Chapman (or any other individual) violated the mandate that grand juries receive accurate legal instructions on the elements of each offense.

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a. A generally applicable duty to report imposed on all New Jersey residents is not related to or inherent in a public office for the purpose of the official misconduct statute.

It is axiomatic that "not every offense committed by a public official involves official misconduct." State v. Hinds, 143 N.J. 540, 549 (1996). The State alleges that Days-Chapman failed to report potential child abuse, violating a duty imposed by N.J.S.A. 9:6-8.10. But this is a broadly applicable duty—defined by the Legislature to reach everyone. It is not a duty "clearly inherent" in public office.

"In referring to 'any' person, the provision carves out no one." L.A. v. New Jersey Div. of Youth & Family Servs., 217 N.J. 311, 325, 328 (2014) (detailing legislative history of statute that initially only applied to "any physician" but was changed to broadly apply to "any person"). "The duty to make such reports is not limited to professional persons, friends or neighbors, who are the persons ordinarily more apt to observe and detect evidence of child abuse, but is required of every citizen." Hill, 232 N.J. Super. at 356; accord Carter v. Estate of Lewis, No. 08-cv-1301, 2011 WL 1885953, at *3 (D.N.J. May 18, 2011) ("The statute applies the same reporting standards to all persons."). N.J.S.A. 9:6-8.10 thus imposes a general duty on "every citizen." Hill, 232 N.J. Super. at 356.

A broadly applicable duty to the general populous cannot be a duty clearly inherent in a public office or related to a public official's job. Days-Chapman's duty to report arose from her role as a resident of New Jersey—not as a principal of a public school. Stated differently, a private-school principal and public-school principal share the same duty to report under N.J.S.A. 9:6-8.10.[7] The duty to report is simply untethered to being a public official. Days-Chapman, as a

[7] The failure to report in violation of N.J.S.A. 9:6-8.10 does not even impose civil liability upon private schools and their employees, Zelnick v. Morristown-Beard Sch., 445 N.J. Super. 250, 263–64 (Law. Div. 2015), let alone subject a private-school employee to a mandatory five-year

public-school principal, was not "under any obligation greater than that of an ordinary citizen" to report under Title 9. See State v. Kueny, 411 N.J. Super. 392, 405 (App. Div. 2010).

N.J.S.A. 9:6-8.10 applies equally to a school principal, doctor, or any other person, whether that person is a professional, movie-theater employee, or unemployed. See, e.g., Esposito v. Am. Multi-Cinema, Inc., A-0788-14T2, 2015 WL 6739489, at *2 (App. Div. Nov. 5, 2015) (noting movie-theater employee had duty under N.J.S.A. 9:6-8.10 to report abuse); cf. Carter, No. 08-cv-1301, 2011 WL 1885953, at *3 (holding that New Jersey affidavit of merit requirement to sue professionals does not apply to violations of N.J.S.A. 9:6-8.10 because "reporting statute applies to all citizens and does not impose a higher standard of care to professionals").

In a comparable situation, the Appellate Division has explicitly held that general duties, including a general duty to report, does not arise to official misconduct under the statute. In Thompson, one of the defendants, an Assistant Director in the Division of Revenue, was charged with non-performance of duty official misconduct for failure to report the receipt of a benefit in contravention of the Conflicts of Interest statute, N.J.S.A. 52:13D-23, and in violation of agency-wide employment policy. 402 N.J. Super. at 197. The court affirmed the dismissal of the indictment because the statutory rules and general employment duties mandating reports were too broad to serve as the basis for an official misconduct charge. Id. at 197–204.

In its analysis, the court explicitly noted the broad applicability of the Conflicts of Interest statute and the State's failure to satisfy the requirement under N.J.S.A. 2C:30-2 that the duty be "specifically required of that office by law or 'clearly' inherent in that office." Id. at 202. The court held that, rather than applying to the particular officeholder at issue, the Conflicts of Interest

prison term.

statute and employment policy "apply across-the-board to all employees in the Department, thus providing general and generic rules." Id. at 201–02.

The State's theory of criminality was that "there was a clear legal duty to refuse gifts and to report them to the Ethics Liaison Officer, and, therefore, acceptance of the benefits and failing to report them constituted a breach of this duty." Id. at 198. The court rejected the State's broad interpretation of the Conflicts of Interest mandatory reporting statute and its relationship to official misconduct. The court found it would be unacceptable to allow the failure to report in violation of the Conflicts of Interest statute to trigger a violation of the official misconduct statute. Id. at 202. The court did so because "failure to report an ethical violation could always be construed as acting with intent to deprive the Department of the opportunity to enforce its Code of Ethics" in violation of the official misconduct statute, and thus the two statutes would impermissibly "be collapsed into one." Id.

