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**Attorney for Defendant**

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|---|---|
| | : SUPERIOR COURT OF NEW JERSEY |
| STATE OF NEW JERSEY | : LAW DIVISION-CRIMINAL |
| | : ATLANTIC COUNTY |
| | : |
| v. | : INDICTMENT NO.: 24-09-2951 |
| | : |
| LA'QUETTA SMALL | : |
| | : |
| | : **ORDER** |
| | : |
| | : |

THIS MATTER having been opened to the Court by Michael H. Schreiber, Esquire, attorney for Defendant La'Quetta Small, and the Court having considered the papers submitted in support herein; along with opposition submitted, and the oral argument of counsel, and for good cause shown;

IT IS on this day of _____, 2024: ORDERED that Defendant La'Quetta Small's Motion to Dismiss the Indictment with Prejudice is GRANTED;

IT IS FURTHER ORDERED pursuant to Rule 1:5-1(a), a copy of this Order shall be served on all parties not served electronically within seven (7) days of its receipt by the moving party.

Date:_____ _____, JSC

____ Opposed
____ Unopposed

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| v. | : INDICTMENT NO.: 24-09-2951 |
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| LA'QUETTA SMALL | : |
| | : |
| | : **BRIEF IN SUPPORT OF** |
| | : **MOTION TO DISMISS THE INDICTMENT** |
| | : |

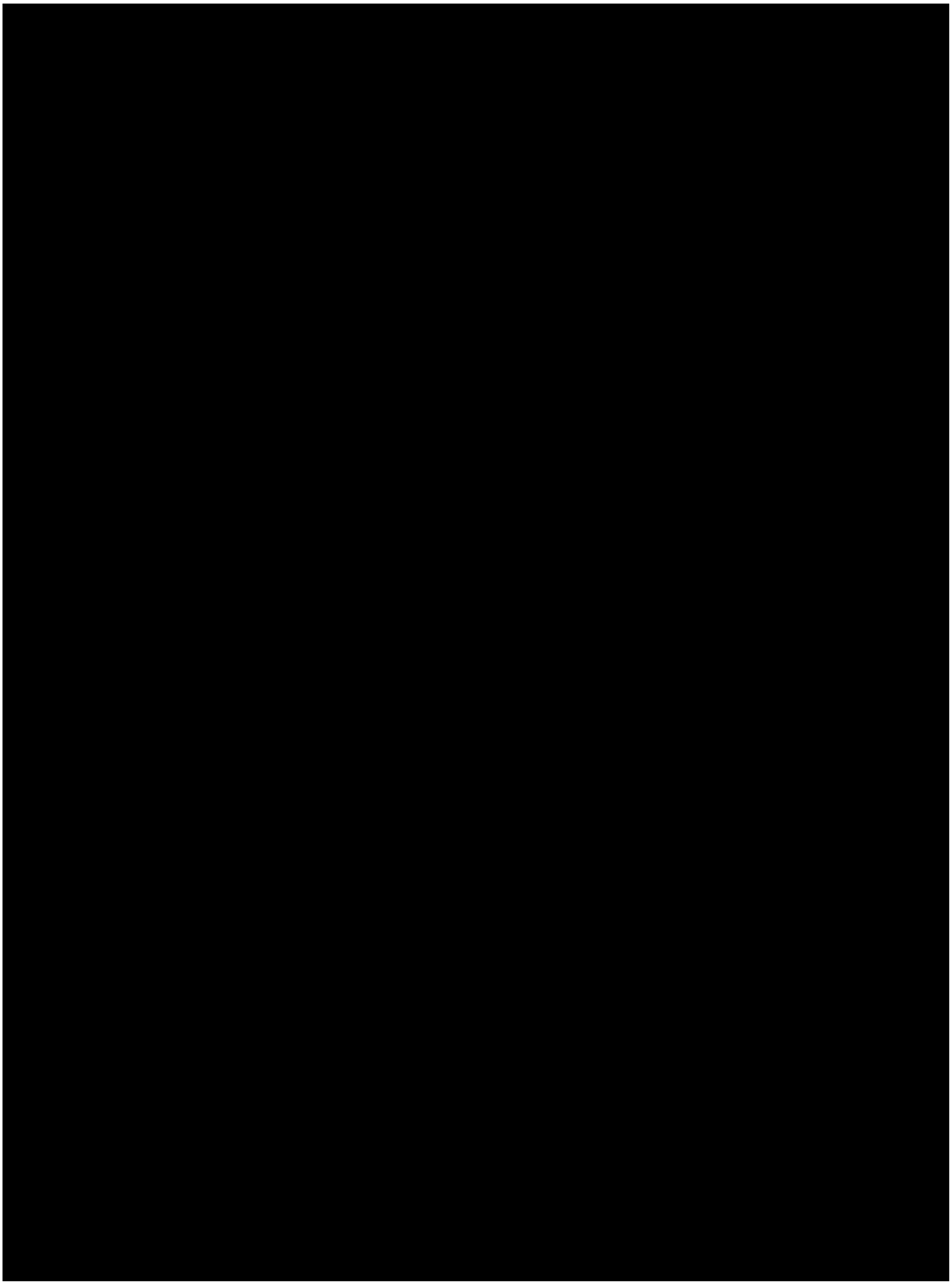
## STATEMENT OF FACTS

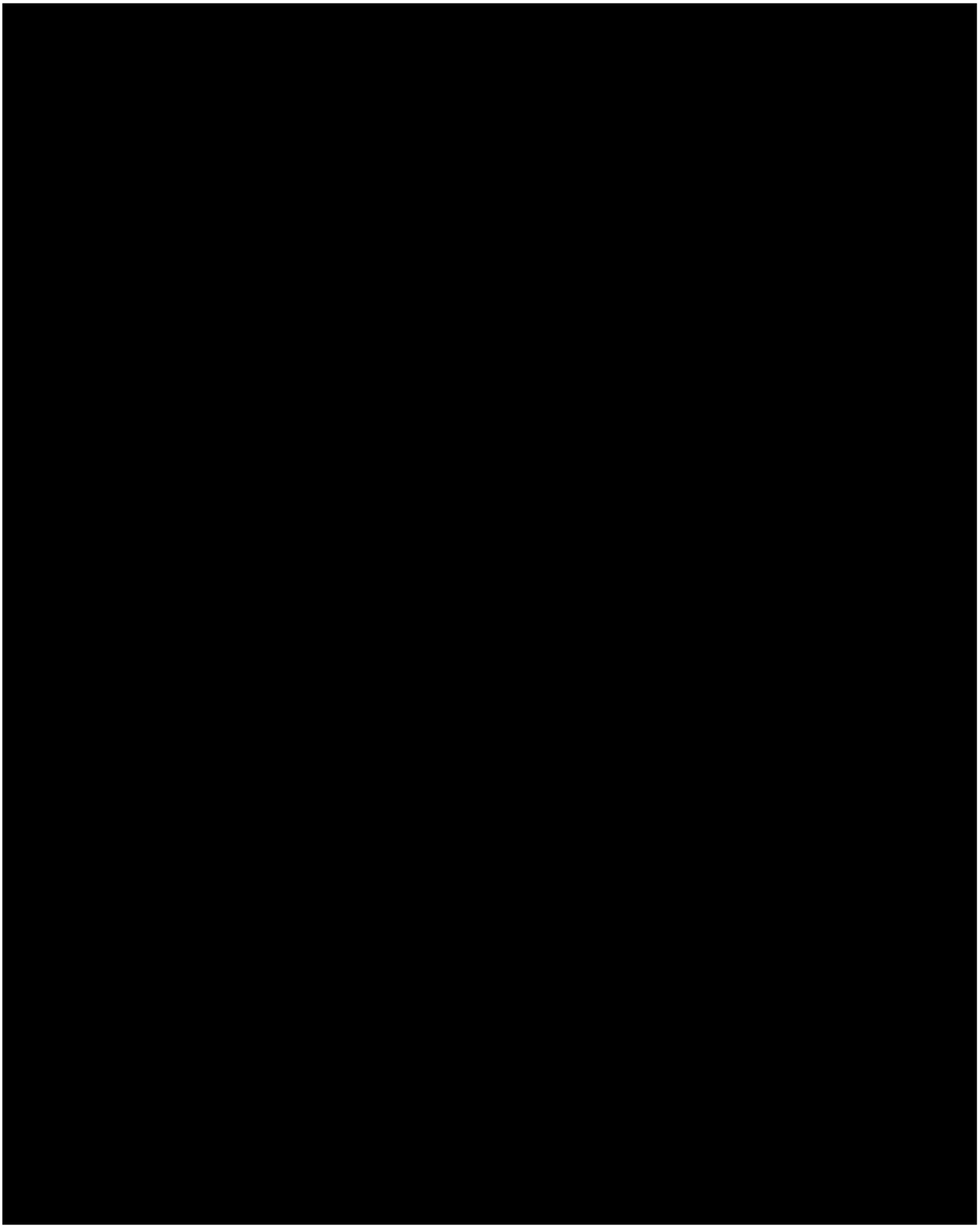
Under Indictment No. 24-09-2951, Defendant La'Quetta Small and Defendant Marty Small are charged with one count of Endangering the Welfare of a Child in the second degree in violation of N.J.S.A. §2C:24-4(a). Defendant Mary Small is also charged with Aggravated Assault in the second degree in violation of N.J.S.A. 2C:24-4A2 and Terroristic Threats in the third degree, N.J.S.A. 2C:12-3A.

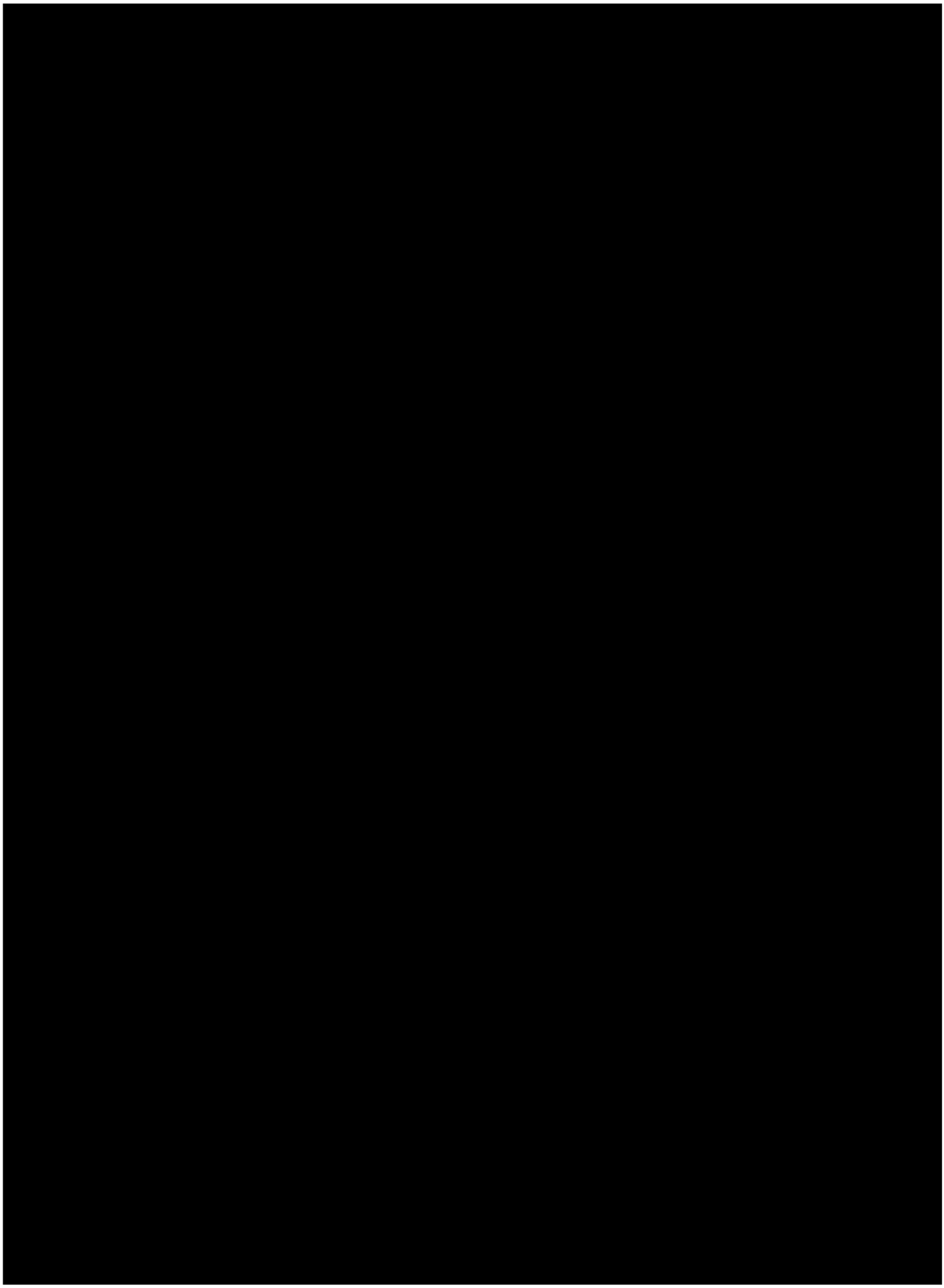
Two witnesses testified for the prosecution before the grand jury: [redacted] See **Exhibit A**, to Counsel's Certification, a copy of the grand jury transcript. Each witness' testimony intertwined the evidence regarding the accusations against Defendant La'Quetta Small and her co-defendant and husband, Marty Small, Jr. Instead of providing the grand jurors with evidence against Marty Small first, then evidence against Defendant La'Quetta Small, or instead of

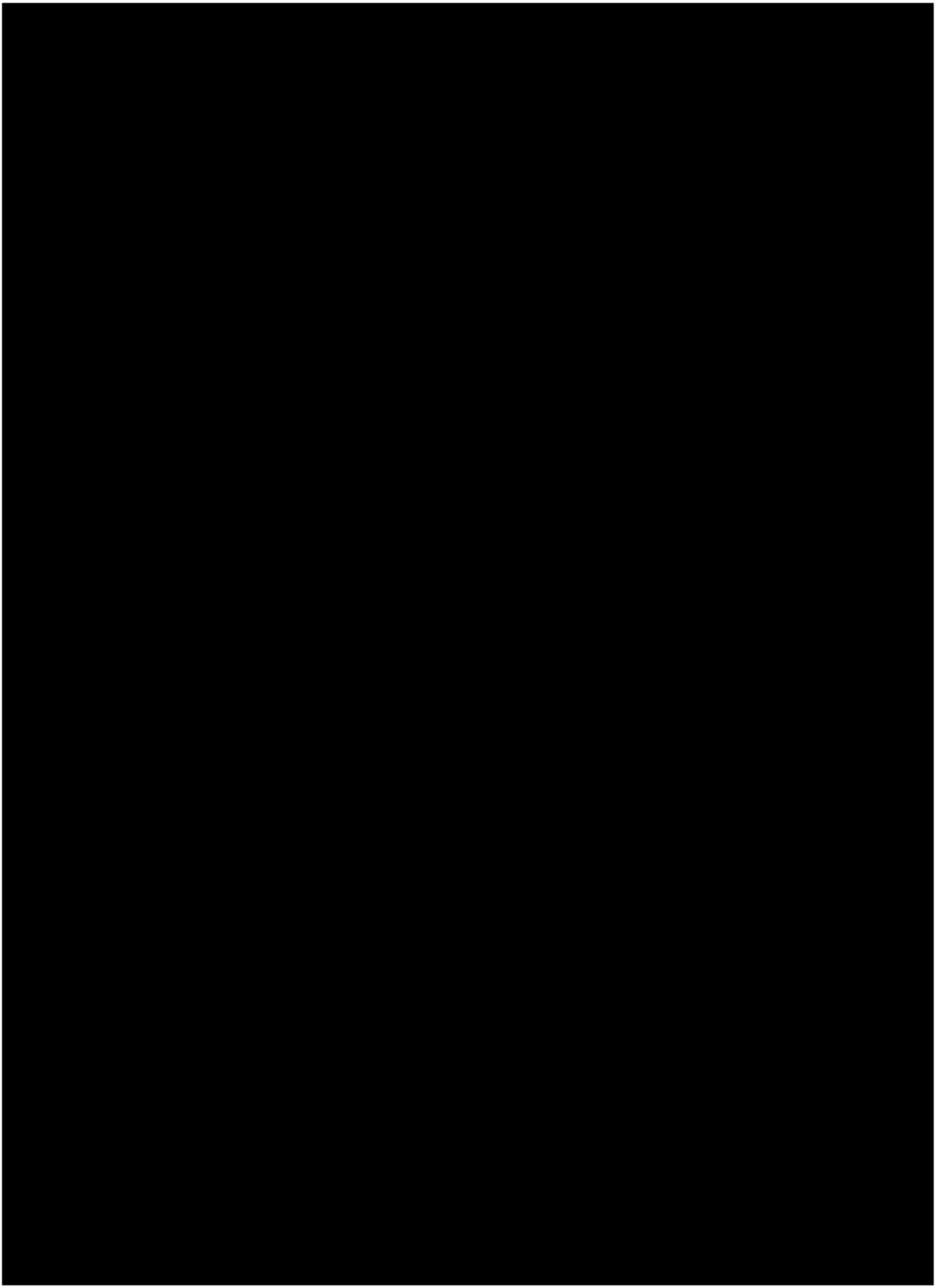
presenting evidence against both defendants first, and then evidence against each defendant, the prosecution witnesses mingled and intertwined the testimony against each Defendant in a manner that was confusing, unnecessarily and prejudicially repetitive, and likely led to the grand jury improperly assigning culpability to Defendant La'Quetta Small based upon accusations and evidence against her husband and Co-Defendant Marty Small.

