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LETTER BRIEF ON BEHALF OF DEFENDANT-RESPONDENT ADRIAN A. MCCONNEY

Honorable Judges of the Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
CN 006
Trenton, New Jersey 08625

Re: State of New Jersey (Plaintiff-Appellant) v.
Adrian A. McConney(Defendant-Respondent)
Docket No. A-2655-13T3

Criminal Action: On the State's Appeal
from a Final Judgment of the Superior Court,
Law Division-Criminal Part, Middlesex County,
Dismissing the Indictment.

Sat Below: Honorable Bradley J. Ferencz, J.S.C.

Honorable Judges:

Pursuant to R. 2:6-2(b), and R. 2:6-4(a), this letter in lieu of formal brief is submitted on behalf of defendant-respondent Adrian A. McConney.

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PRELIMINARY STATEMENT

Defendant was a high-school teacher who twice had sex with an adult female who was a student at his school. As both participants in that relationship, which lasted only for the month of February of 2013, were adults and their relationship was consensual, their behavior was not criminal. Indeed, defendant and the alleged victim could have legally married.

But because of those two sex acts, defendant was indicted for official misconduct. No proofs were presented to the grand jury (and none exist) that defendant used his position or authority as a teacher to establish or foster that relationship. No proofs were presented to the grand jury (and none exist) that defendant rewarded anyone or punished anyone, through his position as a teacher (or otherwise, for that matter), because of that relationship.

Because defendant did not use his position or authority as a teacher with regard to his relationship with the alleged victim, he should not have been indicted for official misconduct for his legal conduct with her. For that reason, as well as others set forth below, this Court should affirm the trial court's order dismissing this indictment, charging a single count of official misconduct, in violation of N.J.S.A. 2C:30-2a.

This Court has often stated that it reviews judgments and orders, not reasons. Hence, a respondent on an appeal may raise

any arguments that would sustain the judgment under review, even those rejected by the lower court. Below, defendant raised many challenges to the indictment. This brief will begin by setting forth those arguments as a basis for sustaining the judgment below, and will conclude by defending the trial court's stated reason for dismissing the indictment.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

On August 27, 2013, a Middlesex County grand jury returned Indictment No. 13-88-01119 against defendant-respondent Adrian A. McConney. That one-count indictment charged him with official misconduct in violation of N.J.S.A. 2C:30-2a. (Sa 1).

Thereafter, defendant filed two motions to dismiss the indictment. (Sa 2, 18). Defendant's several arguments seeking dismissal were rebuffed by the trial court over the course of a number of arguments. At one point, defendant sought and was denied leave to appeal an order denying his motion to dismiss the indictment. (Sa 16). But in the end, on February 4, 2014, the Honorable Bradley J. Ferencz, J.S.C., changed his mind and dismissed the indictment on the ground that the sexual relationship between defendant and the alleged victim was a legal relationship. (Sa 66).

On February 11, 2014, the State filed a notice of appeal from the order dismissing the indictment. (Sa 67). On April

21, 2014, the State's motion for summary disposition was denied. (Sa 69).

COUNTERSTATEMENT OF FACTS

For the purpose of this appeal, defendant accepts as accurate the State's recitation of the allegations presented to the grand jury.

LEGAL ARGUMENT

POINT I

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE IT DOES NOT ALLEGE THE OFFICIAL FUNCTION BREACHED BY DEFENDANT.

Even if the facts presented to the grand jury could support a charge of official misconduct, the indictment that was returned is deficient as a matter of law. It was properly subject to dismissal because it did not allege the supposed official function breached by defendant.

In State v. Schenkolewski, 301 N.J. Super. 115 (App. Div.), certif. denied, 151 N.J. 77 (1997), this Court stated that an "indictment charging official misconduct must allege both the prescribed duty of the office and facts constituting a breach thereof." Id. at 144. In accordance with this requirement, the indictment in Schenkolewski, apparently charging a violation of subsection a of the official misconduct statute, specified the official functions that the defendant in that matter breached as follows:

> [H]aving functions and duties among others to display good faith, honesty, and integrity, to be impervious to corrupting influences, to conduct himself with undivided loyalty to the public trust, and to refrain from activities which interfere with the proper discharge of his duties, at the behest of the defendants and other co-conspirators, did, acting with the purpose to obtain a benefit for himself and another, solicit, agree to accept, and accept money in an amount in excess of 500,000 dollars from [Cogen] … with the assistance of [defendants] Martin Buckley and Abraham Penzer, in exchange for Yisroel Schenkolewski's exercise of influence over the Lakewood Township Committee's decision to settle the lawsuit and transfer land owned by the Township to [Cogen] to build a cogeneration plant … while matters directly relevant to the cogeneration plant were pending before the Zoning Board. . . .