That is what the State seeks to do here. The State repeats the errors of Thompson by trying to collapse two separate statutes, failure to report under N.J.S.A. 9:6-8.10 and official misconduct, into one. N.J.S.A. 9:6-8.10 does not create a duty "specifically required of" or "clearly inherent in" Days-Chapman's office of school principal. It does not even create a duty that "appl[ies] across-the-board" to all public-school employees or public officials. See Thompson, 402 N.J. Super at 202. The duty to report applies to "any person" in the State of New Jersey.

A broadly applicable duty—untethered to any status as a public official—cannot be a duty clearly inherent in certain public offices for the purpose of an official misconduct prosecution. Thompson rejected this approach when the duty to report was narrower and only applied to employees within the same public agency as the defendant. Here, the duty to report universally applies to every single person across the state.

In the words of Thompson, "[e]ven if [the Court] assume[s] that the duty to [report] is a cognizable duty in these circumstances, under the State's theory, the [failure to report] by any [public] employee under any circumstances would subject the recipient to criminal prosecution [of a second-degree crime]." Id. This not only results in a failure of due process notice, see supra, Point II.A., but it also renders the official misconduct charge facially defective. The Court must dismiss the non-performance of duty official misconduct charges.

b. The presentment provided inaccurate instructions to the grand jurors about the imposition of duties to perform.

In addition to claiming that Days-Chapman violated a duty imposed by N.J.S.A. 9:6-8.10 by failing to report alleged child abuse, the State instructed the grand jurors on other supposed duties that Days-Chapman failed to perform. But none of the identified statutes and regulations actually imposed any duty on Days-Chapman.

First, the State read to the grand jurors N.J.S.A. 18A:36-25, "Early Detection of Missing and Abused Children; Policies of School Districts." (T 3:22 to 4:6.) The statute provides: "All school districts shall be required to establish policies designed to provide for the early detection of missing and abused children. These policies shall include provisions for the notification of the appropriate law enforcement and child welfare authorities when a potential missing or abused child situation is detected. This provision shall be complied with no later than March 1, 1985." N.J.S.A. 18A:36-25 (emphasis added). The statute unambiguously imposes a duty that is applicable only to "all school districts." Days-Chapman is not a "school district" who has an obligation "to establish policies" pursuant to the statute. The statute imposes no duty on individuals or school employees, and it was misleading for the State to instruct the grand jury on this as a "duty" Days-Chapman must perform.

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Second, the State read numerous regulations to the grand jurors, including N.J.A.C. 6A:16-6.2 and N.J.A.C. 6A:16-11.1. (T 4:22 to 8:9.) To begin with, regulations from the administrative code cannot make up an element of a crime. As the Appellate Division held, "we do not accept the premise that the elements of a crime can be defined by an administrative regulation, which can be amended or repealed by [the Board] without involvement of the Legislature. Moreover, interpreting the statute to incorporate the regulation would introduce ambiguity as to which acts constitute criminal behavior, raising serious concerns regarding notice." State v. Saad, 461 N.J. Super. 517, 528 (App. Div. 2019). In addition to this general prohibition on using regulations, the two regulations the State read do not impose any duty on individuals. N.J.A.C. 6A:16-6.2 directs that a "school district" shall develop policies and procedures, and that those "[s]chool district policies and procedures shall include" certain components. Likewise, N.J.A.C. 6A:16-11.1 mandates that the "district board of education shall develop and adopt policies and procedures" that include the minimum requirements set forth. A list of what components must be included in a policy or procedure imposes no duty on an individual like Days-Chapman.

Giving the grand jury a single inaccurate instruction on the law related to the elements of an offense is sufficient to warrant dismissal of the Indictment. The multiple errors here on "duty" compound the problem. It is "essential for the grand jury" to have accurate instructions of the underlying law. State v. Jeannotte-Rodriguez, 469 N.J. Super. 69, 100 (App. Div. 2021). The State presented misleading and inaccurate instructions on the law to the grand jurors about duties inherent to Days-Chapman's office. "[T]he absence of clear and adequate instructions" on what a duty is and whether Days-Chapman had a duty to act, "tainted the grand jury's decision to indict." Id. at 98. Therefore, the non-performance of duty official misconduct charges must be dismissed.

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2. Subsection (a), Unauthorized Use of Official Function (Count 6).