[redacted]









[redacted]

Based upon the above-delineated testimony, the grand jurors were charged with attempting to decipher which evidence should be considered against Defendant La'Quetta Small as evidence of a single count of EWOC and which evidence should be considered against Defendant Marty Small Jr. as evidence of EWOC, Aggravated Assault and Terroristic Threats.

Only now, with the benefit of the transcript, can one decipher and isolate the testimony regarding those actions that only involved Defendant La'Quetta Small. The transcript indicates that the grand jurors were told the following: [redacted]

[redacted]

[redacted]

[redacted]

**LEGAL ARGUMENT**

The New Jersey Constitution, enacted in 1947, guarantees a person accused of a crime the right to be indicted by a grand jury before being placed on trial. N.J. Const, art. I, ¶ 8. That paragraph states:

> No person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or, in the militia, when in actual service in time of war or public danger.

This right has existed in New Jersey since 1844, and the grand jury's function has been evolving ever since. Largely, the guarantee of protection afforded by a New Jersey grand jury has mirrored its federal counterpart. State v. Ramseur, 106 N.J. 123, 215 n. 42, 524 A.2d 188 (1987).

The United States Supreme Court has identified the important role of the grand jury in the United States:

> [R]ooted in long centuries of Anglo-American history," the grand jury is mentioned in the Bill of Rights but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It "`is a constitutional fixture in its own right.'" In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.
>
> United States v. Williams, 504 U.S. 36, 47 (1992) (citations omitted).

The New Jersey Supreme Court has recognized the grand jury as an investigative body with expansive powers. State v. Francis, 191 N.J. 571, 587 (2007)(citing Branzburg v. Hayes, 408 U.S. 665, 688, (1972) and United States v. Dionisio, 410 U.S. 1, 13 (1973)). Further, the grand jury acts "as a shield between an individual and his sovereign." Francis, *supra*, 191 N.J. at 585. Moreover, the grand jury seeks "to lend legitimacy to our system of justice by infusing it with a democratic ethos." State v. Fortin, 178 N.J. 540, 638, (2004). "Acting as both shield and sword, the grand jury indicts when a prima facie case is established while standing guard to protect the innocent from hasty, malicious, and oppressive persecution." State v. Del Fino, 100 N.J. 154, 164 (1985), quoting Wood v. Georgia, 370 U.S. 375 (1962).

The grand jury's mission "is to clear the innocent, no less than to bring to trial those who may be guilty." State v. Hogan, 144 N.J. 216, 228 (1996) (internal citations and quotation marks omitted). Accordingly, the Court has demonstrated a "greater willingness to review grand jury proceedings where the alleged deficiency in the proceedings affects the grand jurors' ability to make an informed decision whether to indict." Id. at 229. See also State v. Murphy, 110 N.J. 20,

35 (1988); State v. Del Fino, 100 N.J. 154, 165-66 (1985); and State v. Hart, 139 N.J. Super. 565, 568-69 (App. Div. 1976).

"The grand jury fulfills a dual role under our Constitution: to decide if there is probable cause that a crime was committed and to protect the innocent against unfounded charges. State v. Shaw, 241 N.J. 223, 235 (2020); See also State v. Bell, 241 N.J. 552, 560 (2020). While the Court will only "reluctantly and sparingly review the grand jury's actions to protect its independence," State v. Shaw, 241 N.J. 223, 229-30 (2020), a Court should intervene when "the indictment is manifestly deficient or palpably defective." Bell, *supra,* 241 N.J. at 560, quoting State v. Twiggs, 233 N.J. 513, 531-32 (2018). A Court must act "when necessary to ensure the fairness and integrity of grand jury proceedings" when the evidence presented to the grand jury is insufficient to support the charge. Shaw, supra, 241 N.J. at 230. See also State v. Morrison, 188 N.J. 2, 13 (2006) (The absence of any evidence to support the charges would render the indictment palpably defective and subject to dismissal); See also, State v. Hogan, 144 N.J. 216 (1996).

Where testimony infringes upon the grand jury's independent decision-making function by improperly influencing its ultimate determination, such testimony adversely affects the fairness and integrity of a grand jury proceeding. State v. Tucker, 473 N.J. Super. 329, 346-47 (2022). This improper influence is even greater because a grand jury presentation is one-sided. Id. "[P]rinciples of fairness are particularly important in a grand jury setting in which the prosecutor questions witnesses, introduces evidence, and explains the law to the jurors without a judge or defense attorney in attendance. . . . While performing those functions, the prosecutor cannot impinge on a grand jury's independence and improperly influence its determination." Id. at 348.

An indictment may be dismissed upon a palpable showing of manifest deficiency, State v. Wein, 80 N.J. 491, 501 (1979), or upon a showing that the prosecutor's conduct amounted to an

"intentional subversion" of the grand jury process. State v. Murphy, 110 N.J. 20, 35 (1988). Consequently, "dismissal of the indictment is appropriate" if it is established that the violation substantially influenced the grand jury's decision to indict or if there is "grave doubt" that the determination was reached fairly and impartially. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988).

## I. THE INDICMENT WAS MANIFESTLY DEFICIENT AND PALPABLY DEFECTIVE BASED UPON INSUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE SUPPORTING A VIOLATION OF N.J.S.A. §2C:24-4(a), ENDANGERING THE WELFARE OF A CHILD, AND SHOULD BE DISMISSED.

A trial court deciding a motion to dismiss an indictment determines "whether, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, a grand jury could reasonably believe that a crime occurred and that the defendant committed it." State v. Morrison, 188 N.J. 2, 13 (2006), citing State v. Reyes, 50 N.J. 454, 459 (1967). Even though an indictment is presumed valid, "a defendant with substantial grounds for having an indictment dismissed should not be compelled to go to trial to prove the insufficiency." State v. Hill, 166 N.J. Super. 224, 229 (Law. Div. 1978), rev'd on other grounds, 170 N.J. Super. 485 (App. Div. 1979), quoting State v. Graziani, 60 N.J. Super. 1, 22 (App. Div. 1959), aff'd, 31 N.J. 538 (1960). Moreover, even if an indictment appears sufficient on its face, it cannot stand if the State fails to present the grand jury with at least "some evidence" as to each element of a prima facie case. State v. Donovan, 129 N.J.L. 478, 483 (Sup. Ct.1943); State v. Hill, *supra* at 228-229. Here, the proofs submitted to the grand jury by the State are inadequate to support the return of a true bill against Defendant La'Quetta Small at Count One – Endangering the Welfare of a Child (hereinafter "EWOC") in the second degree in violation of N.J.S.A. §2C:24-4(a).

N.J.S.A. §2C:24-4(a)(2) provides, in pertinent part:

[a]ny person having a legal duty for the care of a child or who has assumed

> responsibility for the care of a child who causes the child harm that would make the child an abused or neglected child as defined in [N.J.S.A.] §9:6-1, [N.J.S.A.] §9:6-3 ***and*** . . . [N.J.S.A. §9:6-8.21] is guilty of a crime of the second degree. {Emphasis added.}

Each of the three statutes cited within the EWOC statute, N.J.S.A. §2C:24-4(a), which "define" "an abused or neglected child," are as follows:

**N.J.S.A. §9:6-1** states in relevant part:

> Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (*C. 9:6-8.21*), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation.

**N.J.S.A. §9:6-8.21(c)** states in relevant part:

> (c) "Abused or neglected child" means a child less than 18 years of age whose parents or guardian, as defined herein,
>
> (1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means ***which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ***;
>
> (2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be ***likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ***;
> . . .
>
> (4) or 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;

**N.J.S.A. §9:6-3** states in relevant part:

> Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child ***shall be deemed to be guilty of a crime of the fourth degree***. {Emphasis added.}

First, with respect to **N.J.S.A. §9:6-1**, as cited in the EWOC statute, no evidence was presented to the grand jury to support a finding of abuse because Defendant La'Quetta Small did not engage in (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (*C. 9:6-8.21*), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation. Thus, no evidence was presented to support a finding of abuse pursuant to N.J.S.A. §9:6-1 as cited

in the EWOC statute, N.J.S.A. §2C:24-4(a).

Second, with respect to **N.J.S.A. §9:6-8.21(c)**, as cited in the EWOC statute, the New Jersey Supreme Court has ruled that the "plain language of N.J.S.A. §9:6-8.21(c)(4)(b) . . . makes clear that [redacted] fault is an essential element for a finding of abuse or neglect." New Jersey Div. of Child Protection and Permanency v. Y.N., 220 N.J. 165, 180 (2014); See also, N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B., 207 N.J. 294, 309-10 (2011) (concluding that Division failed to prove abuse or neglect because [redacted] conduct did not constitute a failure to exercise a minimum degree of care); N.J. Div. of Youth & Family Servs. v. S.N.W., 428 N.J. Super. 247, 249 (App. Div. 2012) (reversing adjudication of abuse or neglect because the trial court did not make a finding that "defendant failed to provide a minimum degree of care"). "At the very least, a minimum degree of care means that [redacted] conduct must be "grossly negligent or reckless." Id., citing, T.B., *supra*, 207 N.J. at 306. "In contrast, [redacted] negligent conduct is not sufficient to justify a finding of abuse or neglect under N.J.S.A. §9:6-8.21(c)(4)(b). Id. at 306-07; See also, State v. Demarest, 252 N.J. Super. 323 (1991)(knowing conduct is the culpability requirement for endangering the welfare of a child); N.J. Dep't of Youth & Family Servs. v. J.L., 410 N.J. Super. 159, 168-69 (App. Div. 2009)(reversing abuse or neglect finding because [redacted] conduct, although "arguably inattentive or even negligent," was not grossly negligent or reckless).

Here, the State failed to present any testimony or evidence that Defendant La'Quetta Small acted "grossly negligent" or "reckless;" that her actions created a substantial or ongoing risk to [redacted] of physical injury causing a risk of death, serious disfigurement, or protracted impairment of emotional health or the function of any bodily organ; or that Defendant La'Quetta Small "harmed" [redacted]

Defendant La'Quetta Small is accused of two incidents of alleged abuse occurring on December 7, 2024 and January 7, 2024. [redacted] See **Exhibit A**, T38:6-12. However, with respect to these two specifically alleged incidents against Defendant La'Quetta Small, the State failed to present any testimony of medical records, photographs, or any evidence of ***injuries*** [redacted] suffered as a result. The State cannot merely provide testimony that [redacted] was allegedly [redacted] on or about December 7, 2024, and provide testimony that a "video clip" exists and tell the grand jurors what it says, without any evidence of what, ***if any***, resulting injuries occurred from these two incidents. Here, the State improperly required the grand jurors to *assume* that injuries resulted. Viewing the grand jury testimony in a light most favorable to the State, it does not establish that [redacted] suffered any injuries or harm as a result of Defendant La'Quetta Small's action on December 7, 2023 or January 7, 2024. Failing to establish that element of the crime, it is thus also undisputed that the State failed to provide any evidence Defendant La'Quetta Small acted grossly negligently or recklessly or caused serious bodily injury to [redacted] that caused a substantial risk of death, disfigurement, or loss of bodily function. State v. Donovan, 129 N.J.L. 478, 483 (Sup. Ct.1943); State v. Hill, supra at 228-229. Defendant La'Quetta Small should not be compelled to go to trial to prove these insufficiencies. State v. Hill, 166 N.J. Super. 224, 229 (Law. Div. 1978), rev'd on other grounds, 170 N.J. Super. 485 (App. Div. 1979), quoting State v.

Graziani, 60 N.J. Super. 1, 22 (App.Div.1959), aff'd, 31 N.J. 538 (1960).

As the Court concluded in Y.N., and wrote, "Sometimes a parent may cause injury to a child to protect that child from greater harm. Under those circumstances, the parent may be acting reasonably. Simply stated, the [EWOC] statute requires more than a mere showing of harm to a child." Y.N., *supra*, 220 N.J. at 182. Thus, no evidence was presented to support a finding of abuse pursuant to N.J.S.A. §9:6-8.21(c), as cited in the EWOC statute, N.J.S.A. §2C:24-4(a).

Finally, with respect to **N.J.S.A. §9:6-3**, as cited in the EWOC statute and as more fully explained above, no evidence was presented to the grand jury to support a finding of abuse because Defendant La'Quetta Small did not "abuse, abandon, be cruel to or neglectful" to [redacted] As stated above, the State failed to provide evidence that [redacted] suffered any harm or injuries from any actions by Defendant La'Quetta Small on December 7, 2023, or January 7, 2024. On those dates, [redacted] attempted to respond to a defiant [redacted] Defendant La'Quetta Small was upset and concerned for [redacted] because [redacted] was dating a boy who was not a good influence. The young man had used derogatory language toward [redacted] He was encouraging [redacted] to engage in activities, including sexual activities and ingesting marijuana, that Defendant La'Quetta Small did not believe were appropriate for [redacted] See **Exhibit B**, p. 21. Anything that occurred on December 7, 2023 and January 7, 2024 were merely the actions of a concerned [redacted] disciplining a defiant teenager because she wanted to protect her. The State's failure to provide any evidence of injuries on those two dates proves this.

Thus, viewing the evidence and the rational inferences drawn from that evidence in the light most favorable to the State, there was insufficient evidence presented by the State to the grand jury that could have reasonably led them to believe that the crime of EWOC occurred and that Defendant La'Quetta Small committed it. State v. Morrison, 188 N.J. 2, 13 (2006) (citing State v.

Reyes, 50 N.J. 454, 459 (1967). Defendant La'Quetta Small should not be compelled to go to trial to prove the insufficiency. State v. Hill, 166 N.J. Super. 224, 229 (Law. Div. 1978), rev'd on other grounds, 170 N.J. Super. 485 (App. Div. 1979), quoting State v. Graziani, 60 N.J. Super. 1, 22 (App.Div.1959), aff'd, 31 N.J. 538 (1960). In failing to provide any evidence of "harm" or "injuries" on December 7, 2023 or January 7, 2024, the State failed to present the grand jury with at least "some evidence" regarding each element of a prima facie case for EWOC. State v. Donovan, 129 N.J.L. 478, 483 (Sup. Ct.1943); State v. Hill, supra at 228-229. The proofs submitted to the grand jury by the State were inadequate to support the return of a true bill against Defendant La'Quetta Small at Count One – Endangering the Welfare of a Child (hereinafter "EWOC") in the second degree in violation of N.J.S.A. §2C:24-4(a). The indictment must be dismissed.

## II. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE GRANTED BASED ON THE STATE'S FAILURE TO PROVIDE A DEFINITION OF "ABUSED OR NEGLECTED" CHILD, WHICH IMPROPERLY INFLUENCED THE GRAND JURY'S INDEPENDENCE AND DECISION-MAKING.

During the grand jury presentation, "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." State v. Brady, 452 N.J. Super. 143, 166 (App. Div. 2017). An indictment *must fail* where a prosecutor's instructions to the grand jury were misleading or an incorrect statement of the law. State v. Triestman, 416 N.J. Super. 195, 205 (App. Div. 2010). An indictment should be dismissed where the prosecutor's error was "clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Hogan, 144 N.J. 216, 344 (1996).

As indicated above, N.J.S.A. §2C:24-4(a)(2) provides, in pertinent part:

> [a]ny person having a legal duty for the care of a child or who has assumed *responsibility for the care of a child who causes the child harm that would make* the child an abused or neglected child as defined in ***[N.J.S.A.] §9:6-1, [N.J.S.A.] §9:6-3 and . . . [N.J.S.A. §9:6-8.21]*** is guilty of a crime of the second degree. {Emphasis added.}

Thus, the EWOC statute requires that the grand jurors be provided a definition of "abused or neglected child" that is in accordance ***with all three sub-statutes: N.J.S.A. §9:6-1, N.J.S.A. §9:6-3 and N.J.S.A. 9:6-8.21***. State v. T.C., 347 N.J. Super. 219, 239 (2002). The three subsections of the EWOC are "*indispensable*" in the statute's application and enforcement. State v. Fuqua, 234 N.J. 583, 591 (2018). {Emphasis added.} The critical issue is the definition of an "abused or neglected child." New Jersey Div. of Youth and Family Services v. P.W.R., 205 N.J. 17, 28 (2011). "Strict adherence to the statutory standards of [N.J.S.A. §9:6-1, N.J.S.A. §9:6-3], N.J.S.A. §9:6-8.21(c)(4) is important because the stakes are high for all parties concerned." Y.N., *supra*, 220 N.J. at 252. New Jersey's child welfare laws balance [redacted] right to raise a child against "the State's *parens patriae* responsibility to protect the welfare of children." New Jersey Div. of Child Protection and Permanency v. Y.N., 220 N.J. 165, 178 (2014), citing, N.J. Dep't of Children and Families v. A.L., 213 N.J. 1, 17-18 (2013). Furthermore, Courts have instructed that whether [redacted] exercised a minimum degree of care must "be analyzed in light of the dangers and risks associated with the situation." Y.N., *supra*, 220 N.J. at 185, citing G.S. v. Dep't of Human Servs., 157 N.J. 161, 181-82 (1999).