Here, the indictment does not set forth the prescribed duty of the office, or in the actual language used by this indictment, the "official function[]"of the office of high-school teacher, that defendant violated. Rather, the official-misconduct count parrots the statutory language, utterly without embellishment.

Hence, the indictment was properly dismissed.

POINT II

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE THE STATE FAILED TO PROPERLY INSTRUCT THE GRAND JURY ON THE LAW.

In State v. Jenkins, 234 N.J. Super. 311 (App. Div. 1989), this Court explained that a jury charge on the offense of possession of a weapon for an unlawful purpose must define the unlawful purpose or purposes at issue. This Court explained that a "jury is not qualified to say without guidance which

purposes for possessing a gun are unlawful under N.J.S.A. 2C:39-4a and which are not," and a jury must not be permitted to "convict based on their own notion of the unlawfulness of some other undescribed purpose." Id. at 316. So too, in the present matter, the grand jurors were not qualified without guidance—and they were given not imprecise guidance, but no guidance at all—to say what are the official functions of the office of high-school teacher. Schenkolewski, supra. In its grand jury presentation, the State cited to no law, rule, regulation, code, manual, or to any authority whatsoever, to support its allegation that defendant had engaged in official misconduct.

Hence, for this reason as well, this indictment was properly dismissed.

POINT III

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE THE FACTS ALLEGED BY THE STATE FAIL TO PROVE THE CRIME OF OFFICIAL MISCONDUCT.

Under the facts alleged before the grand jury, two adults engaged in consensual sex, not in school or during school hours, on two occasions. Other than the claim that defendant thereby engaged in official misconduct, there was nothing illegal about his actions with the supposed victim, who, the State accepts, initiated their sexual relationship. Whether that relationship was inappropriate or even immoral, a question that should be left to society in general or the school board, but not to the Middlesex County Prosecutor's Office, it was not illegal. Two

adults, that is, two persons of the age of consent, have the right to engage in consensual sex and the State may not criminalize their decision to do so. Indeed, defendant McConney and the alleged victim had a legal right to marry one another (albeit McConney would have to have first obtained a divorce). As our Supreme Court explained in State v. Saunders, 70 N.J. 200, 220 (1977) (footnote omitted):

> Fornication may be abhorrent to the morals and deeply held beliefs of many persons. But any appropriate "remedy" for such conduct cannot come from legislative fiat. Private personal acts between two consenting adults are not to be lightly meddled with by the State. The right of personal autonomy is fundamental to a free society. Persons who view fornication as opprobrious conduct may seek strenuously to dissuade people from engaging in it. However, they may not inhibit such conduct through the coercive power of the criminal law. As aptly stated by Sir Francis Bacon, "[t]he sum of behavior is to retain a man's own dignity without intruding on the liberty of others." The fornication statute mocks the dignity of both offenders and enforcers. Surely police have more pressing duties than to search out adults who live a so-called "wayward" life. Surely the dignity of the law is undermined when an intimate personal activity between consenting adults can be dragged into court and "exposed." More importantly, the liberty which is the birthright of every individual suffers dearly when the State can so grossly intrude on personal autonomy.

Hence, there exists yet a third reason why the indictment below was properly subject to dismissal, it seeks to criminalize conduct by the defendant that constituted an expression of his fundamental right to "personal autonomy."

POINT IV

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE THE SEX ACTS BETWEEN DEFENDANT AND THE ALLEGED VICTIM WERE NOT THE PRODUCT OF OFFICIAL ACTS BY DEFENDANT.

The indictment charges that defendant committed official misconduct under subsection a of the statute by one of two means. He either (1) committed an act or acts relating to his office, but constituting an unauthorized exercise of his official functions or (2) committed such acts in an unauthorized manner. How does it make sense to claim that defendant's acts of having sex with the alleged victim constituted an exercise, that was unauthorized, of his official functions? Whatever having sex with the alleged victim was, it was not an exercise of defendant's official functions. Second, how does it make sense to say that his having sex with the victim was an act related to his office that was committed in an unauthorized manner? Was having sex with the alleged victim allowable, but just not allowable in the "unauthorized manner" in which it was done? Asking these questions--questions grounded in the language of the indictment articulating the charge leveled against defendant and the language of the State's charge on the law to the grand jury--starkly demonstrates that the State cannot transform what were perfectly legal acts into the crime of official misconduct any more than one can put a square peg into a round hole.

Case law shows that the fact that defendant and the alleged victim met in school while defendant was her teacher does not mean that their sexual encounters outside of school constituted official misconduct.