Unauthorized act official misconduct occurs when an individual "commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner." N.J.S.A. 2C:30-2(a). Count 6 is facially deficient because Days-Chapman's alleged conduct was not "unauthorized."[8] First, the Atlantic City Board of Education never adopted a policy preventing an employee from telling a parent about allegations of abuse—much to the chagrin of Prosecutor Reynolds. Second, if the policy applied, then Days-Chapman was required to inform Dr. Small—as her supervisor and as the School District's designated reporter—of any allegations of child abuse. Third, the State failed to present any evidence to the grand jury that Days-Chapman actually notified Dr. Small of the allegations of abuse; in fact, the State had evidence (but failed to present it) that Dr. Small already knew of the allegations prior to speaking with Days-Chapman.

a. The policy that the State alleges Days-Chapman violated was never adopted by the Atlantic City Board of Education, and thus the alleged violation of it cannot constitute unauthorized conduct for the purposes of official misconduct.

The Uniform Memorandum of Agreement (the "MOA") is a document outlining standards and procedures for the cooperation between law enforcement and education officials in handling issues affecting students. The State presented the MOA to the grand jury as the basis for Days-Chapman's purported duties regarding reports of abuse. But the MOA is not a binding or self-effectuating legal document. Rather, as the title suggests, it is a standardized agreement that each individual district needs to adopt. Indeed, the MOA is written with blanks for the specific districts to fill-in and complete. (See, e.g., Vartan Cert., Ex. C at 77.) Because the Atlantic City

[8] For the purposes of this motion to dismiss, the facts as alleged by the State are presumed to be true.

Board of Education did not adopt the specific section of the MOA on restricting notification to parents, the policy cannot be used to form the basis as a duty imposed by law on Days-Chapman for the purposes of the official misconduct statute.

We know the Atlantic City Board of Education did not adopt this particular policy because the Atlantic County Prosecutor's Office complained about this to Dr. Small. (See Vartan Cert., Ex. D, at 2 (citing "Notification of Parents or Guardians").)

The MOA must be approved and signed every year. The State seems to suggest that the adoption of the MOA in 2019 imposes its duties on Days-Chapman in 2024. (See Vartan Cert., Ex. C.) To the contrary, the submission of an outdated MOA that was adopted before Days-Chapman became principal and required annual review and approval every year over the following four years, is further proof that the MOA was not in effect during the relevant time period.

Without adoption by the specific district, the MOA is neither binding nor self-effectuating. For example, section 12.1 of the MOA is titled Affirmation and requires the signatures of each county's chief school administrator, chief of police, board of education president, superintendent, and prosecutor in order to "affirm and agree to abide by the standards, procedures, principles and policies set forth in [the MOA]." (Id. at 77.) Furthermore, Appendix B of the MOA explicitly calls for the annual review and approval of the MOA. (Id. at 81–83.) In addition to outlining the annual review process, which includes requiring school administrators and law enforcement officials to review the effectiveness of the MOA's policies and discuss any need to revise them, Appendix B again specifies that "[t]he MOA must be approved by" the aforementioned school and law enforcement officials. (Id.). Without a district adopting the policies contained therein, the MOA is not binding. (See id.)

The State instructed the grand jurors on section 3.17.5 of the MOA. (T 10:21 to 11:7.) But the Atlantic City Board of Education never adopted this provision of the MOA.[9] As such, there was no policy or procedure in place mandating that Days-Chapman refrain from discussing allegations with the parents of a potentially abused child.

b. Days-Chapman had two conflicting and irreconcilable duties: do not tell Dr. Small (the parent of a child) about allegations of abuse and tell Dr. Small (the Superintendent and school district's reporting designee) about allegations of abuse.

Even if the policy applied, then Days-Chapman was faced with conflicting duties. Because these two duties could never be reconciled, performing one of these duties cannot give rise to criminal charges for official misconduct as the unauthorized use of official function.

According to the State, Days-Chapman had a duty to refrain from reporting any alleged abuse to Dr. Small because Dr. Small was the parent of the reporting student. But under the Atlantic City Board of Education district regulations, Days-Chapman had a duty to report any alleged abuse to Dr. Small because she was the Superintendent. Such a stark conflict obviates the necessary knowledge element of unauthorized act official misconduct. In other words, reporting to Dr. Small could not be an intentional and "unauthorized exercise of [] official functions" because Days-Chapman was required to report to Dr. Small.

The Appellate Division has already held as such in one particularly instructive case, State v. Grimes, 235 N.J. Super. 75 (App. Div. 1989). In Grimes, the Appellate Division reversed an official misconduct conviction because the defendant's "mistake concerning the scope of his job responsibilities negated the requirement of a knowing violation of official duty, in contravention

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[9] At a minimum, the fact that the Atlantic City Board of Education did not adopt this specific policy should have been presented to the grand jurors as a factual question for the grand jurors to resolve in determining whether Days-Chapman's conduct was "unauthorized" by law or policy. See Hogan, 144 N.J. at 236 (clearly exculpatory evidence must be presented to grand jurors).