Here, the State's only instruction to the grand jurors regarding the definition of "abused and neglected child" was as follows:

> "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 the defendant or defendants to exercise a minimum degree of care in proving the child with proper supervision or guardianship by unreasonably inflicting or allowing to be inflicted, or a substantial risk thereof, including the infliction of excessive corporal

punishment, or any other acts similarly serious nature requiring the aid of the court."

See **Exhibit A**, T4:17-5:3.

The State failed to mention, refer to, or even acknowledge the three "indispensable" subsections of the EWOC to the grand jurors which are N.J.S.A. §9:6-1, N.J.S.A. §9:6-3, and N.J.S.A. §9:6-8.21(c), as follows:

**N.J.S.A. §9:6-1** states in relevant part:

Abuse of a child shall consist in any of the following acts: (a) disposing of the custody of a child contrary to law; (b) employing or permitting a child to be employed in any vocation or employment injurious to its health or dangerous to its life or limb, or contrary to the laws of this State; (c) employing or permitting a child to be employed in any occupation, employment or vocation dangerous to the morals of such child; (d) the habitual use by the parent or by a person having the custody and control of a child, in the hearing of such child, of profane, indecent or obscene language; (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to debauch or endanger or degrade the morals of the child; (f) permitting or allowing any other person to perform any indecent, immoral or unlawful act in the presence of the child that may tend to debauch or endanger the morals of such child; (g) using excessive physical restraint on the child under circumstances which do not indicate that the child's behavior is harmful to himself, others or property; or (h) in an institution as defined in section 1 of P.L.1974, c. 119 (*C. 9:6-8.21*), willfully isolating the child from ordinary social contact under circumstances which indicate emotional or social deprivation.

**N.J.S.A. §9:6-8.21(c)** states in relevant part:

(c) "Abused or neglected child" means a child less than 18 years of age whose parents or guardian, as defined herein,

(1) inflicts or allows to be inflicted upon such child physical injury by other than accidental means ***which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ***;

(2) creates or allows to be created a substantial or ongoing risk of physical injury to such child by other than accidental means which would be ***likely to cause death or serious or protracted disfigurement, or protracted loss or impairment of the function of any bodily organ***;

. . .

> (4) or 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;
>
> **N.J.S.A. §9:6-3** states in relevant part:
>
> Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child ***shall be deemed to be guilty of a crime of the fourth degree***. {Emphasis added.}

See, Fuqua, *supra,* 234 N.J. at 591. There was no grand jury testimony explaining each sub-statute mentioned within the EWOC statute, specifically N.J.S.A. §9:6-1, N.J.S.A. §9:6-3, and N.J.S.A. §9:6-8.21, each of which provides differing definitions of "abused and neglected child." The State wholly failed to explain any of the elements of the definition of the "abused and neglected child" to the grand jurors from the varying statutes cited within the EWOC statute. The State failed to explain, in any detail or lay terms, each element of the charge and the State's burden of proof. The State also failed to emphasize important words and phrases of each element or even to properly paraphrase what constitutes an "abused or neglected child" in accordance with N.J.S.A. §9:6-1, N.J.S.A. §9:6-3, and N.J.S.A. §9:6-8.21. See, T.C., *supra*, 347 N.J. Super. at 239. "The criminal law cannot be administered justly or efficiently if the jury is allowed to speculate as to what conduct the law intended to proscribe by a specified crime." State v. Butler, 27 N.J. 560, 595 (1958).

In this case, the grand jury's inadequate instructions permitted such speculation because it was never appraised of the statutory definitions contained in N.J.S.A. §9:6-1, N.J.S.A. §9:6-3, and N.J.S.A. §9:6-8.21. The prosecutor's failure to provide any instruction regarding the three

*indispensable* subsections of the EWOC statute left the grand jurors without any explanation of the permitted and prohibited definition of "abused and neglected child" and without any ability to comprehend or appreciate the distinctions to which it was required to adhere. The indictment must fail because of the State's failure to clearly and accurately explain the law to the grand jurors, which caused them to speculate on purely legal issues improperly. State v. Brady, 452 N.J. Super. 143, 166 (App. Div. 2017); State v. Triestman, 416 N.J. Super. 195, 205 (App. Div. 2010). This failure on the part of the State was clearly capable of producing an unjust result, and the grand jury would likely have reached a different result but for the State's error. State v. Hogan, 144 N.J. 216, 344 (1996).

Additionally, the prosecutor's failure to provide any instruction regarding the three *indispensable* subsections of the EWOC statute left the grand jurors without any explanation of the definition of "excessive corporal punishment." The grand jurors were never told that the law *does not* prohibit the use of corporal punishment or "the general proposition that [redacted] may inflict moderate correction such as is reasonable under the circumstances." State v. A.L.A., 251 N.J. 580, 593 (2022), quoting T.C., *supra*, 347 N.J. Super. at 239-40.

In DYFS v. K.A., 413 N.J. Super. 504 (App. Div. 2010), the Court found a mother who had struck her child several times on the shoulder, causing visible bruises after the child refused to complete her homework and remain in her room during a "time out" punishment, did not inflict excessive corporal punishment within the meaning of N.J.S.A. 9:6-8.21(c)(4)(b). In K.A., the Court ruled that the goal is the protection of children, and in resolving whether abuse has occurred, the focus must be on the harm to the child "rather than the mental state of the accused abuser." K.A., *supra*, 413 N.J. Super. at 511. The K.A. Court concluded that certain factors should be included before reaching a conclusion that "excessive corporal punishment" was inflicted,

including the reasons underlying the parent's actions, the isolation of the incident, and the trying circumstances occurring due to the child's psychological disorder. Id. The K.A. Court stated that these factors "form the prism through which we determine whether [the parent's] actions were indeed excessive." Id. Herein, the State failed to present any evidence incorporating these factors, including the reasons underlying the incident, the isolated nature of the only two incidents asserted against Defendant La'Quetta Small, and the trying circumstances of [redacted] trying to protect [redacted] from a toxic romantic relationship. These alleged actions by Defendant La'Quetta Small occurred on only two days of [redacted] Defendant La'Quetta Small was trying to protect [redacted] from a manipulating sixteen-year-old juvenile delinquent who was improperly counseling [redacted] to have sex and to defy [redacted] Adding to the emotional concerns was the fact that this boy allegedly gave [redacted]

Courts have cautioned that "one ought not assume that what may be 'excessive' corporal punishment for a younger child must also constitute unreasonable infliction of harm, or excessive corporal punishment in another setting involving an older child." New Jersey Div. of Youth and Family Services v. P.W.R., 205 N.J. 17, 31 (2011). An occasional slap, "although hardly admirable, . . . does not fit a common sense application of the statutory prohibition against 'excessive' corporal punishment." Id. at 35. "[B]y qualifying the prohibition with the term, 'excessive,' the statutory language plainly recognizes the need for some parental autonomy in the child-rearing dynamic that, of necessity, may involve the need for punishment. Limiting State involvement only to interference with excessive corporal punishment requires the exercise of judgment . . . before a finding of physical abuse is entered against a parent." Id. at 37. In P.W.R., the New Jersey Supreme Court recognized that in child abuse and neglect cases, the totality of the proofs must be evaluated because

> ". . . the evidence can be synergistically related. . . [I]t is impossible to ignore the difficult home environment present. . . Clearly, there were problems within this family. The question, however, is not whether [Mother] and [Child] struggled over the issues between them, but rather, whether [Child's] "physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired" because of [Mother]. Despite the long list of [Child's] complaints, actionable abuse or neglect was not demonstrated. Most of the allegations were the product of the family's tight financial situation, such as the lack of central heating and the family's apparent need for monetary contribution from [Child's] part-time job. The dominant allegation of abuse was that [Mother] slapped [Child] in the face, which conduct, although abhorrent to a sixteen-year-old young woman, and hardly admirable, does not fit within the statutory definition of abuse. The remaining instances of alleged abuse and neglect, while not necessarily paragons of parenting, do not satisfy the standard articulated in N.J.S.A. 9:6-8.21(c)(4). In sum, although no parenting awards are to be won on this record, neither was actionable abuse or neglect proven.

The prosecutor's failure to provide any instruction regarding the three *indispensable* subsections of the EWOC statute left the grand jurors without any explanation regarding the difficult home environment in the Small's home as material and exculpatory evidence. Therefore, the grand jurors were improperly induced to conclude that the State had made out a *prima facie* case against the accused. State v. Hogan, *supra*, 144 N.J. at 236. The State's failure to provide this evidence to the grand jury impinged on their independence. It improperly influenced their determination, creating grave doubt that the determination was reached fairly and impartially. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988). The States' presentation of the evidence to the grand jurors sacrificed the common sense of the situation to the State's zealous stewardship of children's rights. It failed to allow the grand jurors to consider whether the evidence showed that [redacted] peculiar harms and possible unforeseen outcomes were not part of a pattern of abuse but, more likely, aberrational acts. NJ Div. of Youth & Family Servs. v. S.S., 372 N.J. Super. 13, 27 (App. Div. 2004), *certif. denied*, 182 N.J. 426 (2005).

Furthermore, the prosecutor's failure to provide instruction regarding the three indispensable subsections of the EWOC statute left the grand jurors without an understanding of

the standard for establishing a "minimum degree of care." Courts have determined that to serve the legislative interest in protecting children, "a guardian [would be found to have] fail[ed] to exercise a minimum degree of care when he or she is aware of the dangers inherent in a situation and fails adequately to supervise the child or recklessly creates a risk of serious injury to that child." G.S. v. Dep't of Human Servs., 157 N.J. 161, 181 (1999). Herein, there was no evidence of any injury or harm to [redacted] as a result of the alleged actions of Defendant La'Quetta Small on December 7, 2023 or January 7, 2024. The State's failure to present this required evidence amounted to an "intentional subversion" of the grand jury process. State v. Murphy, 110 N.J. 20, 35, 538 A.2d 1235 (1988). By preventing the grand jury from fully understanding the law regarding the standards for establishing a "minimum degree of care," the State deceived the grand jury and presented its evidence in a way that was tantamount to telling the grand jury a half-truth. Hogan, *supra*, 144 N.J. at 236. Thus, the grand jury could not perform its vital function of protecting Defendant La'Quetta Small from the inappropriate zeal on the part of a prosecutor. Defendant La'Quetta Small has presented a palpable showing of manifest deficiency on the part of the State and the indictment against her should be dismissed.

## III. DEFENDANT LA'QUETTA SMALL'S MOTION TO DISMISS THE INDICTMENT SHOULD BE GRANTED BASED ON THE STATE'S FAILURE TO PROVIDE EXCULPATORY EVIDENCE.

A prosecutor is obligated to present exculpatory evidence to a grand jury. State v. Hogan, 144 N.J. 216 (1996). "In order to perform that vital protective function, the grand jury cannot be denied access to evidence that is credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a *prima facie* case against the accused." Id. at 236. The Hogan court concluded that a prosecutor must present exculpatory evidence that satisfies two requirements: 1.) it must directly negate guilt, and 2.) it must also be

clearly exculpatory. Id. at 237. Evidence "directly negates guilt" when the exculpatory evidence "squarely refutes an element of the crime in question." Id. Evidence is "clearly exculpatory" when the reliability of the evidence can be established. Id.

Herein, [redacted] See **Exhibit B** to Counsel's Certification, a copy of the DCP&P report, p. 41. [redacted] a report from [redacted] of the [redacted] that indicated [redacted] had [redacted] that [redacted] that [redacted] of ACHS. See **Exhibit B**, p.42, 21, 28.

The State's failure to present several of [redacted] which were reliable and directly exculpatory evidence, amounted to an "intentional subversion" of the grand jury process. State v. Murphy, 110 N.J. 20, 35, 538 A.2d 1235 (1988). By preventing the grand jury from knowing of [redacted] the State deceived the grand jury and presented its evidence in a way that was tantamount to telling the grand jury a half-truth. Hogan, *supra*, 144 N.J. at 236. Thus, the grand jury could not perform its vital function of protecting Defendant La'Quetta Small from the inappropriate zeal on the part of a prosecutor. The grand jury was improperly denied access to credible material evidence, and it was so clearly exculpatory that it would induce a rational grand juror to conclude that the State had not made out a prima facie case against the accused for the

EWOC charge. The State, in essence, presented a distorted version of the facts and interfered with the grand jury's decision-making function. Its manipulated presentation of evidence substantially influenced the grand jury's decision to indict on EWOC, and there is grave doubt that the grand jury's determination with respect to that count against Defendant La'Quetta Small was arrived at fairly and impartially. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988). A fair determination of the issues of harm, abuse, unreasonable corporal punishment, impairment, and a minimum degree of care require the State to provide evidence as to each of these elements so that the grand jury can make a fair and reasonable determination. That did not occur here.

The purposes of the grand jury extend beyond bringing the guilty to trial. Equally significant is its responsibility to "protect[] the innocent from unfounded prosecution." State v. Murphy, 110 N.J. 20, 29 (1988). As the court wrote in Hogan, "We have recognized that the grand jury is the "primary security to the innocent against hasty, malicious and oppressive persecution," Del Fino, 100 N.J. 154, 164 (1985) (quoting Wood v. Georgia, 370 U.S. 375, 390 (1962)), and that it serves the invaluable function of determining "whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Ibid. (quoting United States v. Provenzano, 688 F.2d 194, 202 (3d Cir.) (quoting Wood, *supra*, 370 U.S. at 390), cert. denied, 459 U.S. 1071 (1982)). Thus, the grand jury's "mission is to clear the innocent, no less than to bring to trial those who may be guilty." State v. Hart, 139 N.J. Super. 565 (App. Div.1976) (quoting United States v. Dionisio, 410 U.S. 1, 16-17 (1973)." Id. at 228. On this point, the Court should recall that the grand jurors were advised on over seven different occasions in a redundant manner of the alleged abuse by Defendant Marty Small in which Defendant La'Quetta Small was not involved.

In order for the grand jury to perform its vital function of "protect[ing] persons who are victims of personal animus, partisanship, or inappropriate zeal on the part of a prosecutor[,]" the grand jury cannot be denied access to evidence that is credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a prima facie case against the accused. If evidence of that character is withheld from the grand jury, the prosecutor, in essence, presents a distorted version of the facts and interferes with the grand jury's decision-making function. Ibid. [redacted] withheld from the grand jury. [redacted] grand jurors of [redacted] See **Exhibit B** to Counsel's Certification, a copy of the DCP&P report, p. 41. [redacted] from [redacted] of the [redacted] that indicated [redacted] that [redacted] See **Exhibit B**, p.42, 21, 28.

An indictment may be dismissed upon a palpable showing of manifest deficiency, State v. Wein, 80 N.J. 491, 501, 404 A.2d 302 (1979), or upon a showing that the conduct of the prosecutor amounted to an "intentional subversion" of the grand jury process. State v. Murphy, 110 N.J. 20, 35, 538 A.2d 1235 (1988). Consequently, "dismissal of the indictment is appropriate 'if it is established that the violation substantially influenced the grand jury's decision to indict,'" or if

there is "grave doubt" that the determination ultimately reached was arrived at fairly and impartially. Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988). Again, there was no evidence of physical or mental injuries or harm, no medical evidence or expert opinion as to these required elements.

In the instant matter, the grand jury was deceived. There is grave doubt that the determination with respect to the charge of EWOC against Defendant La'Quettaa Small was reached fairly and impartially. Thus, Defendant La'Quetta Small has presented a palpable showing of manifest deficiency on the part of the State, and the indictment against her should be dismissed.

## IV. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE GRANTED BASED ON THE STATE'S FAILURE TO SEVER THE INDICTMENTS AGAINST DEFENDANT LA'QUETTA SMALL AND DEFENDANT MARTY SMALL WHICH CAUSED UNDUE PREJUDICE AGAINST DEFENDANT LA'QUETTA SMALL.

R. 3:7-7 provides that:

> Two or more defendants may be charged in the same indictment or accusation if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count. The disposition of the indictment or accusation as to one or more of several defendants joined in the same indictment or accusation shall not affect the right of the State to proceed against the other defendants. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

When it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation, the Court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief. State v. Chenique-Puey, 145 N.J. 334, 341 (1996), citing State v. Briley, 53 N.J. 498, 503 (1969); see also, R. 3:15-2(b). While there is a "general preference" to try co-defendants jointly, "nevertheless, a single joint trial, however, desirable from the point of view of efficient and expeditious criminal

adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." State v. Sanchez, 143 N.J. 273, 290 (1996).

R. 3:15-2 provides an avenue for separate trials where defendants may be prejudiced by being tried jointly:

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.

R. 3:15-2(b).

Separate trials are necessary when the co-defendants' defenses are "antagonistic and mutually exclusive or irreconcilable." State v. Brown, 170 N.J. 138, 160 (2001), quoting State v. Brown, 118 N.J. 595, 605-06 (1990). "Central to the inquiry is 'whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges.'" Chenique-Puey, *supra*, 145 N.J. at 341, quoting State v. Pitts, 116 N.J. 580, 601-02 (1989). The rationale of this approach is that "[i]f the evidence would be admissible at both trials, then . . . 'a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.'" Chenique-Puey, *supra*, 145 N.J. at 341, quoting State v. Coruzzi, 189 N.J. Super. 273, 299 (App. Div.), *certif. denied*, 94 N.J. 531 (1983). This central or core antagonism concept is sometimes called the "mutual exclusivity of defenses." Brown I, 118 N.J. at 606. "When . . . the jury can reasonably accept the core of the defense offered by either defendant only if it rejects the core of the defense offered by his co-defendant, the defenses are sufficiently antagonistic to mandate separate trials." Ibid. Conversely, "[i]f the jury can return a verdict against one or both defendants by believing neither, or believing portions of both, or, indeed, believing both completely, the defenses are not mutually exclusive." Ibid.