In State v. DeCree, 343 N.J. Super. 410 (App. Div.), certif. denied, 170 N.J. 388 (2001), the defendant was a school security guard who was convicted of second-degree official misconduct under N.J.S.A. 2C:30-2a for having participated in a fraud and kickback scheme involving the submission of false medical claims to the State Health Benefits Program. The defendant argued on appeal that even if she was properly found guilty of second-degree conspiracy to commit theft by deception, her misconduct did not constitute official misconduct. The State sought to counter that claim by arguing that the "defendant's actions constitute[d] official misconduct because she was employed as a security guard by the Newark Board of Education and spoke to Burns [a coconspirator] about the scheme on school premises, while in uniform and on duty." Id. at 417. Hence, "[a]ccording to the State, these circumstances were sufficiently related to her official status to constitute the crime of official misconduct." Id. This Court, however, wisely rejected the State's view that simply because the misconduct was job-related, that is, it took place on the job and would not have occurred but for the defendant's employment, it was

official misconduct. In the following passage, this Court explained that because the defendant's illegal conduct did not involve an abuse by her of her governmental powers as a security guard, that misconduct could not form the basis for an indictment charging the crime of official misconduct:

> The official misconduct statute is aimed at preventing "the abuse of government power for personal benefit." State v. Vickery, 275 N.J.Super. 648, 651, 646 A.2d 1159 (Law Div.1994). Examples of conduct that have been found to constitute official misconduct are sexual misconduct by a police officer while conducting a motor vehicle stop, State v. Stevens, 203 N.J.Super. 59, 495 A.2d 910 (Law Div.1984), modified, 222 N.J.Super. 602, 537 A.2d 774 (App.Div.1988), aff'd, 115 N.J. 289, 558 A.2d 833 (1989); facilitating the payment of bribes to obtain a rent increase not otherwise permitted, State v. Bryant, 257 N.J.Super. 63, 607 A.2d 1343 (App.Div.1992); a teacher exposing young students to inappropriate material, State v. Parker, 124 N.J. 628, 592 A.2d 228 (1991), cert. denied, 503 U.S. 939, 112 S. Ct. 1483, 117 L.Ed.2d 625 (1992). Defendant had no official functions relating to law enforcement. She was neither a police officer nor an investigator. Her duties were confined to preventing unauthorized persons from entering the school. Her actions in joining the scheme had nothing to do with her status as a security guard but everything to do with her public employment and participation in the State Health Benefits Program.
>
> [Id. at 418; emphasis added].

The application of DeCree to the instant case is clear. Assuming the truth of the State's allegations, defendant's having had (legal) sex with the alleged adult victim was not

official misconduct, even if we assume that as a teacher he should not have done so, because the State offered no proof to the grand jury that he somehow used or abused his authority as a teacher to do so or as a consequence of having done so. There was no proof, for example, that he promised a better grade to the alleged victim in exchange for sex or that he did anything or promised to do anything for the alleged victim in his role as a teacher either to induce her to engage in sex with him or as a reward for her having done so. Just as with the security guard in DeCree, where the victim could not have committed fraud but for her employment as a school security guard, the fact that defendant might not have met the alleged victim but for his having been her teacher, and, as well, the fact that he was her teacher, does not make their relationship a violation of the official misconduct statute.

Furthermore, defendant points this Court to several federal circuit cases recognizing that either a police officer or a teacher who meets someone through his official duties and then engages in misconduct with that person outside of his official duties does not act under color of law while engaging in that misconduct. Roe v. Humke, 128 F.3d 1213 (8th Cir.1997) (although police officer met the student through his role as goodwill ambassador to school, no nexus existed between his official duties and molestation of student where the defendant

molested the student at his farm, while he was off-duty, in plain clothes, driving his personal car, and did not pretend to be engaged in any official activity); Becerra v. Asher, 105 F.3d 1042, 1047 (5th Cir.1997) (although teacher had "first befriended and shown a special interest in" the victim at school, there was no nexus between official duties as teacher and sexual assault where teacher molested student off campus five months after student withdrew from school); D.T. v. Independent School District, 894 F.2d 1176, 1186-88 (10th Cir.1990) (teacher was not acting under color of law when he molested students during summer vacation, while under no contractual obligation to school district, molestation took place at his home following a fundraising activity for a basketball camp not affiliated with the school; and the events were the product of a private activity that the plaintiffs voluntarily and freely participated in as private individuals).

It is also well to observe that the above case law echoes the following long-ago comment of Chief Justice Weintraub, no less cogent because of its age:

> All persons have the "duty" to obey the law. More accurately, there is no "duty" but rather a liability to punishment. Every public officer of course is thus amenable in his capacity of private citizen, but he does not necessarily commit two crimes by a single act merely because he happens also to be a public official.
>
> [State v. Cohen, 32 N.J. 1, 13 (1960) (Weintraub, C.J., concurring).]