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of N.J.S.A. 2C:30-2." State v. Wickliff, 378 N.J. Super. 328, 335–36 (App. Div. 2005) (citing Grimes, 235 N.J. Super. at 75).

Grimes, a constable, was indicted, convicted, and sentenced for charging $150 for overseeing the removal of a tenant's goods. Grimes, 235 N.J. Super at 81. The State presented three theories of official misconduct to the jury: (1) the constable knowingly overcharged for services that had a maximum rate of $30; (2) the constable knowingly performed private services that he should not have performed without judicial approval; and (3) the constable knowingly solicited the business in excess of the maximum charge, without the necessary approval, or in violation of the duty to avoid conflicts of interest. Id. at 83–84. The Appellate Division, however, reversed the conviction and dismissed the indictment because "[t]he law of constables' duties in tenant removals is so uncertain . . . that the law does not, in this area, give a person of ordinary intelligence fair warning what conduct is proscribed." Id. at 90 ("In those circumstances, it is fundamentally unfair to subject defendant to a criminal prosecution.").

Specifically, the court pointed to conflicting authority that imposed differing duties on the constables: one opinion noted that a constable "had a right . . . to remove [a tenant's goods] himself, as agent of the plaintiff," and another said that a constable "must . . . remove them himself as agent of the landlord." Id. at 84 (citations omitted). The uncertainty boiled down to the nuances of grammar and punctuation—i.e., the distinction between "had a right" and "must," as well as the effect of comma placement in relation to "as agent." Id. at 84–85. One interpretation allowed a constable to charge for private removal services, while the other mandated such services as part of a constable's public responsibilities. Id. at 85–87.

The Appellate Division found that this uncertainty created by minor changes in language could not sustain the knowledge requirement of official misconduct because it presented two

conflicting versions of a constable's duties: to act as a public official within the set charge limit or to appropriately solicit private work that is traditionally available to constables. See id. at 89–90 ("A public servant is guilty of official misconduct . . . only if he knows his act, relating to his office, is unauthorized or committed in an unauthorized manner. Unlike most crimes, as to which ignorance of the law is not material, an essential element of this kind of official misconduct is defendant's knowledge that the act he commits is unauthorized." (emphasis added) (citations omitted)).[10]

Here, the uncertainty is much greater than issues of nuanced grammar. The State declared before the grand jury that the non-binding MOA imposes a duty on Days-Chapman to refrain from reporting any alleged abuse to Dr. Small because she was the parent of the reporting student. (T 10:21 to 11:7.) But Atlantic City Board of Education District Regulation 8462 requires Days-Chapman to inform Dr. Small of any incidents of alleged abuse because she, as the Superintendent, is the designated school official for such notification. (See Vartan Cert., Ex. B.)

The State instructed the grand jury on part of District Regulation 8462, but specifically omitted the language from the accompanying District Policy 8462 that "[t]he person notifying designated child welfare authorities shall inform the Principal or other designated school official(s) of the notification, if such had not occurred prior to the notification." (Id.) (emphasis added). Additionally, the grand jurors were not instructed that, under District Policy 8462, "[t]he district

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[10] Notably, the Appellate Division did not attempt to resolve this uncertainty because such uncertainty at the time of the alleged conduct is what defeats knowledge, not a court's ability to resolve uncertainty ex post facto. See Grimes, 235 N.J. Super. at 89 ("Our intention is not to resolve all of the imponderables, but only to demonstrate that they are imponderables and that they are unresolved."); see also id. at 89–90 ("In order fairly to expose a public officer to prosecution for committing an unauthorized act, there must be an available body of knowledge by which the officer had the chance to regulate his conduct. The law must give a person of ordinary intelligence fair warning what conduct is proscribed, so that he may act accordingly.").

designates the Superintendent or designee as the school district's liaison to law enforcement authorities." (Id.) (emphasis added).[11] Under District regulation and policy, Days-Chapman had to tell the Superintendent, Dr. Small. Had she not, the State would have indicted a fifth count of non-performance of an official duty under N.J.S.A. 2C:30-2(b).

These conflicting responsibilities create a much greater degree of uncertainty than that in Grimes. If nuanced grammatical differences cause a failure of authority to provide "an available body of knowledge by which [an] officer had the chance to regulate his conduct," certainly so must diametrically incompatible policies. See Grimes, 235 N.J. Super at 89. "That degree of uncertainty shows that the law does not, in this area, give a person of ordinary intelligence fair warning what conduct is proscribed." Id. at 90. Days-Chapman could not simultaneously refrain from telling Dr. Small of the reported abuse, as the State alleges, and also inform Dr. Small of the reported abuse, as required by District regulation and policy.