Here, it is self-evident that the offenses allegedly committed by Defendant La'Quetta Small in early December 2023 and allegedly in early January 2024, and those offenses allegedly committed by Defendant Marty Small in mid-December 2023 and mid-January 2024 are factually and legally distinct. As a matter of law enforcement tactics, these alleged offenses may have followed a similar investigation path, but for purposes of obtaining indictments, the only thing they have in common is that Defendant La'Quetta Small and Defendant Marty Small are [redacted] to the alleged victim, [redacted] The State's burden against Defendant Marty Small for the charge of aggravated assault required evidence showing that Defendant Marty Small caused *significant bodily injury to* [redacted] *manifesting an extreme indifference to the value of human life*. See **Exhibit A**, T6:12-7:10. In presenting such alleged evidence against Defendant Marty Small; the State failed to appreciate the inherent undue prejudice to Defendant La'Quetta Small because the grand jury likely improperly relied upon the evidence of alleged significant injuries caused by Defendant Marty Small against Defendant La'Quetta Small. By presenting the evidence of offenses alleged to have occurred at different times by a different defendant and involving differing standards to establish a prima facie case to the grand jury in one hearing, the State caused Defendant La'Quetta Small to suffer undue prejudice and denied her a fair hearing.

The Supreme Court has noted:

> The relief afforded by Rule 3:15-2(b) addresses the inherent "'danger[,] when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all.'" A court must assess whether prejudice is present, and its judgment is reviewed for an abuse of discretion. The test for assessing prejudice is "whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges." N.J.R.E. 404(b) requirements must be met, and the evidence of other crimes or bad acts must be "relevant to prove a fact genuinely in dispute and the evidence is necessary as proof of the disputed issue[.]"

State v. Sterling, 215 N.J. 65, 73 (2013) (alteration in original) (citations omitted). The first step in addressing these concerns expressed by the Court in Sterling is to determine whether evidence related to the alleged Aggravated Assault by Defendant Marty Small would have been admissible against Defendant La'Quetta Small if a separate grand jury hearing was held charging her with a single violation of the EWOC statute. The answer is a simple no.

Evidence of other crimes or bad acts excluded at the joint trial must be "relevant to prove a fact genuinely in dispute, and the evidence is necessary as proof of the disputed issued." State v. Darby, 174 N.J. 509, 518 (2002), quoting State v. Hernandez, 170 N.J. 106, 118-19 (2001). At its core, severance involves balancing "the potential prejudice to defendant's due process rights against the State's interest in judicial efficiency." Brown I, 118 N.J. at 605, quoting State v. Coleman, 46 N.J. 16, 24 (1965).

N.J.R.E. 404(b) states:

> Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

The Supreme Court established a four-prong test to determine the admissibility of evidence under N.J.R.E. 404(b):

1. The evidence of the other crime must be admissible as relevant to a material issue;
2. It must be similar in kind and reasonably close in time to the offense charged;
3. The evidence of the other crime must be clear and convincing; and
4. The probative value of the evidence must not be outweighed by its apparent prejudice.

State v. Cofield, 127 N.J. 328, 338 (1992).

The first prong requires the evidence of the crime to be relevant to a material issue. The evidence of the alleged mid-January 2024 aggravated assault by Defendant Marty Small is not relevant to any material issue related to the alleged early December 2023 and early January 2024 incidents allegedly supporting the EWOC charge against Defendant La'Quetta Small. The alleged mid-January 2024 aggravated assault charge involved allegations that Defendant Marty Small [redacted] This alleged incident with the [redacted] involved allegations of serious and significant bodily injury. Moreover, the State presented evidence of the alleged [redacted] and its injuries to grand jurors *at eight (8) different instances of testimony*. It was repeated over and over to the grand jury. Thus, it is reasonable and likely that the grand jury considered the evidence of alleged serious or significant bodily injury to [redacted] allegedly perpetrated by Defendant Marty Small through the use of a broom, in their deliberations regarding whether Defendant La'Quetta Small violated the EWOC statute. Defendant La'Quetta Small was prejudiced in the joint indictment, which violated her right to due process and a fair trial. Their defenses were antagonistic and mutually exclusive. Most importantly, *the State never informed the grand jurors that evidence presented against Defendant Marty Small should not be considered evidence against Defendant La'Quetta Small*. Defendant La'Quetta Small had no involvement whatsoever in the alleged aggravated assault involving the broom on January 13, 2024. No curative instruction was given to address any potential prejudice. See State vl Freeman, 64 N.J. 66, 68-69 (1973) (The separate status of co-defendants can be preserved with proper instructions to the jury).

Thus, the indictment must be dismissed based on the undue prejudice caused by the joinder of these crimes. State v. Sterling, *supra*, 215 N.J. at 72.

## V. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT SHOULD BE GRANTED BECAUSE THE STATE'S DECISION TO PROSECUTE DEFENDANT LA'QUETTA SMALL FOR THE SECOND-DEGREE OFFENSE UNDER N.J.S.A. 2C:24-4a WAS ARBITRARY AND CAPRICIOUS. N.J.S.A. 2C:24-4a IS FACIALLY IMPROPER AND VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Uniformity in sentencing is one of the paramount goals of the Code of Criminal Justice (Code). State v. Lagares, 127 N.J. 20, 31 (1992). As noted above, child abuse and neglect are criminalized in two separate statutes. First, N.J.S.A. §9:6-3, which is part of the Child Welfare Act, states, in relevant part:

> Any parent, guardian, or person having the care, custody, or control of any child who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be guilty of a crime of the fourth degree.

N.J.S.A. §9:6-3.

The child endangerment section of the Code incorporates the standards of N.J.S.A. §9:6-3, raising child abuse and neglect to a second-degree offense:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct that would impair or debauch the morals of the child or who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, R.S. 9:6-3and P.L. 1974, c. 119, s.1 (C.9:6-8.21 ) is guilty of a crime of the second degree.
>
> N.J.S.A. §2C:24-4a.

Child abuse and neglect constitute a fourth-degree crime under N.J.S.A. §9:6-3 and a second-degree crime under N.J.S.A. §2C:24-4a. The two identical statutes require proof of the same "knowing" level of mental culpability. State v. Demarest, 252 N.J. Super. 323, 333 (App.Div.1991). The jury instructions for each are the same. State v. N.A., 355 N.J. Super 143, 153 (App.Div.2002), *certif. denied*, 175 N.J. 434(2003). However, when prosecuted pursuant to N.J.S.A. §2C:24-4(a), a defendant is exposed to a five to ten-year state prison term; when

prosecuted pursuant to N.J.S.A. §9:6-3, a defendant is exposed only to an eighteen-month prison term. D.A.V., *supra*, 176 N.J. at 338.

In 2001, in a concurring opinion, the New Jersey Supreme Court in State v. D.A.V. admonished the State for its failure to have standards to guide prosecutorial discretion in selecting under which statute to prosecute a defendant. State v. D.A.V., 176 N.J. 338, 340 (2001). In D.A.V., the concurring opinion acknowledged that while the State controls the charging process, the Court's deference to that power does not "abdicate its power to promote uniformity in sentencing." Id. at 341, citing Lagares, *supra*, 127 N.J. at 27-28 and State v. Leonardis (Leonardis II), 73 N.J. 360, 381 (1977). "In furtherance of that imperative, which is grounded in fundamental fairness, [the] Court has required prosecutors to be guided by uniform guidelines and subject to judicial review on decisions implicating the ultimate sentence of a defendant." Id. at 342. "Permitting prosecutors to choose at their whim whether to charge between identical child abuse and neglect statutes, one with a maximum range of eighteen months and the other ten years in prison, "would add undue variability, inevitable inconsistency, and greater disparity to the sentencing process." Id., citing State v. Brimage, 153 N.J. 1, 12 (1998), quoting State v. Warren, 115 N.J. 433, 449 (1989). The concurring opinion in D.A.V. concluded that "the Attorney General should adopt new guidelines to assure uniformity among the twenty-one counties." Id. at 343. The guidelines should be "sufficient to guide the discretion of prosecutors so that rational distinctions are made in applying the appropriate statute." Id. The Court wrote,

> Without such guidance, it is inevitable that glaring disparities will arise as different prosecutors and different prosecutor's offices choose between the two statutes based on personal preference or philosophy rather than an objective distinction. A proper respect for the function of coordinate branches of government, the judiciary and the executive, can be achieved by standards that promote uniform sentencing policies. Guidelines that facilitate fairness in the charging process and, therefore, fairness in sentencing with respect to those statutes will likely avert a future constitutional challenge.

The New Jersey Supreme Court issued the concurring opinion in State v. D.A.V. over twenty years ago. Yet the State has failed to follow the Court's direction. The State has never issued guidelines for prosecutors to follow when deciding when to charge a defendant with a fourth-degree crime under N.J.S.A. 9:6-3 or a second-degree crime under N.J.S.A. 2C:24-4a.

Approximately one year after issuing the concurring opinion in D.A.V., the Supreme Court denied certification to the Appellate Court's decision in State v. T.C., 347 N.J. Super. 219 (App. Div. 2002), certif. denied, 177 N.J. 222 (2003), which ruled that "there is no constitutional infirmity in the fact that N.J.S.A. §2C:24-4(a) is substantively identical to N.J.S.A. §9:6-3." Id. at 229-231. However, the T.C. Court also recognized that "there is some limitation on prosecutorial discretion in this context and that the Court will interfere when the prosecutor's conduct is 'arbitrary, capricious or otherwise constitutes a patent or gross abuse of discretion.'" Id. at 116. The T.C. Court noted that "the Supreme Court [in D.A.V.] affirmed this Court's holding and Justice Albin, in his concurring opinion, urged the Attorney General to "promulgate guidelines to assist prosecutors in choosing whether to prosecute a defendant under N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3. . . [Justice Albin] emphasized that such guidelines must 'guide the discretion of prosecutors so that rational distinctions are made in applying the appropriate statute.' . . . In the absence of such guidelines, Justice Albin concluded that 'similarly situated defendants' will inevitably be charged disparately and suffer disparate sentences under those identical statutes." T.C., 348 N.J. Super. at 339.

In the unpublished opinion of State v. M.K.C., 2006 N.J. Super. LEXIS 114, (a copy of which is attached to Counsel's Certification), the Court cited D.A.V. and T.C. It concluded that "[w]hile Justice Albin's recommendation [in D.A.V.] is sound, current New Jersey law grants prosecutors the discretion to seek a conviction under the more serious provision." The M.K.C.

Court then ruled that because the "*peril was of life-threatening dimension*," it "fully justifies the prosecutorial decision to charge the more serious offense [of N.J.S.A. §2C:24-4(a) and not N.J.S.A. §9:6-3]." M.K.C., at *16-17. {Emphasis added.} Here, even viewing the evidence in a light most favorable to the State, there is no proof that Defendant La'Quetta Small ever put [redacted] life in danger. There is no evidence to establish the "peril" to [redacted] "was of life-threatening dimension."

Aside from the unpublished opinion in M.K.C., there is very little case law establishing when or how the State should decide whether to prosecute under N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3. In State v. D.V., 348 N.J. Super. 107 (App. Div. 2002), the Court wrote, "Those prosecuted for violation of N.J.S.A. 9:6-3 are arguably guilty of ***less egregious or repetitive criminal conduct*** than those confronted with the second-degree penalties of N.J.S.A. 2C:24-4a." Id. at 116. In State v. D.W.S., 2015 N.J. Super. Unpub. LEXIS 2995 (a copy of which is attached to Counsel's Certification), the Court wrote, "There is a ***continuum of behavior*** that may satisfy the child abuse and neglect statutes, [N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3]. In State v. L.G.R., 2104 N.J. Unpub. LEXIS 2828, (a copy of which is attached to Counsel's Certification), the Court affirmed "amendments to [N.J.S.A. §2C:24-4(a) and N.J.S.A. §9:6-3] in the intervening years evince a legislative intent that both statutes are to be preserved perhaps to provide prosecutors the option of charging a lesser offense ***under appropriate circumstances***." L.G.R., at *10.

However, for more than twenty years since the Supreme Court's concurring opinion in D.A.V., no Court has provided a definition or explanation of what the "***less egregious or repetitive criminal conduct*** would be, or an explanation of the "***continuum of behavior"*** to consider or what "***appropriate circumstances***" should be considered by the prosecutor in deciding whether to charge a defendant with the second-degree or fourth degree EWOC status. Because of this utter

lack of precedent or established guidelines, a defendant is without adequate resources to show that the State is violating the "well-settled rule" that when an act violates more than one statute, the State may prosecute under either so long as "it does not discriminate against any class of defendants." State v. Moorer, 448 N.J. Super. 94, 104 (App. Div. 2016). Without any guidelines, as called for by the Supreme Court more than twenty years ago in D.A.V., and without any precedential opinions, there is no basis for a defendant to challenge the "discretionary decision vested and exercised by prosecutors on an everyday basis." T.C., *supra*, 347 N.J. Super. at 231. Without any guidelines or precedential opinions, there is no way for a defendant to challenge or assert a discriminatory motive regarding the "fundamental responsibility of the prosecutor to decide whom to prosecute and what charges to consider." D.V., *supra*, 348 N.J. Super. at 114-115.

In United States v. Batchelder, 442 U.S. 114, 123-124 (1979) and in State v. Kittrell, 145 N.J. 112, 127-128 (1996), the Courts concluded:

> The discretionary authority of the prosecutor in the enforcement of criminal laws is well-settled. It is the fundamental responsibility of the prosecutor to decide whom to prosecute and what charges are to be considered. ***The factual complex, the conduct of defendant and the extent of sentencing exposure are relevant considerations for the prosecutor to consider.*** . . . [w]hen "an act violates more than one criminal statute, the Government may prosecute against either so long as it does not discriminate against any class of defendants." {Emphasis added.}

Without any guidelines for the prosecutor to consider, a defendant is without any recourse to fundamentally be assured that the prosecutor did adequately analyze the "factual complex, the conduct of the defendant, and the extent of the sentencing exposure" as relevant considerations in deciding whether to charge N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3.

In United States v. Jackson, 862 F.3d 365 (3rd Cir. 2017), the federal Court accurately summed up how one should view the EWOC statutes in New Jersey, and wrote,

> . . . Turning to the New Jersey statutory scheme, the District Court aptly observed that "***we are dealing with a less than clear statute***." . . . which "***is very***

> ***unsatisfactory . . . really a morass***" . . . Specifically, N.J. Stat. Ann. § 2C:24-4(a) ("Endangering welfare of children") incorporates definitions of basic concepts like abuse and neglect from various provisions of Title 9 of the New Jersey Statutes Annotated . . . See, e.g., N.J.S.A. §§ 9:6-1 (Abuse, abandonment, cruelty and neglect of child; what constitutes), 9:6-3 (Cruelty and neglect of children; crime of fourth degree; remedies), 9:6-8.21 (Definitions); State v. N.I., 349 N.J. Super. 299, (App. Div. 2002) (The imprecision of the Title 9 definitions incorporated into N.J.S.A. 2C:24-4(a), which caused the [Criminal Law Revision] Commission to be '***not happy***' ***and to recommend the statute only "[w]ith hesitancy," has come home to roost in this case.*** It would, of course, be best if N.J.S.A. 2C:24-4(a) was self-contained with its own appropriate and precise definitions.. . . Furthermore, it appears that the same conduct may be prosecuted under § 2C:24-4(a) as a crime of the second degree (which happened here) or as a fourth-degree crime under N.J. Stat. Ann. § 9:6-3. . . . In that respect, it appears that those provisions are unique in the New Jersey Statutes Annotated. . . . [The statutes are] an admittedly complicated state statutory scheme.
>
> Id at 377, 386.

This matter is akin to the Court's analysis in State v. A.T.C., 239 N.J. 450 (2019), wherein the Court was faced with a facial constitutional challenge, premised on a separation of powers, to the Jessica Lunsford Act (JLA), N.J.S.A. §2C:14-2(a),(d). In A.T.C, the Court cited State v. Lagares, 127 N.J. 20 (1992) and State v. Vasquez, 129 N.J. 189 (1992) extensively and wrote, "The separation of powers question considered in this appeal arises in the context of criminal sentencing, a function that 'does not fit neatly within a single branch of government.'" A.T.C., *supra*, 239 N.J. at 467, citing Lagares, *supra*, 127 N.J. at 27. The A.T.C. Court noted that the Legislature is constitutionally empowered to define crimes and establish the appropriate punishment for their commission. That authority includes mandate imprisonment for certain crimes, leaving no judicial discretion. Ibid; see also State v. Cannon, 128 N.J. 546, 563 (1992). As a member of the executive branch, the sentencing prerogatives of the prosecutor include determining the extent of a defendant's sentencing exposure when deciding what charges will be brought. Lagares, *supra*, 127 N.J. at 27; see also State v. Moorer, 448 N.J. Super. 94, 104 (App. Div. 2016). "Notwithstanding the important roles of the coordinate branches in sentencing, however, the determination of "[a]

criminal sentence is always and solely committed to the discretion of the trial court to be exercised within the standards prescribed by the Code of Criminal Justice." State v. Hess, 207 N.J. 123, 151 (2011), quoting State v. Warren, 115 N.J. 433, 447 (1989); See also Lagares, *supra*, 127 N.J. at 27-28.