An act that is mandated cannot also be unauthorized. These two conflicting duties preclude any finding of Days-Chapman's knowledge and intent to commit an unauthorized act. The Court must dismiss the unauthorized use of official function charge.

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[11] At a minimum, the failure to provide the grand jurors with complete and accurate instructions violates Hogan. Brady, 452 N.J. Super. at 166 ("Nevertheless, in the first instance, the prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty.").

The grand jurors here were deprived of the ability to make an informed decision whether or not Days-Chapman had the requisite knowledge and intent to commit an unauthorized act in violation of the official misconduct statute. See Eldakroury, 439 N.J. Super. at 310.

c. The State alleges that Days-Chapman "notif[ied] a suspected abused student's parents of the student's disclosure of abuse," but failed to provide evidence to the grand jury on whether Dr. Small was already notified of the disclosure before any conversation with Days-Chapman.

The Uniform Memorandum of Agreement on parental notification, which was never adopted by the Atlantic City Board of Education, states that "Notification to the students, parents, or guardians must not be made by school officials when it is suspected that either parent or guardian is responsible for the suspected abuse." The grand jurors were read this provision. (T 10:21–25.)

The subsection (a) official misconduct charge specifically rests on Days-Chapman committing an unauthorized act of "notifying a suspected abused student's parents of the student's disclosure of abuse." (Vartan Cert., Ex. A, at p. 7.) But Days-Chapman did not notify Dr. Small of J.S.'s disclosure. Dr. Small already knew. Days-Chapman cannot "notify" someone of a fact who already knew that fact. The policy does not prohibit discussing the disclosure with a parent who already knows of the disclosure. At most, the policy prohibits a school official from being the one to provide that "notification" to the parents.

The State had evidence of Dr. Small's prior notice from J.S. of J.S.'s disclosure before Dr. Small allegedly discussed the matter with Days-Chapman. In an affidavit of probable cause for the arrest of the Smalls, the State explained that J.S. disclosed potential abuse to a therapist via a telehealth appointment on January 22, and that Dr. Small then spoke with the therapist about J.S.'s disclosure. (Vartan Cert., Ex. 4, at 1–2.)

This evidence directly negates a key element of the offense—that Days-Chapman "notified" Dr. Small—and thus must have been presented to the grand jury. It is fundamental that grand jurors "cannot be denied access to evidence that is credible, material, and so clearly exculpatory." Hogan, 144 N.J. at 236. The failure to provide evidence of Dr. Small's pre-existing

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knowledge was "tantamount to telling the grand jury a half-truth" regarding Days-Chapman's allegedly "notifying" Dr. Small. See id.

Not only did the State have this clearly exculpatory evidence available to it, but defense counsel specifically requested that the ACPO include this exculpatory piece of evidence in any presentment to a grand jury.

> Also, our investigation has revealed that on January 22, 2024, the day J.S. reported the alleged abuse to a counselor, J.S. also told her mother that day that she had made the report. Ms. Days-Chapman did not disclose the reported abuse to either the mayor or the superintendent. Rather, J.S. herself told her parents about her report the day she made it. This is consistent with your Office's Affidavit of Probable Cause underlying the criminal complaint of the mayor and superintendent. In it, your Office alleged that on January 22, 2024 (the same day), J.S. had a telehealth consultation where she disclosed the alleged abuse to a therapist. At the end of that consultation, the therapist spoke directly with Mrs. Small about J.S.'s report—meaning, the therapist told Mrs. Small about the alleged abuse. (See Affidavit of Probable Cause at pp. 1–2.)
>
> [Vartan Cert., Ex. 3, at 2 (citing Ex. 4).]

The letter explicitly noted that the evidence "is highly exculpatory, and must be shared with the grand jurors pursuant to State v. Hogan." (Id. at 3.)

The State knew that Dr. Small was notified of the disclosure of potential abuse by either J.S. or the therapist on January 22, 2024. The State was aware of this exculpatory evidence but nonetheless made a conscious decision not to present it to the grand jury. The subsection (a) official misconduct charge must be dismissed. The grand jury presentation on this count contained a "deficiency" on the key element that "affect[ed] the grand jurors' ability to make an informed decision whether to indict." See Hogan, 144 N.J. at 229.

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B. Endangering the Welfare of a Child (Count 3).

1. Only parents and guardians have a "legal duty" within the meaning of second-degree endangering the welfare of a child.

Endangering the welfare of a child prohibits causing a "child harm that would make the child an abused or neglected child." N.J.S.A. 2C:24-4(a)(2). Days-Chapman is charged with second-degree endangering. A key element of second-degree endangering is whether the defendant is an individual who has a "legal duty for the care of a child or who has assumed responsibility for the care of a child." "Our Supreme Court has interpreted this provision narrowly." Saad, 461 N.J. Super. at 523.