In Lagares, the Court ruled that the absence of guidelines or "any avenue for effective judicial review" would render the statutes unconstitutional. Id. at 31. It explained:

> Where the Legislature has permitted the executive to select defendants for enhanced punishment or favorable treatment, this Court has generally required that decision-making be carried out in a fashion that limits potential arbitrariness. In addition, we have required that the judiciary retain the power to review prosecutorial decisions to avoid abuses of discretion.

Id. at 28. The Court imposed three requirements to interpret the statute in Lagares as constitutional. Id. at 32. First, the Court interpreted the statute to require that Guidelines be adopted to assist prosecutorial decision-making with respect to applications for enhanced sentences. Second, the Court required prosecutors to state the reasons for seeking an extended sentence on the trial court record to permit effective review of prosecutorial sentencing decisions. Ibid. Finally, the Court concluded that the Legislature had not intended "to circumvent the judiciary's power to protect defendants from arbitrary application of enhanced sentences" and thus confirmed that "an extended term may be denied or vacated" upon a showing that the prosecutor's decision to seek that sentence was arbitrary and capricious. Id. at 33. Following the Court's decision in Lagares, the Attorney General issued a Directive establishing guidelines governing the exercise of prosecutorial discretion under the statute.

Similarly, in State v. Vasquez, 129 N.J. 189 (1992), the defendant argued that the Legislature's grant of prosecutorial discretion contravened the separation of powers principles. Id. at 195. The A.T.C. Court wrote,

> The Court viewed the separation of powers issue in Vasquez to be "similar to that resolved in Lagares" and concluded that "the same interpretation is appropriate.". . . It construed N.J.S.A. 2C:35-12 to preserve judicial authority to reject a plea bargain or post-conviction agreement that waived, or did not waive, the statutory parole disqualifier in the event that the prosecutor's discretion was exercised in an arbitrary or capricious manner:
>
> > Judicial oversight is mandated to protect against arbitrary and capricious prosecutorial decisions. To that end, the prosecutor should state on the record the reasons for the decision to waive or the refusal to waive the parole disqualifier. A defendant who shows clearly and convincingly that the exercise of discretion was arbitrary and capricious would be entitled to relief. Those standards prevent the legislative goal of uniformity in sentencing from being undermined by unreviewable prosecutorial discretion.
>
> So interpreted, the statute does not violate the doctrine of separation of powers, and we reject defendant's contrary contention. (Citations omitted).

Vasquez, *supra,* 129 N.J. at 196-97. After the Vasquez decision, the Attorney General issued plea-bargaining Guidelines for the drug offense sentencing statutes. A.T.C., *supra*,239 N.J. at 473. Subsequently, the Court reviewed the Attorney General's Guidelines for plea bargaining in State v. Brimage, 153 N.J. 1, 13 (1998) and found that same "fell short of the mark." Brimage, *supra*, 153 N.J. at 14-15, because the Guidelines allowed for an impermissible "intercounty disparity," which violated the goals of uniformity in sentencing. The Brimage Court concluded that the Guidelines "not only fail[] on statutory grounds but also threaten the balance between prosecutorial and judicial discretion required under Vasquez, 129 N.J. 189. The Guidelines failed to appropriately channel prosecutorial discretion, thus leading to an arbitrary and unreviewable difference between different localities." Brimage, *supra*, 153 N.J. at 22-23. The Brimage Court ordered the Attorney General to promulgate new plea bargain Guidelines to correct that disparity. Brimage, *supra*, 153 N.J. at 24-25. "[T]o permit effective judicial review, the Court required that prosecutors state on the record their reasons for choosing to waive or not to waive the mandatory

minimum period of parole ineligibility specified in the statute, and their reasons for any departure from the guidelines." Ibid.

Based on the Court's analysis in Larages, Vasquez, and Brimage, the Court in A.T.C., derived three core principles necessary to uphold the separation of powers involving statutes granting sentencing discretion to prosecutors. The A.T.C. Court wrote,

> First, the Attorney General must promulgate uniform statewide guidelines designed to channel that discretion and minimize sentencing disparity between counties, taking into account the legislative objective in the sentencing statute.
>
> . . . Second, to facilitate effective judicial review, the prosecutor must provide a written statement of reasons for his or her exercise of prosecutorial discretion.
>
> . . . Third, the sentencing court maintains oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner.
>
> . . . Those three procedural safeguards allow for effective judicial review of the prosecutor's exercise of discretion granted by the Legislature, thus satisfying separation of powers principles. As we recently noted in the context of prosecutorial decisions whether to waive mandatory minimum sentences pursuant to the Graves Act, N.J.S.A. 2C:43-6.2, courts are in a position to conduct meaningful judicial review where 'prosecutors are guided by standards, inform defendants of the basis for their decisions, and are subject to judicial oversight.' State v. Benjamin, 228 N.J. 358, 373, 157 A.3d 427 (2017).
>
> . . .We hold that the JLA does not violate the separation of powers doctrine, provided that the State presents a statement of reasons explaining its decision to depart from the twenty-five year mandatory minimum sentence specified in N.J.S.A. 2C:14-2(a), and the court reviews the prosecutor's exercise of discretion to determine whether it was arbitrary and capricious. So that the standard we adopt today may be applied in this matter, we remand to the sentencing court for further proceedings in accordance with this opinion.
>
> A.T.C., *supra*, 239 N.J. at 473-476.

Over twenty years ago, the New Jersey Supreme Court instructed the Attorney General to issue Guidelines on how, when, and why prosecutors choose to charge a defendant with either a second-degree or fourth-degree violation of EWOC. There is no dispute that in deciding whether to charge a second-degree violation of EWOC or a fourth-degree EWOC, the ***only difference***

***between the two statutes is sentencing.*** Thus, following the Court's analysis in Larages, Vasquez, Brimage, and most recently in A.T.C., Defendant La'Quetta Small asserts that until the Attorney General promulgates uniform statewide Guidelines that require prosecutors to provide a written statement of reasons for his or her exercise of prosecutorial discretion which allows the Court to maintain oversight to ensure that prosecutorial discretion is not exercised in an arbitrary and capricious manner, N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3 must be found by the Court to be facially impermissible and a violation of the separation of powers. Without such Guidelines, defendants are subject to the whims of individual prosecutors who can decide without any guidelines or parameters to charge a defendant with a second-degree EWOC or a fourth-degree EWOC offense.

Herein, Defendant La'Quetta Small is the victim of such arbitrary and capricious conduct on the part of the State. There is no evidence of *any* injury or harm to [redacted] in early December 2023 or January 2024, let alone any evidence of serious or significant bodily injury to [redacted] There is no evidence that [redacted] life was ever in danger. In fact, the grand jury was never even told that [redacted] was a difficult and rebellious teenager and that Defendant La'Quetta Small had [redacted] right to discipline [redacted] when she believed it was in [redacted] best interest. There was no evidence against Defendant La'Quetta Small involving *excessive corporal punishment*. These were isolated incidents between Defendant La'Quetta Small and [redacted] in early December 2023 and January 2024 that do not indicate a pattern of behavior. It is clear from a review of the evidence, in a light most favorable to the State, that no basis exists for the State to charge Defendant La'Quetta Small with the second-degree EWOC offense rather than the fourth-degree EWOC offense. The State's actions were arbitrary and capricious, so the indictment must be dismissed. The State's reliance

upon N.J.S.A. §2C:24-4(a) or N.J.S.A. §9:6-3, which are facially invalid, was in error. The indictment must be dismissed.

## CONCLUSION

For all of the above reasons, it is respectfully requested that Defendant La'Quetta Small's motion to dismiss the indictment should be granted.

Respectfully submitted,

Date: 1/27/25

s/**Michael H. Schreiber**
Michael H. Schreiber, Esq.

# Exhibit C

# *State v. D.W.S.*

Superior Court of New Jersey, Appellate Division

August 26, 2015, Submitted; December 24, 2015, Decided

DOCKET NO. A-0502-14T2

**Reporter**
2015 N.J. Super. Unpub. LEXIS 2995 *

STATE OF NEW JERSEY, Plaintiff-Appellant, v. D.W.S., Defendant-Respondent.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Burlington County, Indictment No. 14-02-0190.

## Core Terms

sentence, imprisonment, probation, injustice, second-degree, deterrence, mitigating factors, circumstances, convictions, downgrade, ***corporal punishment***, conditioned, deter, third-degree, overrides, aggravating factor, parenting class, trial court, incarceration, monitor, jail, discipline, severe

**Counsel:** Robert D. Bernardi, Burlington County Prosecutor, attorney for appellant (Jennifer B. Paszkiewicz, Assistant Prosecutor, of counsel and on the brief).

Respondent has not filed a brief.

**Judges:** Before Judges Ostrer and Carroll.

## Opinion

PER CURIAM

This is a sentencing appeal by the State. Defendant entered an open plea of guilty to one count of second-degree endangering the welfare of a child, *N.J.S.A. 2C:24-4(a)*. The court downgraded the sentence to the third-degree range, *see N.J.S.A. 2C:44-1(f)(2)*, and then imposed a sentence of three years probation, conditioned on 364 days imprisonment and other conditions, notwithstanding the presumption of incarceration. *See N.J.S.A. 2C:44-1(d)*. The State does not challenge the court's decision to sentence defendant as a third-degree offender. However, the State contends that the facts and circumstances did not justify departure from the presumption of imprisonment. We agree.

I.

It is undisputed that defendant struck his four-year-old daughter, K.S., repeatedly with his belt on April 10, 2013. He did so to discipline her for kicking a student, and then a teacher, at school that day. Defendant initially struck K.S. on the **[*2]** legs, but as she moved, his blows landed on her back. K.S. screamed, cried, and ran away from him. A school employee noticed K.S.'s bruises the next day and notified the Division of Child Protection and Permanency

(DCPP), which became involved with the family.[1] Defendant was apparently removed from the household and required to attend parenting classes. He was ultimately allowed to return to the household in March 2014.

A Burlington County grand jury indicted defendant in February 2014. Defendant was charged with second-degree endangering, in that, while having a duty to care for K.S., he caused her harm that would make her an abused or neglected child as defined in N.J.S.A. 9:6-1, -3 and -8.21, N.J.S.A. ***2C:24-4(a)*** (count one); and fourth-degree child abuse, in that he willfully inflicted unnecessarily severe ***corporal punishment*** and/or caused mental or physical pain to be inflicted upon K.S. by willful act, N.J.S.A. 9:6-3 (count two).

On the eve of trial, defendant entered his open plea. **[*3]** It was understood that defendant would seek a downgraded sentence as a third-degree offender with a probationary term, conditioned upon no more than 364 days in the Burlington County jail; and the State would seek a sentence within the third-degree range of three to five years. Defendant acknowledged in the plea form that he was pleading guilty to a crime with a presumption of imprisonment. The court did not indicate on the record its intention with respect to sentencing.[2]

At sentencing on September 12, 2014, the State argued for a sentence of five years imprisonment. The State **[*4]** emphasized defendant's prior criminal record. Defendant was fifty-one years old, and had three prior indictable convictions, and three municipal court convictions. His criminal convictions consisted of: fourth-degree criminal sexual contact in 1990, for which he received one year probation; multiple drug offenses in 1990, including, most seriously, first-degree distribution, for which he received a twenty-five-year sentence in 1996; and another first-degree drug offense in April 1993, for which he was sentenced to a concurrent fifteen-year term. He was paroled in 2003, and "maxed out" in 2010. After being paroled, defendant was convicted in municipal court in 2004 of simple assault, for which he received one year probation, conditioned on forty-five days jail, suspended; violating a fish and wildlife regulation in 2006, for which he was fined; and obstructing the administration of law, in 2007, for which he was fined. Also, in 2004, a domestic violence restraining order was entered against defendant.

Defense counsel argued for a sentence of probation conditioned on 364 days in jail. He asserted that the ***corporal punishment*** that defendant meted out was once considered socially acceptable; **[*5]** K.S. did not suffer significant injury; and defendant had completed parenting classes and otherwise satisfied DCPP that it was appropriate for him to be reunified with K.S. and his family. Acknowledging defendant's prior record, counsel argued that defendant had "no problems for 10 years," had quit dealing drugs, gotten married, and was employed. At the sentencing hearing, defendant apologized, expressed his remorse, stated that he had learned that the ***corporal punishment*** he meted out was inappropriate, and acknowledged that there were preferable ways to discipline and teach his daughter.

The court found aggravating factors three and nine, N.J.S.A. 2C:44-1(a)(3) (risk of reoffending) and -1(a)(9) (need to deter defendant and others). The court rejected the State's suggestion that the court also find factors one, N.J.S.A. 2C:44-1(a)(1) (nature and circumstances of the offense); two, -1(a)(2) (the gravity and seriousness of harm inflicted and the vulnerability of the victim); and six, -1(a)(6) (extent of defendant's criminal record and seriousness of the offenses of which he has been convicted). The court found that K.S.'s injuries were not severe enough to justify finding factors one or two; and defendant's convictions were too **[*6]** remote to find factor six.

The court also found mitigating factors two, N.J.S.A. 2C:44-1(b)(2) (defendant did not contemplate his conduct would cause or threaten serious harm); four, -1(b)(4) (substantial grounds tending to excuse or justify defendant's conduct, though not a defense); eight, -1(b)(8) (defendant's conduct resulted from circumstances unlikely to recur); nine, -1(b)(9) (defendant's character and attitude indicate he's unlikely to reoffend); and ten, -1(b)(10) (defendant is likely to

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[1] The record does not clearly reflect the extent of K.S.'s injuries. Photographs were apparently presented to the sentencing court, but they are not included in the record before us. Defendant admitted in his allocution that he left bruises on his child.

[2] It is unclear whether the court indicated its tentative intention in another setting. Question 22 of the plea form, regarding any other promises, was not completed, but the box for "non-negotiated pleas" was also blank. During the plea hearing, counsel and the court discussed prior plea negotiations, in which the court apparently expressed a willingness to sentence defendant to a probationary term conditioned on 270 days imprisonment. At sentencing, the court confirmed that it had expressed its intention to impose probation conditioned on 364 days, but it was unclear whether the court did so in advance of the plea.

respond affirmatively to probation). With respect to factor two, the court noted that defendant had tried other forms of discipline, and believed ***corporal punishment*** was needed, although the court emphasized it was not appropriate. The court applied factor four because defendant viewed his behavior as appropriate discipline, as opposed to abuse, which the court viewed as an explanation, though not a justification, for his actions. The court found factors eight and nine because defendant had completed parenting classes while separated from his family, before securing reunification through DCPP.

In imposing a sentence in the third-degree range, and in departing from the presumption of imprisonment otherwise required **[*7]** by *N.J.S.A. 2C:44-1(d)*, the court stated:

> In weighing the aggravating and mitigating factors on a qualitative as well as a quantitative basis, this Court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors, but I must go further. On the downward departure, I must also find that there are compelling reasons to downgrade your sentence such that the interests of justice demand a downgrade and that's really what [counsel] was referring to in terms of the Court has to go beyond that to overcome that presumption of imprisonment even on the downgrade under the case law and I do find those compelling reasons are present in this case and let me address those.
>
> In sentencing the Court does abide by a principle of first do no harm. This Court is aware that you had also been monitored through DCPP for quite an extended period of time. You did have to undergo parenting classes, although in a moment I'll get to the proof of that, you're going to have to supply that to the Court as part of your probation. I get to monitor you under probation which wouldn't happen also in a state prison setting. But beyond that, I feel that in terms of the interests of justice, I have to evaluate **[*8]** what further deterrence is served by now sending you to state prison. DCPP monitored you. Unlike those of us who sit in this courtroom, they had the ability to monitor you regularly and I did Children in Court for years so I know that. They had a constant interaction with you, with KS, with the family, and after that regular monitoring, because this happened April 11th I think it was of 2013, litigation ceased on March 31st, 2014, through the DCPP. The family was reunited. You were returned to the home after 11 months. You had to undergo counseling and parenting classes, continuous court monitoring, and apparently were successful or the DCPP would never have closed the litigation on this case and allowed the family to be reunited and I have to respect that and those findings on the part of another branch of this organization.
>
> So in looking at the case as a whole, the wishes of the family, the fact that the family is now reunited after what is an appropriate period of learning, as you indicate, but punishment also in this case, this Court is imposing the maximum amount of jail that can be imposed without moving into the state prison territory and I feel that justice is served by this **[*9]** sentence.
> So for all of the reasons that I've indicated, I am going to sentence you to three years probation, conditioned upon your serving 364 days in the Burlington County Jail.

The State's appeal followed. The State argues the court abused its discretion in imposing a probationary term conditioned on 364 days in the county jail. It contends the court erred in rejecting aggravating factor six, and the facts and circumstances did not justify a predicate finding that defendant's "imprisonment would be a serious injustice which overrides the need to deter such conduct by others."[3]

II.

We exercise limited review of the trial court's sentence. *State v. Miller, 205 N.J. 109, 127, 13 A.3d 873 (2011)*. We may not substitute our judgment for that of the trial court. *State v. Evers, 175 N.J.355, 386, 815 A.2d 432 (2003)*. We defer to the trial court's assessment of aggravating and mitigating factors if supported by competent, credible evidence in the record. *Miller, supra, 205 N.J. at 127*. However, we may review a sentence to determine if the sentencing guidelines were violated. *Evers, supra, 175 N.J. at 387*.

At issue in this case are the guidelines governing a decision to overcome the presumption of imprisonment that attaches to a first **[*10]** or second-degree offense.

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[3] Defendant did not file a timely answering brief, and the court entered an order suppressing the filing of any brief thereafter.

> The court shall deal with a person who has been convicted of a crime of the first or second degree . . . by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.
>
> [N.J.S.A. 2C:44-1(d).]

The decision to depart from the presumption of imprisonment is separate and distinct from the decision to impose a sentence for a first or second degree offense within the range appropriate for a crime one degree lower. *See* N.J.S.A. 2C:44-1(f); *Evers, supra, 175 N.J. at 389*. A downgrade may be imposed "where the court is clearly convinced that the mitigating factors substantially outweigh the aggravated factors and where the interest of justice demands . . . ." N.J.S.A. 2C:44-1(f)(2). "[T]he reasons offered to dispel the presumption of imprisonment must be even more compelling than those that might warrant downgrading an offense." *Evers, supra, 175 N.J. at 389*; *State v. Megargel, 143 N.J. 484, 498-502, 673 A.2d 259 (1996)*. Even if a court decides to impose a downgraded sentence for a second-degree offense, the presumption of incarceration still applies. *State v. O'Connor, 105 N.J. 399, 404-05, 522 A.2d 423 (1987)*. A term of imprisonment of 364 days or less, imposed as a condition of probation pursuant to N.J.S.A. 2C:43-2(b)(2), does not satisfy the presumption **[*11]** of imprisonment. *O'Connor, supra, 105 N.J. at 409-11*.

The Court in *Evers* reviewed prior precedent applying *section 1(d)*, noting that a defendant bears a "heavy burden" to overcome the presumption of imprisonment, and that the absence of a prior record, or a defendant's amenability to probation, has not sufficed. *Evers, supra, 175 N.J. at 390-92*. In an exceptional case in which the Court approved departure from the presumption, *State v. Jarbath, 114 N.J. 394, 555 A.2d 559 (1989)*, the Court relied on the "sum of [the defendant's] condition and character" — she was mentally retarded and psychotic — "and the level of her culpability on the continuum of reckless manslaughter." *Evers, supra, 175 N.J. at 389-90*.

A defendant must show "that his character and condition were so unique or extraordinary, when compared to the class of defendants facing similar terms of incarceration, that he was entitled to relief from the presumption of imprisonment." *Id. at 392*. A court must find that "the human cost of imprisoning a defendant for the sake of deterrence constitutes a serious injustice." *Ibid.*

The court clarified what kind of "character and condition" is required to satisfy the statute:

> In deciding whether the "character and condition" of a defendant meets the "serious injustice" standard, a trial court should determine whether there is clear and convincing evidence **[*12]** that there are relevant mitigating factors present to an *extraordinary* degree and, if so, whether cumulatively, they so greatly exceed any aggravating factors that imprisonment would constitute a serious injustice overriding the need for deterrence.
>
> [*Evers, supra, 175 N.J. at 393-94*.]

In assessing the need to deter, and whether the "serious injustice" of imprisonment would override that need, a court must consider the circumstances and severity of the offense:

> In determining the role that deterrence should play in the serious injustice standard, we begin by restating that there is a presumption of imprisonment for those convicted of first- and second-degree crimes. N.J.S.A. 2C:44-1d. However, a violation of a criminal statute may be more or less egregious depending on the particular facts. "In evaluating the severity of the crime, the trial court must consider the nature of and the relevant circumstances pertaining to the offense. Every offense arises in different factual circumstances." *Megargel, supra, 143 N.J. at 500*. For example, in *Jarbath, supra*, the Court in assessing the defendant's culpability for manslaughter, referred to the criminal act as "accidental," and focused on the severe mental retardation of the defendant. *114 N.J. at 405-06*. We have noted that "[c]ourts should consider a defendant's **[*13]** role in the incident to determine the need to deter him from further crimes and the corresponding need to protect the public from him." *Megargel, supra, 143 N.J. at 501*. "'[D]emands for deterrence are strengthened in direct proportion to the gravity and harm[ful]ness of the offense and the deliberateness of the offender.'" *Id. at 501* (second alteration added) (quoting *State in the Interest of C.A.H. & B.A.R., 89 N.J. 326, 327, 446 A.2d 93 (1982)*).

> [*Evers, supra, 175 N.J. at 394*.]

The mitigating factors identified in the Code, *N.J.S.A. 2C:44-1(b)*, inform the court's determination:

> Accordingly, trial courts should look to the statutory sentencing mitigating factors and determine whether those factors are present to such an extraordinary degree and so greatly exceed the aggravating factors that a particular defendant is distinguished from the "heartland" of cases for the particular offense. . . . It is the quality of the extraordinary mitigating factors taken together that must be weighed in deciding whether the "serious injustice" standard has been met. The trial court also must look at the gravity of the offense with respect to the peculiar facts of a case to determine how paramount deterrence will be in the equation. Generally, for first- and second-degree crimes there will be an overwhelming presumption that deterrence will be of value.
>
> [*Evers, supra, 175 N.J. at 394-95*.]

Applying these guidelines, we are **[*14]** constrained to conclude that the record does not support the court's determination to depart from the presumption of incarceration. We note that the court did not, either in its oral sentence or in the judgment of conviction, expressly find that imprisonment would result in a "serious injustice which overrides the need to deter such conduct by others." The court referred only to the "interests of justice," which is incorporated in the standard governing the downgrade decision. The court referred to "what further deterrence is served by now sending [defendant] to state prison"; however, the court's consideration of deterrence plainly pertained to specific deterrence of defendant. The court noted defendant's rehabilitation while under DCPP oversight. However, the statute requires the court to determine whether the serious injustice of imprisonment "overrides the need to deter such conduct *by others*." *N.J.S.A. 2C:44-1(d)* (emphasis added).

In any event, we conclude that the record does not support a finding that defendant's "character and condition were so unique or extraordinary when compared to the class of defendants facing similar terms of incarceration." *Evers, supra, 175 N.J. at 392*. This was not an unusual episode of aberrant **[*15]** or anti-social behavior. Defendant has an extensive criminal record, which did not cease after his release from parole after serving lengthy sentences on first-degree drug convictions. He has been convicted of assault, and has committed domestic violence leading to entry of a restraining order. Although K.S. did not suffer permanent or significant injuries, she undoubtedly suffered bruises significant enough to alert teachers the next day.

We are also struck by the age and immaturity of the child. Defendant reportedly admitted that he began using a belt to discipline K.S. at the age of three-and-a-half. Although defense counsel argued that ***corporal punishment*** was widely practiced and accepted a generation ago, the ***corporal punishment*** meted out in this case was excessive under the circumstances. We are confident it would fall outside even outmoded standards of behavior, which may have tolerated slaps of a hand on a young child's buttocks, but not repeated blows to the legs with a belt. Moreover, defendant's successful completion of parenting classes, and his positive prospects for success on probation, do not adequately distinguish him from others who have completed the same programs, **[*16]** after meting out excessive ***corporal punishment*** and triggering the involvement of DCPP. Under these circumstances, we cannot conclude that his imprisonment would constitute a serious injustice that overrides the need to deter other parents and adults who may resort to such excessive ***corporal punishment***.

We conclude by recognizing that there is a continuum of behavior that may satisfy the child abuse and neglect statute, *N.J.S.A. 9:6-1* and *-8.21(c)*, and, in turn, the child endangering statute, *N.J.S.A. **2C:24-4(a)***. A prosecutor exercises broad discretion in determining whether to prosecute such acts as a fourth-degree offense, pursuant to *N.J.S.A. 9:6-3*, or as a second-degree offense, pursuant to *N.J.S.A. **2C:24-4(a)***. The elements are essentially the same, although the sanctions are obviously quite different. *See* Cannel, *New Jersey Criminal Code Annotated*, comment 3 on *N.J.S.A. 2C:24-4* (2015) (discussing and comparing *N.J.S.A. 2C:24-4* and *N.J.S.A. 9:6-3*). Prosecutorial discretion is not immune from review. *Cf. State v. Meyer, 192 N.J. 421, 432, 930 A.2d 428 (2007)* (applying "gross and patent abuse of prosecutorial discretion" standard to review of decision not to admit offender into Drug Court under *N.J.S.A. 2C:35-14*). As in this case, the court may determine that a person convicted of a second-degree offense should be sentenced within the third-degree range.

However, **[*17]** the court is bound by the Legislature's determination to grade this offense as a second-degree crime, carrying with it the presumption of imprisonment. *See* Evers, supra, 175 N.J. at 399 (stating that it is the Legislature's prerogative to grade offenses). The crime to which defendant pleaded guilty was raised from a third-degree to a second-degree offense in 1992. *L.* 1992, *c.* 6, § 1.

In sum, the record does not support the trial court's departure from the presumption of incarceration. We remand to the trial court for further proceedings. As we noted at the outset, it is unclear whether defendant entered his plea with the court's assurance that the court would impose a sentence of probation, conditioned on 364 days imprisonment. If defendant did, then he would be entitled to withdraw his plea. R. 3:9-3(e).

Sentence reversed. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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# ***State v. L.G.R.***

Superior Court of New Jersey, Appellate Division

September 15, 2014, Submitted; December 8, 2014, Decided

DOCKET NO. A-5256-12T4

**Reporter**
2014 N.J. Super. Unpub. LEXIS 2828 *

STATE OF NEW JERSEY, Plaintiff-Respondent, v L.G.R., Defendant-Appellant.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 08-06-954.

## Core Terms

sexual, neglect, bedroom, trial court, lesser-included, endangering, charges, certif, endangerment, debauch

**Counsel:** Brickfield & Donahue, attorneys for appellant (Joseph R. Donahue, of counsel and on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

**Judges:** Before Judges Sabatino and Guadagno.

## Opinion

PER CURIAM

After a jury trial, defendant L.G.R.[1] was found guilty of second-degree endangering the welfare of a child, *N.J.S.A. 2C:24-4(a)* (count two). The trial court imposed a custodial sentence of seven-and-a-half years, plus certain fines and other monetary sanctions. We affirm defendant's conviction and sentence, except to remand for the limited purpose of correcting the judgment of conviction to vacate the $100 sexual offender's surcharge.

I.

The State's proofs at trial essentially were as follows. In reciting those facts we recognize that the jury found defendant not guilty of **[*2]** the other count of the indictment, which had charged him with first-degree aggravated sexual assault, *N.J.S.A. 2C:14-2(a)(1)* (count one). The factual narrative we present is therefore subject to that caveat.

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[1] To protect the privacy of the minor victim, who is related to defendant, we use initials for defendant and other adult family members mentioned in this opinion. *N.J.S.A. 2A:82-46*. We also use pseudonyms for the victim and for defendant's minor stepson.

Defendant is the step-grandfather of the minor victim, S.M. ("Sally"), who was age seven at the time of the offense on September 24, 2006. On the night in question, Sally stayed at the home of defendant and his wife C.R., who is Sally's maternal grandmother. C.R.'s eight-year-old son, A.R. ("Andrew"), who is Sally's biological uncle, also lived there. Sally's mother had dropped her off at the residence so that C.R. could baby sit that night.

While defendant was at work, Sally and Andrew were playing video games in the living room, with C.R. near them on the sofa. They all fell asleep on the sofa. Defendant returned from work late that night, apparently in a drunken state. He went to bed in the bedroom that he shares with C.R.

According to Sally's account of the events, at about 6:00 a.m., defendant emerged from the bedroom. He pulled down his underwear and got on top of her, placing his penis either in or next to her mouth for about two minutes. As defendant did so, Sally tried to wake up C.R. **[*3]** by pinching her. According to Sally, C.R. woke up, screamed at defendant, and he retreated to the bedroom. When Sally's mother arrived about ten minutes later to pick her up, Sally told her what had happened. The mother immediately took Sally to the police station, where Sally repeated her allegations. Defendant was subsequently arrested and charged in this two-count indictment.

L.G.R., who testified in his own defense at trial, denied having any sexual contact with Sally. He claimed that at about 5:00 a.m. on the morning in question he woke up and roused his wife C.R. According to defendant, the two of them went into the bedroom and C.R. performed fellatio upon him, with the bedroom door ajar. Defendant claimed that Sally walked into the bedroom and saw him and C.R. engaged in their sexual activity.

In her own testimony, C.R. partially supported defendant's narrative, although she initially told the police that the sex in the bedroom occurred around 9:00 a.m. rather than around 5:00 a.m. She denied observing defendant having any sexual contact with her granddaughter. However, Sally contended that before she was taken from the residence that morning, C.R. admonished Sally not to "tell **[*4]** anybody what [defendant] did to you."

II.

On appeal, defendant raises two points for our consideration:

*POINT I*
THE COURT ERRED IN FAILING TO CHARGE THE JURY WITH THE LESSER-INCLUDED CHARGE OF CRUELTY AND NEGLECT OF CHILDREN.

*POINT II*
THE JURY VERDICT WAS INCONSISTENT AND AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

We address these points in turn.

A.

Defendant's first argument is that the trial court erred in rejecting his counsel's request that the jury be charged on count two, the endangerment count, with fourth-degree abuse or neglect of a child under *N.J.S.A. 9:6-3* as a lesser-included offense. We disagree.

In considering this charge issue, we are cognizant of the well-established principle that proper jury charges are "essential for a fair trial." *State v. Koskovich, 168 N.J. 448, 507, 776 A.2d 144 (2001)* (internal citations and quotation marks omitted); *see also State v. Eldridge, 388 N.J. Super. 485, 495, 909 A.2d 736 (App. Div. 2006)*, *certif. denied*, *189 N.J. 650, 917 A.2d 789 (2007)*. We also recognize that "[e]rroneous instructions on matters or issues material to the jurors' deliberations are presumed to be reversible error." *State v. Grunow, 102 N.J. 133, 148, 506 A.2d 708 (1986)*; *see also State v. Lopez, 187 N.J. 91, 101, 900 A.2d 779 (2006)*.

The trial court generally has an obligation to submit to a criminal jury not only the charges specified in the indictment but also uncharged lesser-included offenses that are rationally grounded in the evidence. *State v. Denofa, 187 N.J.*

*24, 41, 898 A.2d 523 (2006)*; *see also State v. Rivera, 205 N.J. 472, 489, 16 A.3d 352 (2011)*. The **[*5]** Legislature has defined a lesser-included offense in *N.J.S.A. 2C:1-8(d)* in three alternative ways, only the first of which is pertinent to defendant's argument here. Under that first alternative definition, an offense is a lesser-included offense when "[i]t is established by proof of the same or less than all the facts required to establish the commission of the offense charged." *N.J.S.A. 2C:1-8(d)(1)*. The issue presented here is whether, in the context of the facts of this case, a fourth-degree offense under *N.J.S.A. 9:6-3* for child abuse or neglect comprises such a "lesser-included offense" with respect to the child endangerment offense under *N.J.S.A. 2C:24-4(a)* as to which defendant was found guilty. Even if defendant's conduct would represent a violation of both the *Title* 2C and the *Title* 9 statutes, we also must consider whether the trial court was obligated to charge the jury with the *Title* 9 offense as an alternative, less-serious disposition. Applying case law precedent and what appears to be the Legislature's intent respecting these two overlapping statutes, we conclude that the court was not obligated to charge the *Title* 9 violation.

Two separate portions of the New Jersey statutes criminalize certain forms of child **[*6]** abuse or neglect: *Title* 9 and *Title* 2C. We begin with *Title* 9.

*N.J.S.A. 9:6-1* prohibits four types of conduct directed toward a child: abuse, abandonment, cruelty and neglect. *N.J.S.A. 9:6-1* contains no restriction as to who may unlawfully commit such abuse. The abuse provision of *N.J.S.A. 9:6-1* states, in pertinent part, that "[a]buse of a child shall consist in any of the following acts: . . . (e) the performing of any indecent, immoral or unlawful act or deed, in the presence of a child, that may tend to *debauch or endanger or degrade the morals of the child*. . . ." *Ibid.* (emphasis added). That abusive conduct prohibited under *N.J.S.A. 9:6-1* is criminalized by *N.J.S.A. 9:6-3*, which states, in part:

> Any parent, guardian or person having the care, custody or control of any child, who shall abuse . . . such child . . . shall be deemed to be guilty of a *crime of the fourth degree*.
>
> [*N.J.S.A. 9:6-3* (emphasis added).]