The State sought, and the grand jury returned, an indictment based on the "legal duty" portion of the statute. (T 74:25 to 75:5; Vartan Cert., Ex. A, p. 4.) The State did not seek, and thus the grand jury did not return, an indictment based on the "assumed responsibility" portion of the statute. But only the "assumed responsibility" portion can apply to non-parents and non-guardians, such as Days-Chapman. "For a person who is not a parent or guardian to be liable for the higher degree of offense, that person must be shown to have assumed responsibility for the child." Cannel, New Jersey Criminal Code Annotated, comment 4 to N.J.S.A. 2C:24-4, at p. 505 (2024). The State simply chose not to seek indictment on the sole provision of the statute that could be applicable to Days-Chapman. Because the statutory "legal duty" refers to a parent or guardian, and not a principal, the second-degree engendering count must be dismissed.[12]

[12] In addition to failing as a matter of law, the State failed to instruct the grand jurors on how to determine if Days-Chapman had a legal duty. The Appellate Division has explained that "having a legal duty for the care of a child" is an element of the offense that must be explained to lay jurors. The Appellate Division overturned a conviction, in part, where "[t]he judge gave the jurors no direction on how to determine whether defendant had a legal duty for the care of the children, and the State presented no evidence on that point." State v. McInerney, 428 N.J. Super. 432, 444 (App. Div. 2012).

The second-degree enhancement is limited to specific relationships, namely those akin to parental and guardian relationships. The purpose of the enhanced punishment is to account for "the profound effect on the child when the harm is inflicted by a parental figure in whom the child trusts." State v. Galloway, 133 N.J. 631, 660–61 (1993). The "legal duty" part of the enhancement provision has never been applied to an individual outside the parent or guardian context.

The Supreme Court has referred to the duty imposed for heightened punishment as the "parental duty." State v. Miller, 108 N.J. 112, 120–21 (1987). "[T]he crime of endangering the welfare of a child is aimed not only at specific conduct but also at the violation of the duty that a parent owes to a child." Id. at 118–19. Thus, the elevated penalty for endangering requires not only the harm to the child, but also "proof of a parental or custodial relationship." Id. at 120. In Miller, the Supreme Court detailed the Legislature's justification for this difference, explaining that "'[c]rime within the family is one of the most deeply troubling aspects of contemporary life . . . . The Legislature has therefore graded sexual crimes that occur within the family differently from those occurring in other contexts.'" Id. at 119 (quoting State v. Hodge, 95 N.J. 369, 377 (1984) (emphasis added)).

A professional obligation does not equate to a "legal duty" within the meaning of the statute. Saad, 461 N.J. Super. at 527. Nor does having "supervisory authority." State v. Bostic, A-3549-19, 2024 WL 1103250, at *4 (App. Div. Mar. 14, 2024), certif. denied, 258 N.J. 136 (2024). "[W]hen the Legislature intended to include an actor's professional status as an element

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Lay grand jurors must be given adequate instruction on the law involved. Brady, 452 N.J. Super. at 166 ("[T]he prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty."). But the State did not define "legal duty for the care of a child" to the grand jury, nor did the State provide any instruction on "how to determine whether [Days-Chapman] had a legal duty for the care" of J.S., and "the State presented no evidence on that point" to the grand jurors. See McInerney, 428 N.J. Super. at 444.

of a crime, it has done so explicitly," but it did not do so with N.J.S.A. 2C:24-4(a). Saad, 461 N.J. Super. at 528–29 (rejecting State's argument that doctor treating children had a "legal duty for the care" of those children). In rejecting the expansion of the second-degree enhancement to a doctor, which the Appellate Division noted would have also necessarily extended it to other licensed professionals (nurses, psychologists, athletic trainers, chiropractors, marriage counselors, massage therapists, and optometrists), the Appellate Division explained that "[w]e have seen no indication that the Legislature intended the second-degree provision of N.J.S.A. 2C:24-4(a)(1) to extend that far." Id. at 529.

There is no case saying a teacher or principal (or anyone other than a parent or guardian for that matter) has an automatic "legal duty for the care of a child." In 2019, the Appellate Division remarked that it could find "only one published opinion in which an appellate court held the legal duty for the care or assumption of responsibility element of N.J.S.A. 2C:24-4(a)(1) had been established outside of a parent-child relationship." Id. at 525 (citing State v. McInerney, 428 N.J. Super. 432 (App. Div. 2012)). And there do not appear to be any published decisions since.