The child endangerment section of the Criminal Code, as it existed at the time of the present incident, incorporated the standards of *N.J.S.A. 9:6-3*, elevating child abuse and neglect to a second-degree offense when, as here, it is committed by

> Any person having a legal duty for the care of a child or who has assumed responsibility **[*7]** for the care of a child who engages in *sexual conduct which would impair or debauch the morals* of a child, or who causes the child harm that would make the child an abused or neglected child as defined in [*N.J.S.A. 9:6-3*] is guilty of *a crime of the second degree*. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.
>
> [*N.J.S.A. 2C:24-4(a)* (emphasis added).][2]

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[2] This subsection was amended by the Legislature in August 2013. The amendment divided the offense into two separate components, establishing separate provisions for the offense of engaging in sexual conduct which would impair or debauch the morals of the child in *subsection (a)(1)* and for the offense in *subsection (a)(2)* of causing the child such harm that would make him or her an abused or neglected child. *N.J.S.A. 2C:24-4(a)* now reads as follows:

> (1) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would *impair or debauch the morals of the child* is guilty of a crime of the *second degree*. Any other person who engages in conduct or who causes harm as described in this paragraph to a child **[*8]** is guilty of a crime of the third degree.
>
> (2) Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child *who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, R.S. 9:6-3 and P.L. 1974, c.119, s.l (C.9:6-8.21)* is guilty of a crime of the *second degree*. Any other person who engages in conduct or who causes harm as described in this paragraph to a child is guilty of a crime of the third degree.

In *State v. N.A., 355 N.J. Super. 143, 152, 809 A.2d 825 (App. Div. 2002)*, *certif. denied*, *175 N.J. 434, 815 A.2d 480 (2003)*, we examined these *Title* 2C and *Title* 9 provisions and held that the trial court is not obligated to charge a fourth-degree violation of *N.J.S.A. 9:6-3* when the State has elected to prosecute a defendant under the more stringent parallel terms of *N.J.S.A. 2C:24-4(a)*. We recognized in *N.A.* that "the *Title* 2C offense of endangering the welfare of children and the *Title* 9 offense of cruelty and neglect of children are the same offenses." *Id. at 153*. "The only difference is the degree of the offense and the penalty." *Ibid.* "Each offense characterizes **[*9]** the same harm or risk of harm to the child." *Ibid.* "Each offense requires the same proof of 'knowing culpability.'" *Ibid.* (citation omitted). "Each offense also encompasses conduct by a parent." *Ibid.* Consequently, "[a]n instruction to the jury on each offense would be the same." *Ibid.*

We explained in *N.A.* that the duplicative relationship between *N.J.S.A. 9:6-3* and *N.J.S.A. 2C:24-4(a)* is the result of the Legislature's design. As we noted:

> The conclusion that the offenses are identical is supported by the legislative history of Title 2C. The 1971 Commentary to what became the Criminal Code, specifically the section which was later codified as [*N.J.S.A.] 2C:24-4*, states "[t]his Section incorporates into the Code the existing law as to abuse, abandonment, cruelty and neglect of children by making such conduct criminal under the definitions of those terms in Title 9. The intent is to incorporate the crime now defined in [*N.J.S.A.] 9:6-3* without substantial change except for the penalty provisions." *Final Report of the New Jersey Criminal Law Revision Commission*, Vol. II at 259 (1971). Although one commentator opines that [*N.J.S.A.] 9:6-3* has been superseded, it has not been repealed. Cannel, *New Jersey Criminal Code Annotated*, comment 3 on *N.J.S.A. 2C:24-4 (2002)*.
>
> [*Ibid.*]

We further explained in *N.A.* that **[*10]** the continued dual existence of the second-degree or third-degree child endangerment offense in *N.J.S.A. 2C:24-4* and the separate fourth-degree criminal provision within *N.J.S.A. 9:6-3* persists in order to give prosecutors the discretion to charge the less stringent *Title* 9 violation where circumstances justify it:

> Indeed, amendments to both statutes in the intervening years evince a legislative intent that both statutes are to be preserved perhaps to provide prosecutors the option of charging a lesser offense under appropriate circumstances.
>
> [*Ibid.*

Given this dual structure that reposes wider charging discretion with prosecutors, we concluded that it would be inappropriate for trial courts to interfere with that discretion by allowing juries to be charged in *N.J.S.A. 2C:24-4* cases with *N.J.S.A. 9:6-3* violations as a lesser-included offense. As we noted, a jury cannot be permitted to make a finding in this context that will solely affect "the gradation of the offense" for the same conduct. *Ibid. See also State v. D.V., 348 N.J. Super. 107, 114-16, 791 A.2d 304 (App. Div. 2002)*, *aff'd sub nom, State v. D.A.V., 176 N.J. 338, 823 A.2d 34 (2003)* (upholding a prosecutor's inherent discretion to select between charging a defendant with a crime of the fourth degree rather than a crime of the second or third degree).

The principles set forth **[*11]** in *N.A.* are reinforced by our subsequent opinion in *In re Registrant R.B., 376 N.J. Super. 451, 870 A.2d 732 (App. Div. 2005)*, *overruled on other grounds, In re T.T., 188 N.J. 321, 907 A.2d 416 (2006)*. In *R.B.*, the central issue before the court was whether a defendant's federal conviction for sexual exploitation of a child was similar to luring under New Jersey criminal law, *N.J.S.A. 2C:13-6*, for Megan's Law reporting purposes. In analyzing that question, we looked for comparative purposes to the child abuse or neglect provisions in *Title* 9. We observed that, although the *Title* 9 statute did not expressly use the term "sexual conduct" as did the endangering

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> [*N.J.S.A. 2C:24-4(a)(1)*, *(2)* (emphasis added).]

For the reasons set forth in our opinion, the restyling of *N.J.S.A. 2C:24-4(a)* into these two subparts does not affect our lesser-included offense analysis.

statute, we observed that "there can be no doubt that the reference in N.J.S.A. 9:6-1 to 'debauch[ing] or endanger[ing] or degrad[ing] the morals of the child' is a reference to prohibited sexual conduct." *Id. at 469*. *R.B.* is thus consistent with the notion that the *Title* 9 abuse provision mirrors the *Title* 2C child endangerment provision, at least in the present factual context, where an act of sexual contact debauches or degrades a child's morals.

"The choice of [a criminal] statute under which [the State elects] to proceed is nothing more than the normal type of discretionary decision vested in and exercised by prosecutors on an everyday basis." *State v. T.C., 347 N.J. Super. 219, 231, 789 A.2d 173 (App. Div. 2002)*, *certif. denied*, *177 N.J. 222, 827 A.2d 289 (2003)*. In *State v. D.V., supra, 348 N.J. Super. at 114-15*, we noted that

> Specific conduct **[*12]** may violate more than one statute[.] Where two criminal statutes prohibit the same basic act, the prosecutor may in the exercise of sound discretion proceed under either or both statutes as long as only as single conviction survives.
>
> The discretionary authority of the prosecutor in enforcement of criminal laws is well-settled. It is the fundamental responsibility of the prosecutor to decide whom to prosecute and what charges are to be considered. The factual complex, the conduct of defendant and the extent of sentencing exposure are relevant considerations for the prosecutor to consider. . . . [w]hen "an act violates more than one criminal statute, the Government may prosecute against either so long as it does not discriminate against any class of defendants." *United States v. Batchelder, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 2204, 60 L. Ed. 2d 755, 765 (1979)*. *See also, State v. Kittrell, 145 N.J. 112, 127-30, 678 A.2d 209 (1996)*.
>
> [*Id. at 114-15* (citations omitted in part).]

Generally, where specific conduct may violate more than one statute, the more serious grade or offense will govern. *State v. Eure, 304 N.J. Super. 469, 475, 701 A.2d 464 (App. Div.)*, *certif. denied*, *152 N.J. 193, 704 A.2d 23 (1997)*. The selection of the charge rests in the sound discretion of the prosecutor. The lesser-included offense instruction sought here by defendant would have thwarted that discretion. We therefore reject defendant's claim to an entitlement to an instruction **[*13]** under *N.J.S.A. 9:6-3*.

B.

In his second point, defendant contends that the jury's verdict on count two was against the weight of the evidence. We find no merit to that contention.

*Rule 2:10-1* expressly provides that

> [i]n both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

Here, defendant moved unsuccessfully for a new trial based on his contentions that the verdict was against the weight of the evidence and impermissibly inconsistent. Having preserved the issue, we may properly review those contentions on appeal.

The court's task on a motion under *Rule 2:10-1* is to determine if a "trier of fact could rationally have found beyond a reasonable doubt that the essential elements of the crime were present." *State v. Carter, 91 N.J. 86, 96, 449 A.2d 1280 (1982)*. "Where the jury's verdict was grounded on its assessment of witness credibility, a reviewing court may not intercede, absent clear evidence on the face of the record that the jury was mistaken or prejudiced." **[*14]** *State v. Smith, 262 N.J. Super. 487, 512, 621 A.2d 493 (App. Div.)*, *certif. denied*, *134 N.J. 476, 634 A.2d 523 (1993)*. Moreover, the court may not overturn the verdict "merely because it might have found otherwise upon the same evidence." *State v. Johnson, 203 N.J. Super. 127, 134, 495 A.2d 1367 (App. Div. 1985)*, *certif. denied*, *102 N.J. 312, 508 A.2d 195 (1985)*.

Here, the jury was free to accept or reject the credibility of the State's witnesses. The jury had the ability to weigh and consider defendant's testimony and that of the witnesses called in his favor. The jury ultimately found Sally's

allegations credible and believed the State's version of the facts as presented, and this court will not interfere with that result.

A conviction for endangering the welfare of a child, as charged in the present case, required the State to prove, beyond a reasonable doubt, that defendant knowingly engaged in sexual conduct that would impair or debauch the morals of a child. *N.J.S.A. 2C:24-4(a)*. Sally testified that while she was asleep in the living room, defendant "got on top of" her, in his underwear and then placed his penis in her mouth and "push[ed] it in and out" of her mouth for "about two minutes." The jury was properly instructed that the requisite conduct alleged by the State was that defendant "rubb[ed] his penis against the buttocks of the victim — over her clothing and/or perform[ed] an act of sexual penetration, namely **[*15]** fellatio[,] upon the victim."

Although defendant presented testimony about an alleged incident in the marital bedroom the jury was not necessarily required to accept that version of events. It is far from "clear" that the "only reasonable explanation" behind the jury's verdict is that it believed the bedroom incident, rather than the incident in the living room, endangered Sally's welfare contrary to *N.J.S.A. 2C:24-4(a)*.[3] Appellate intervention is warranted only to correct an "injustice resulting from a plain and obvious failure of the jury to perform its function." *Johnson, supra, 203 N.J. Super. at 134*. Such is not the case here.

Finally, we reject defendant's contention that the verdict was inconsistent and must be reversed on that basis. It is well settled that "[a] jury may render inconsistent verdicts so long as there exists a sufficient evidential basis in the record to support the charge on which the defendant is convicted." *State v. Banko, 182 N.J. 44, 46, 861 A.2d 110 (2004)*. For the reasons we already explained, there was an ample factual basis grounded in the evidence **[*16]** to support the jury's finding of guilt on count two.

C.

We therefore affirm defendant's conviction. With the State's consent, we remand the sentence for the limited purpose of having the trial court amend the judgment of conviction to remove the $100 surcharge imposed because the surcharge does not apply to endangering convictions. *See N.J.S.A. 2C:43-3.7*.

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[3] It is also questionable as a matter of law whether the allegedly consensual sexual activity of defendant with his wife within the confines of their bedroom would comprise child endangerment under the statute.

# Exhibit C

# State v. M.K.C.

Superior Court of New Jersey, Appellate Division

March 6, 2006, Submitted; March 28, 2006, Decided

DOCKET NO. A-4185-03T4

**Reporter**
2006 N.J. Super. Unpub. LEXIS 114 *; 2006 WL 770621

STATE OF NEW JERSEY, Plaintiff-Respondent, vs. M.K.C., Defendant-Appellant.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 03-03-0617.

## Core Terms

sentence, locks, front, door, bedroom, endangering, clothes, aggravating factor, second degree, violations, picture, walked, floor, seat, yard, neglected, noticed, urine, girl

**Counsel:** Yvonne Smith Segars, Public Defender, attorney for appellant (Jack Gerber, Designated Counsel, the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Assistant Prosecutor, of counsel and on the brief).

**Judges:** Before Judges Cuff, Parrillo and Holston, Jr.

## Opinion

PER CURIAM

Defendant was charged with second degree endangering the welfare of his children contrary to *N.J.S.A. 2C:24-4(a)*. He was sentenced to an eight-year term of imprisonment. The appropriate assessments and penalties were also imposed. On appeal, he argues that the judge should have charged the jury on the fourth degree endangering charge codified at *N.J.S.A. 9:6-3*. He contends that the omission to charge the lesser offense denied his rights to due process and equal protection. We disagree and affirm.

In August 2001, Raymond Dressler, the construction code official and zoning officer for Montvale, noticed an accumulation of debris, including furniture, building materials and toys and an "overabundance of accumulated garbage and refuse" scattered around the yard surrounding defendant's home. **[*2]** Defendant's large stone house fronted on West Grand Avenue; the side yard was on Terry Court. West Grand Avenue is the main thoroughfare in Montvale.

As a result of his observations, Dressler met with defendant and his wife on several occasions and walked around the property, showing them various ordinance violations. Dressler also sent them letters detailing the violations. Despite some attempts to clean up the property, more debris and refuse appeared on the property.

In October 2002, Dressler applied for an administrative search warrant, which would allow him to search defendant's home for building and zoning violations. On October 16, 2002, the judge issued Dressler a warrant. On the morning of October 18, 2002, Dressler saw defendant on the front lawn of his house. After seeing defendant, Dressler drove a few blocks to Borough Hall to get police assistance, which was standard operating procedure. Patrolman Piot responded to assist Dressler.

At around 11:00 a.m., Dressler returned to defendant's home. As Dressler drove west on West Grand, defendant and his wife drove past him, going east on West Grand. Defendant was driving and his wife was in the front passenger seat. Dressler, who **[*3]** was driving an SUV at about twenty to twenty-five miles an hour, could see into defendant's car because it was a compact car "that sits lower on the road." He observed only some tools, jackets and clothing in the back seat. He saw no children in the car. After driving past defendant's car, Dressler drove to defendant's house, pulled onto Terry Court and parked his car alongside Piot, who was waiting for Dressler. After a brief conversation, Piot returned to patrol duty but Dressler remained on Terry Court to await defendant's return.

Defendant and his wife returned home at around 2:00 p.m., pulling into the driveway and stopping in the front of the house. From his vantage point on Terry Court, Dressler was able to see them. Defendant and his wife were the only people that exited the car. Once Dressler saw them get out of the car, he called Piot. After exiting the car, defendant's wife walked up the front stairs of the house and defendant walked around the front of the yard, then down the side of the yard and back to the front yard.

Piot arrived at defendant's house about three minutes after Dressler's call and pulled his patrol car into the driveway. Dressler, who was parked across the **[*4]** street, moved his car to the side of the house and met Piot and defendant in the driveway. Dressler handed defendant the search warrant and explained that it gave him and Piot the right to enter the house and search the premises for zoning and construction code violations. After reading the warrant, defendant asked for more time to examine the document, but Dressler explained that they wanted to search the house immediately. Defendant told Dressler and Piot that he would have to go around the back and open the front door for them because the front door lock was broken.

While defendant went around the back of the house, Dressler and Piot walked up to the front door, which was wide open. As they waited for defendant to come to the front door, they heard defendant say, "get the children out of the house, the cops are here and they're going to search it." At that point, Dressler followed Piot into the house and they proceeded up the stairs. Household items, clothes, debris and refuse were scattered on the staircase. When they reached the top of the stairs, defendant and his wife were standing in the hallway. Defendant's wife was noticeably upset, questioning Dressler's and Piot's presence **[*5]** in the house and saying she wanted to call her lawyer. She then notified Dressler and Piot that her children were asleep in the room next to them and she did not want them disturbed. The door to the room was closed and Dressler noticed three different locking devices on the outside of the door.

Dressler and Piot eventually entered the room and observed a bedroom with two small children, a five-year-old girl and a three-year-old boy, a couch with a blanket, two small beds, some toys and a child's toilet on the floor. Dressler was struck by the smell of urine in the room. The children were disheveled and sitting around a small table eating cereal and using small coffee creamers as milk. Their "[h]air was matted. They were dirty. Everything in the place smelled." The children did not appear to be frightened of their parents, but they also "weren't particularly let's say social."

Piot asked defendant and his wife about the children in the room, "who they were, what they were doing, and why there were three locks on the door." Defendant's wife answered that they were their children, they were in the room having breakfast and the locks on the door were there to keep the children in. She explained **[*6]** that their bedroom was on the third floor and they did not want the children getting out of their second floor bedroom when she and her husband could not hear them.

Piot questioned both defendant and his wife about leaving the children home alone. At first, defendant's wife said that she was at home with the children. After Dressler told Piot that he had seen them driving earlier in the day without the children, defendant's wife stated they went shopping and left the children alone in the house for a very short period of time.

Dressler continued his inspection of the twenty-six room house. He could not get into nineteen of the rooms because "[t]hey were so full of contents." During the course of his inspection, Dressler took pictures of the interior of the house, which were admitted in evidence. One of the pictures depicted a bathroom near the foyer underneath the stairs in which the toilet lid was open and the toilet was clogged and filled with feces. In addition, Dressler observed that while there was only one bedroom on the third floor of the house where defendants slept, the second floor had eight bedrooms, including the children's room.

Dressler also took a picture of the locks on **[*7]** the door to the children's room. The picture depicted a brass door knob that could be locked with a key, a black slide gate lock that locks from left to right and a deadbolt lock on the top. Other pictures depicted the five-year-old girl in two different outfits. Dressler explained that "she seemed to be soiled and . . . in need of change," so defendant's wife changed her while Dressler and Piot were there. A picture was also taken of the back seat of defendants' car, which contained no car seats and so many items in the back seat that nobody would "put children in the back of that car." After completing his inspection, Dressler notified both defendants and Piot that the structure was unsafe and uninhabitable.

At about 2:45 p.m., the Montvale Police Department contacted the Division of Youth and Family Services (DYFS) about the children. Linda Tatekawa, a DYFS caseworker, arrived at defendants' house at approximately 4:00 p.m. When she arrived, Dressler and Piot were in the front yard; the two children were playing in front of the house. The children were dressed in sweat suits, no socks, and the small boy was not wearing a jacket. It was cold, so Tatekawa asked defendant's wife to **[*8]** get the small boy a jacket.

As Tatekawa walked into the house, the first thing she noticed was the number of items on the front porch. These items, which included garbage bags, car seats and toys, obstructed the entrance of the home. When she entered the home with Dressler, Piot and both defendants, they went into the kitchen. In the kitchen, there was a table covered with clothes, the ceiling was falling and there was a bucket of water that appeared to have been sitting there for a while. The general refrigerator had barely anything in it. There was no milk. Three freezers were loaded with food and meats, but the meats were freezer burned.

Heading towards the children's bedroom, Tatekawa observed a lot of items blocking the pathway, which was a concern because in times of emergency or fire the children were not easily accessible. When they entered the children's bedroom, the children were just sitting around the table, not playing, and Tatekawa noticed the three door locks on the bedroom door and a strong smell of urine throughout the room. The sofa was saturated with urine. She received no response when she asked why the room reeked of urine.

Tatekawa spoke with the children privately. **[*9]** While the three-year-old boy was not able to reply to Tatekawa's questions, the five-year-old girl told her they were locked in their bedroom and sometimes their mother let them out and sometimes she didn't. The room contained two beds with clean linens; however, there were no clothes, no dressers, no curtains, no telephone or baby monitor, no intercom system or any other means of two-way communication in the room. When Tatekawa confronted defendant about locking the children in the bedroom, he admitted to leaving the children locked in the bedroom, but only at night because the three-year-old boy tended to wander about the house. Defendants explained that they had adopted the children from Lithuania about a year earlier. While the girl had been examined by a doctor since arriving in the United States, the little boy had not been examined since leaving Lithuania.

Based on these observations, Tatekawa escorted the children and defendant's wife to police headquarters. Piot, defendant and Dressler followed in another vehicle. At police headquarters, defendants were placed under arrest and Tatekawa served defendants with an emergency removal letter and took custody of the children. At around **[*10]** 8:00 p.m., Tatekawa took the children to the emergency room in Teaneck to have the children examined and learned that the little boy was not wearing a diaper, underwear or socks. The little girl was also not wearing underwear or socks.

The physician's assistant, who evaluated the children in the emergency room that evening, spent twenty minutes with the children. When she first saw them they were "unkempt, slightly disheveled, their clothes were dirty." She found that the little boy had an ear infection and a slight fever. She prescribed a shampoo for head lice and wrote another prescription for the ear infection.

Defendant's wife, M.C., testified at trial. [1] She was born in Ireland and came to the United States with her husband in 1990. Since moving to this country, both she and her husband maintained jobs and never required government assistance. She worked as a nurse and defendant worked as a maintenance man and had his own cleaning business. By October 18, 2002, defendants had acquired "quite a bit of property", which included two houses in Pearl River, New York, one house in Englewood and another house in Montvale.

According to M.C., the entire family went to Pearl River on October 18 to pack up items at one of their houses, which was about to be sold. On their return, the children ran into the house. She followed, got some cereal as a snack for the children, and the three of them went upstairs to the children's bedroom. As the children were playing, she heard defendant say "get the kids out, the police are here." She closed the door, but did not lock it, to keep the children from being exposed to the police. A few minutes later, Piot walked up to the second floor and into the children's bedroom.

M.C. testified that the room smelled like urine because she was potty training her son at the time and sometimes he missed the potty and went on the rug. She explained that the children's clothing was kept in a small room which had been converted to a closet. She also asserted that only one tile was missing in the kitchen ceiling. In addition, there was a stainless steel refrigerator in the house where they kept milk and other food, which the caseworker never checked. **[*12]** She explained that she changed both children's clothes while Piot and Dressler were in the house because she did not have a chance to do so while they were in Pearl River. She also explained that the locks on the children's door were a remnant of the former use of the house as a senior citizen facility. She asserted that the children were not locked in the room. Additionally, the orange tinge and matted look of the children's hair was attributable to Halloween make-up applied to their hair.

On appeal, defendant raises the following arguments:

> POINT 1 THE DEFENDANT WAS DENIED HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS TO A FAIR TRIAL BY NOT HAVING THE JURY CHARGED ON FOURTH DEGREE ENDANGERING THE WELFARE OF A CHILD UNDER *N.J.S.A. 9:6-3*.
>
> POINT 2 THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL'S FAILURE TO RECOGNIZE THE DUE PROCESS AND EQUAL PROTECTION DIMENSIONS OF CHARGING THE TITLE 9 OFFENSE EQUALLY AND INDEPENDENTLY FROM *N.J.S.A. 2C:24-4(a)*. (Not raised below).
> POINT 3 THE SENTENCE WAS EXCESSIVE AND UNDULY PUNITIVE.

Initially, we observe that the issue of the need to charge the jury on the Title 2C offense and the Title 9 offense was not framed in the trial court **[*13]** in the manner that it is presented on appeal. At trial, defendant insisted that the Title 9 offense should be presented to the jury as a lesser-included offense. The trial judge denied this request and rightly so. *State v. D.A.V., 176 N.J. 338, 339, 823 A.2d 34 (2003)*; *State v. N.A., 355 N.J. Super. 143, 153, 809 A.2d 825 (App. Div. 2002)*, *certif. denied*, *175 N.J. 434, 815 A.2d 480 (2003)*. Therefore, we consider the argument presented on appeal in accordance with the plain error rule. *R. 2:10-2*; *State v. Macon, 57 N.J. 325, 333, 273 A.2d 1 (1971)*. Thus, this court must determine whether any error had the clear capacity to produce an unjust result. *Ibid.*

*N.J.S.A. 2C:24-4(a)*, second degree endangering the welfare of child, and *N.J.S.A. 9:6-3*, fourth degree cruelty and neglect of children, criminalize the same harm or risk of harm to a child. *D.A.V., supra, 176 N.J. at 339*. *N.J.S.A. 9:6-3* is part of the general provisions governing the welfare of abused and neglected children. It states, in pertinent part:

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[1] M.C. was also charged with and convicted of endangering the welfare **[*11]** of her children. Her appeal, A-4519-03T4, was listed back-to-back with this appeal and is also decided this date in a separate opinion.

> Any parent, guardian or person having the care, custody or control of any child, who shall abuse, abandon, be cruel to or neglectful of such child, or any person who shall abuse, be cruel to or neglectful of any child shall be deemed to be **[*14]** guilty of a crime of the fourth degree.
>
> [*N.J.S.A. 9:6-3*.]

*N.J.S.A. 2C:24-4(a)* provides:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, *or who causes the child harm that would make the child an abused or neglected child as defined in R.S. 9:6-1, R.S.9:6-3 and P.L.1974, c.119, § 1 (C.9:6-8.21) is guilty of a crime of the second degree*. (emphasis added)

These identical statutes require the same proof of "'knowing' culpability." *State v. Demarest, 252 N.J. Super. 323, 333, 599 A.2d 937 (App. Div. 1991)*. The only difference between them is the degree of the offense and the penalty imposed -- when prosecuted pursuant to *N.J.S.A. 2C:24-4(a)*, a defendant is exposed to a five to ten-year state prison term; when prosecuted pursuant to *N.J.S.A. 9:6-3*, a defendant is exposed only to an eighteen-month prison term. *D.A.V., supra, 176 N.J. at 338*. The instruction to the jury on each offense would be the same. *N.A., supra, 355 N.J. Super. at 153*.

In *State v. T.C., 347 N.J. Super. 219, 229-31, 789 A.2d 173 (App. Div. 2002)*, *certif. denied*, *177 N.J. 222, 827 A.2d 289 (2003)*,this court held that there **[*15]** is no constitutional infirmity in the fact that *N.J.S.A. 2C:24-4(a)* is substantively identical to *N.J.S.A. 9:6-3*. Moreover, the prosecutor is afforded discretion to seek a conviction under the more serious provision. *Ibid.*; *State v. D.V., 348 N.J. Super. 107, 113-16, 791 A.2d 304 (App. Div. 2002)*, *aff'd o.b.*, *176 N.J. 338, 823 A.2d 34 (2003)*. In making their determinations, both courts relied on *United States v. Batchelder, 442 U.S. 114, 123-24, 99 S. Ct. 2198, 2204, 60 L. Ed. 2d 755, 764 (1979)*, in which the Supreme Court stated, "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." In addition, both courts found that while "the primary concern of Title 9 is the protection of children rather than the culpability of adults," *T.C., supra, 347 N.J. Super. at 231*, the purpose of the Title 2C provision is to permit prosecution for the offense carrying the greater penalty when circumstances permit. *Ibid.*; *D.V., supra, 348 N.J. Super. at 114-15*.

In *D.V., supra*, this court recognized that there is some limitation on prosecutorial discretion in this context and that the court will interfere when the prosecutor's **[*16]** conduct is "arbitrary, capricious or otherwise constitutes a patent or gross abuse of discretion." *348 N.J. Super. at 116*. On certification, the Supreme Court affirmed this court's holding and Justice Albin, in his concurring opinion, urged the Attorney General to "promulgate guidelines to assist prosecutors in choosing whether to prosecute a defendant under *N.J.S.A. 2C:24-4(a)* or *N.J.S.A. 9:6-3*." *D.A.V., supra, 176 N.J. at 342*. He emphasized that such guidelines must "guide the discretion of prosecutors so that rational distinctions are made in applying the appropriate statute." *Ibid.* In the absence of such guidelines, Justice Albin concluded that "similarly situated defendants" will inevitably be charged disparately and suffer disparate sentences under those identical statutes. *Id. at 339*.

Here, given the holdings in *D.V.* and *T.C.*, the trial court did not err in refusing to charge the Title 9 offense. Although defendant contends both *N.J.S.A. 2C:24-4(a)* and *N.J.S.A. 9:6-3* should have been charged as independent offenses, defendant failed to demonstrate that the State abused its discretion in only indicting defendant under the second degree offense. While Justice Albin's recommendation **[*17]** is sound, current New Jersey law grants prosecutors discretion to seek a conviction under the more serious provision. *T.C., supra, 347 N.J. Super. at 229-31*. The peril posed to the children by their parents' act of leaving them alone in a room in a house with the multiple construction code violations found here is manifest. The peril was of life-threatening dimension and fully justifies the prosecutorial decision to charge the more serious offense.

Defendant also argues that trial counsel was ineffective because he failed to recognize the constitutional ramifications of the prosecutorial decision to charge the more serious offense. In light of our disposition of the merits of this issue,

defendant cannot satisfy the first prong of the two prong *Strickland* [2]/Fritz [3] test. That is, he cannot demonstrate that trial counsel's performance was deficient. *Strickland v. Washington, supra, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693*; *Fritz, supra, 105 N.J. at 58*.

Defendant also contends that the eight-year term of imprisonment is excessive and unduly punitive. **[*18]** We do not address the merits of this contention because a remand is required to reconsider the term in light of recent case law developments.

In *State v. Natale, 184 N.J. 458, 878 A.2d 724 (2005)* (*Natale II*), the Court stated that, under our Code of Criminal Justice, "before any judicial factfinding, the maximum sentence that can be imposed based on a jury verdict or guilty plea is the presumptive term," and therefore "the 'statutory maximum' for *Blakely* [*v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)]* and [*United States v.] Booker[, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)]* purposes is the presumptive sentence." *Natale II, supra, 184 N.J. at 484*. Accordingly, the Court "eliminat[ed] the presumptive terms" creating the "'statutory maximum' authorized by the jury verdict or the facts admitted by a defendant at his guilty plea [as] the top of the sentencing range for the crime charged." *Id. at 487*.

The holding in *Natale II* is entitled to "pipeline retroactivity," and thus applicable to defendants who had cases on direct appeal at the time of the decision. *Id. at 494*. A new sentencing hearing is to be held in each affected case based on the record at the prior sentencing. **[*19]** *Id. 495-96*. At the hearing, the trial court must:

> determine whether the absence of the presumptive term in the weighing process requires the imposition of a different sentence. The court should not make new findings concerning the quantity or quality of aggravating and mitigating factors previously found. Those determinations remain untouched by this decision. Because the new hearing will be based on the original sentencing record, any defendant challenging his sentence on *Blakely* grounds will not be subject to a sentence greater than the one already imposed.
>
> [*Ibid.*]

Here, after finding aggravating factors (3), (6) and (9) and no mitigating factors applicable, the trial court imposed an eight-year term on defendant's second degree endangering conviction. The sentence clearly exceeds the former seven-year presumptive term for a second degree offense under *N.J.S.A. 2C44-1(f)(1)(c)*.

It should be noted that the State contends the judge properly imposed an eight-year sentence for endangering the welfare of a child because all three of the applicable aggravating factors fell within the "recidivism exception" recognized by the Court in *State v. Abdullah, 184 N.J. 497, 506 n.2, 878 A.2d 746 (2005)*. In *Abdullah*, **[*20]** the Supreme Court suggested "that aggravating factors (3), (6) and (9) related to [a] defendant's prior convictions" might be "the basis for increasing defendant's sentence above" what had been the presumptive term. *Abdullah, supra, 184 N.J. at 506, n.2*. [4]

Here, the trial judge identified aggravating factors (3), (6) and (9), *N.J.S.A. 2C:44-1(a)(3)*, *(6)* and *(9)*, as the relevant aggravating factors, but failed to specify what evidence in the record, if any, supported his findings. While we can infer that the judge's findings were based on defendant's prior conviction in another state for endangering the welfare of an elderly person, the judge did not state his reasons for finding these aggravating factors applicable. Therefore, we are constrained to remand for reconsideration of the sentence.

Affirmed in part; remanded for reconsideration of sentence.

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[2] *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

[3] *State v. Fritz, 105 N.J. 42, 58, 519 A.2d 336 (1987)*.

[4] *But see State v. Nesbitt, 185 N.J. 504, 519, 888 A.2d 472 (2006)* (term of imprisonment in excess of presumptive term remanded for consideration notwithstanding citation of aggravating factors (3), (6) and (9)).

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| | : SUPERIOR COURT OF NEW JERSEY |
| STATE OF NEW JERSEY | : LAW DIVISION-CRIMINAL |
| | : ATLANTIC COUNTY |
| | : |
| v. | : INDICTMENT NO.: 24-09-2951 |
| | : |
| LA'QUETTA SMALL | : |
| | : |
| | : **NOTICE OF DEFENDANT LA'QUETTA SMALLS'** |
| | : **MOTION TO DISMISS THE INDICTMENT** |
| | : |

PLEASE TAKE NOTICE that as soon thereafter as counsel may be heard, the undersigned will seek an Order dismissing the indictment against Defendant La'Quetta Small.

PLEASE TAKE FURTHER NOTICE that the undersigned will rely upon the attached brief, certification, and exhibits in support of the motion.

PLEASE TAKE FURTHER NOTICE that pursuant to R. 1:6-2, it is requested that the Court consider this motion on the papers submitted UNLESS opposition is timely filed, in which case, oral argument is hereby requested.

Date: 1/27/25

By:

s/**Michael H. Schreiber**
Michael H. Schreiber, Esquire
Counsel for Defendant La'Quetta Small

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| v. | : INDICTMENT NO.: 24-09-2951 |
| | : |
| LA'QUETTA SMALL | : |
| | : |
| | : **PROOF OF SERVICE** |

I, Michael H. Schreiber, hereby certifies as follows:

1. I am counsel for Defendant.

2. On January 28, 2025, I have caused a copy of the Notice of Motion to Dismiss the Indictment and supporting papers to be filed on e-courts with a copy of the same provided by electronic service to the prosecutor assigned to the matter.

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

Date: January 28, 2025

s/**Michael H. Schreiber**
Michael H. Schreiber

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| | : |
| LA'QUETTA SMALL | : |
| | : |
| | : **CERTIFICATION OF COUNSEL** |
| | : |
| | : |

Michael H. Schreiber, Esquire, hereby certifies:

1. I represent Defendant La'Quetta Small in the above matter.

2. Attached as Exhibit A is a true and correct copy of the transcript of the grand jury proceedings.

3. Attached as Exhibit B is a true and correct copy of the DCP&P Investigative Report.

4. Attached as Exhibit C are true copies of the following unpublished opinions: State v. M.K.C., 2006 N.J. Super. LEXIS 114; State v. D.W.S., 2015 N.J. Super. Unpub. LEXIS 2995; and State v. L.G.R., 2104 N.J. Unpub. LEXIS 2828.

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

s/**Michael H. Schreiber**
Date: 1/27/25 Michael H. Schreiber, Esquire