Notably though, the one example the Appellate Division could find, McInerney, was limited to the "assumed responsibility for the care of the child" portion of the statute because the "legal duty" aspect was not at issue. In McInerney, the Appellate Division reversed the conviction for endangering the welfare of a child and ordered a new trial based on faulty instructions explaining the assumption of responsibility element. 428 N.J. Super. at 434. McInerney opened the door that a teacher or other school staff member could have assumed the responsibility of caring for a child that would raise their relationship to that of a parent/guardian, but that was a factual question for the jurors.

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The Supreme Court has also indicated that a teacher-student relationship does not equate to an automatic "legal duty," but rather must arise factually under the "assumed responsibility" standard. "Depending on the circumstances, the statute can also apply to the relationship between a teacher or high school athletic coach and a student." State v. Sumulikoski, 221 N.J. 93, 108 (2015) (citing McInerney, 428 N.J. Super. at 434, 441–44 (emphasis added)). The circumstances would not matter if a teacher, or principal, always had a legal duty to care for a child. To that end, in Sumulikoski, the defendant was a teacher and school administrator chaperoning a school trip, and the Supreme Court's analysis was limited to the assumption of responsibility, and did not include legal duty at all. Id. at 108–09. If teachers and administrators always had a legal duty to care for their students within the meaning of N.J.S.A. 2C:24-4, that would have been the end of the analysis in Sumulikoski; the statute would have applied, and there would have been no need to consider whether the teacher and administrator had assumed responsibility for the care of the child.

A principal does not have an automatic legal duty to care for a child in the same manner as a parent or guardian does. Days-Chapman never had a legal duty to care for J.S. as mandated by N.J.S.A. 2C:24-2(a)(2). Therefore, the second-degree endangering the welfare count fails as a matter of law.

2. "Causes the child harm" is unconstitutionally vague as applied to Days-Chapman's alleged failure to report harm already completed.

The State's theory is that Days-Chapman "cause[d] the child harm that would make the child an abused or neglected child" within the meaning of the endangering statute. See N.J.S.A. 2C:24-4(a)(2). The definition of "harm" is unconstitutionally vague and without precise definition as applied to Days-Chapman. Count 3 must be dismissed.

"A statute is unconstitutionally vague, in violation of due process, if persons of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Smith,

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251 N.J. 244, 263 (2022) (quotation omitted). "A statute that is challenged as vague as applied must lack sufficient clarity respecting the conduct against which it is sought to be enforced." State v. Lenihan, 219 N.J. 251, 267 (2014) (quotation omitted). "[I]f a statute is vague as applied to [the] conduct [at issue], it will not be enforced even though the law might be validly imposed against others not similarly situated." State v. Cameron, 100 N.J. 586, 593 (1985). Criminal statutes are "subjected to sharper scrutiny and given more exacting and critical assessment under the vagueness doctrine than civil enactments." Id.

The endangering the welfare of a child statute fails to provide a clear definition of "harm" that specifies what "would make the child an abused or neglected child." "The Title 9 citations in subsection a do not provide a clear definition of the sort of harm forbidden." New Jersey Criminal Code Annotated, comment 3 to N.J.S.A. 2C:24-4, at p. 502. The definitions in the referenced statutes (N.J.S.A. 9:6-1, 9:6-3, and 9:6-8.21) are "imprecise" and "not consistent." Id. at p. 503.

The State instructed the grand jury on one provision as the harm Days-Chapman allegedly caused. (T 21:21 to 22:10.) That subsection, N.J.S.A. 9:6-8.21(4)(b), defines an "abused or neglected child" as:

> (4) a child whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his parent or guardian, as herein defined, to exercise a minimum degree of care
>
> > (a) in supplying the child with adequate food, clothing, shelter, education, medical or surgical care though financially able to do so or though offered financial or other reasonable means to do so, or
> >
> > (b) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court;

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The definition of failing to "provid[e] the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof" is hopelessly vague. See id. It requires "persons of common intelligence" to "necessarily guess at its meaning and differ as to its application." Smith, 251 N.J. at 263.

There appears to be only one case analyzing this subsection. The Appellate Division described it as "focus[ing]" "on the conduct of the parent which exposes the child to a 'substantial risk' of death or physical harm." State v. N.A., 355 N.J. Super. 143, 150–51 (App. Div. 2002). The provision was not challenged as vague in N.A. because the conduct alleged fell squarely within it.

> [D]efendant and R.M. were living together with their two year old son, K.M., and their one year old daughter, B.M. On June 18, the two children were in the playpen, while R.M. was on the couch watching television and defendant was sleeping in the next room. R.M. fell asleep and awoke to hear defendant screaming at their son. Defendant then grabbed the child and threw him on the floor. Defendant picked him up and hit him on the legs, buttocks, back and head. She slapped and punched the child fifteen to twenty times. Then, she took the boy into the bedroom and hit the boy five to ten times on his buttocks with a hairbrush.
>
> [Id. at 146.]

This is the type of conduct the statute was intended to cover. And it must be interpreted in such a way that it is limited as such. Repeatedly hitting and punching one's own child is "unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof." But this definition does not encompass failing to report the potential abuse of other parents. Applying this statutory definition to the failure-to-report context would render it devoid of precise meaning and thus unconstitutionally vague. See Cameron, 100 N.J. at 593.

C. Hindering Apprehension or Prosecution (Count 7).

Hindering apprehension or prosecution, N.J.S.A. 2C:29-3(a)(3), requires that the individual "suppresses, by way of concealment or destruction, any evidence of the crime." Here,

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the State charged Days-Chapman with suppressing "by way of concealment." There is no allegation of destruction. The conduct alleged, failing to report potential child abuse, does not qualify as "suppress[ing]" evidence "by way of concealment" within the meaning of the statute. Because the conduct falls outside the meaning of the statute, Count 7 must be dismissed.

In criminalizing hindering, the Legislature required positive action—the "concealment or destruction" of physical evidence. "What is forbidden is actual suppression of evidence." New Jersey Criminal Code Annotated, comment 3 to N.J.S.A. 2C:29-3, at p. 566 (discussing identical language of "suppresses, by way of concealment or destruction, any evidence" also contained in N.J.S.A. 2C:29-3(b)(1)).

The caselaw applying the concealment aspect of the statute demonstrates that the conduct proscribed needs to be an affirmative act suppressing physical evidence, and not mere failure to disclose information. See, e.g., State v. Maltese, 222 N.J. 525, 550 (2015) (noting concealment conviction was supported by evidence that "defendant put the bodies in the tub, and then transported the bodies to the park and buried them"); State v. Williams, 190 N.J. 114, 128 (2007) (approvingly citing out-of-state case where defendant "pushed his automobile into a lake" as evidence of concealment (citation omitted)); State v. Morente-Dubon, 474 N.J. Super. 197, 206–07 (App. Div. 2022) (noting "deliberate and extensive efforts of concealment" by moving and desecrating the deceased victim's body); State v. Henry, 323 N.J. Super. 157, 161 (App. Div. 1999) (holding that defendant was not "concealing himself" within meaning of N.J.S.A. 2C:29-3 when he ran away and avoided police); see also New Jersey Criminal Code Annotated, comment 2 to N.J.S.A. 2C:29-3, at p. 565 (questioning "whether mere refusal to testify would amount to a violation of this section. It is unclear that such conduct does amount to suppression of evidence 'by way of concealment or destruction.'").

Interpreting the statute in the broad manner advocated by the State would also "lead to absurd or unreasonable results" that should "be avoided." See State v. Nance, 228 N.J. 378, 396 (2017). Imposing a requirement of affirmative disclosure would otherwise create a duty on every citizen to report not only every crime, but also every traffic violation in Title 39. See N.J.S.A. 2C:29-3(a) ("A person commits an offense if, with purpose to hinder the detention, apprehension, investigation, prosecution, conviction or punishment of another for an offense or violation of Title 39 of the Revised Statutes or a violation of chapter 33A of Title 17 of the Revised Statutes he . . . (emphasis added).) Thus, every time an individual driving on the Parkway or Turnpike fails to report each and every driving infraction that the individual sees, according to the State, that individual violates N.J.S.A. 2C:29-3(a)(3) by "suppress[ing], by way of concealment" evidence. The Court should avoid an interpretation that would lead to this result.

Failure to report potential child abuse is simply non-disclosure of information that falls outside the scope of the statutory language "suppresses, by way of concealment or destruction, any evidence of the crime." Criminal statutes are to be strictly construed and should not be applied to "conduct beyond the contemplation of the Legislature." Provenzano, 34 N.J. at 322. The "fair meaning" of N.J.S.A. 2C:29-3(a)(3) cannot be said to include the conduct alleged against Days-Chapman. See id. This Court must dismiss Count 7.

D. Pattern of Official Misconduct (Count 8).

A charge of pattern of official misconduct under N.J.S.A. 2C:30-7 requires "two or more" violations of the official misconduct statute, N.J.S.A. 2C:30-2. Because each of the official misconduct counts is individually deficient, as discussed supra, there are no valid official misconduct charges remaining. As a result, the pattern of official misconduct charge must also be dismissed because the necessary element of two or more official misconduct violations is absent from the Indictment.

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CONCLUSION

For the foregoing reasons, the Indictment must be dismissed.

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By: *s/ Lee Vartan*

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