All of these cases establish the point that just because defendant met the alleged victim in school in his role as a teacher does not make his relationship with her outside of school an act of official misconduct.

As to any claim that defendant breached section b of the official misconduct statute, even though the indictment clearly charges him with a violation under section a, that claim is dispositively refuted by State v. Keuny, 411 N.J. Super. 392 (App. Div. 2010). Keuny clearly explains that section b of the statue involves omissions to act, that is, it concerns "passive inactivity" in violation of a duty to act. Id. at 403, n. 6. The Keuny Court quotes from the New Jersey Criminal Law Commission Commentary that states: "'Subsection b, the "omission to act" phase of this offense, [refers to] to a public servant who consciously refrains from performing an official non-discretionary duty ... [and] ... [i]n the absence of a duty to act, there can be no conviction.'" Id. at 406 (quoting II Final Report of the New Jersey Criminal Law Revision Commission, Commentary 291 (1971)).

In Keuny a police officer was indicted for failing to return an ATM card. Hence, this Court explained, he was "not indicted or convicted for violating N.J.S.A. 2C:30-2a which requires an affirmative act." Id. at 404.

Whatever one might wish to say about defendant's conduct towards the alleged victim, it is beyond doubt that he was indicted not for inactivity, or a failure to act, but for activity, or acting. If having sex can be said to have constituted inactivity or a failure to act, than words have no meaning and the concept of due process notice is an utterly empty proposition.

Hence, the indictment was properly dismissed.

POINT V

THE INDICTMENT WAS PROPERLY DISMISSED BECAUSE IT FAILS TO DISTINGUISH BETWEEN TWO ELEMENTS OF THE CRIME OF OFFICIAL MISCONDUCT.

The State's charge falls under State v. Thompson, 402 N.J. Super. 177 (App. Div. 2008). More particularly, Thompson, holds that official misconduct charges cannot be based on "general and generic" codes of conduct and it disallows the filing of such charges by doubling counting the commission of an unethical act as both the benefit received and the failure to perform a duty imposed by law or inherent in the office. Thus, Thompson, supra at 202, states:

> Even if we assume that the duty to decline benefits is a cognizable [official] duty ... , under the State's theory, the acceptance of any benefit from a vendor by any Department employee under any circumstances would subject the recipient to criminal prosecution. By this rationale, there would be no practical distinction between two key elements of the crime, the failure to perform a duty and the unlawful purpose. They would be one and the same. Likewise, with the failure to report counts, because failure to report an ethical violation

> could always be construed as acting with intent to deprive the Department of the opportunity to enforce its Code of Ethics, the two elements in those counts would likewise be collapsed into one. This tautology would result in strict criminal liability for nothing more than an ethical violation. We cannot accept this rationale.

Defendant realizes, of course, that this passage deals with 2C:30-2b, not 2C:30-2a, the section under which he was indicted. Defendant nonetheless submits that this rationale applies under subsection a as well. Applying that rationale to the instant matter, the indictment must fail because the acts of sex between defendant and the alleged victim constituted—in some unexplained manner—both the (supposed) unauthorized exercise of defendant's official functions or the (supposed) official acts committed in an unauthorized manner and the benefit received. Here, in other words, the indictment is sustained only by the same tautology condemned in Thompson.

Hence, the indictment was properly dismissed.

POINT VI

THE NEA CODE IS IRRELEVANT TO THE INDICTMENT.

To the extent that the State references the School Board's Handbook's reference to the NEA Code, it is irrelevant to the validity of the indictment. It is indisputably irrelevant because the NEA Code was not presented to the grand jury. The grand jury was completely unaware that such a thing as an NEA Code of Ethics or a Board Handbook existed. Likewise, the grand

jury was unaware that defendant had been presented with any such Handbook or that he may have known of the existence of the NEA Code. The State obliquely recognizes this flaw in its argument in a footnote.

It should additionally be noted that the very terms of the NEA Code of Ethics state that its provisions do no more than "indicate" the "aspirations of all educators." (emphasis added). Hence, it is not a Code that mandates anything.

Second, the NEA Code also specifies that it may not be enforced through the criminal laws of the states. The Code's Preamble states: "The remedies specified by the NEA and/or its affiliates for the violation of any provision of this Code shall be exclusive and no such provision shall be enforceable in any form other than the one specifically designated by the NEA or its affiliates." (emphasis added). Hence, the NEA was careful to ensure that its Code would not be used as the basis for a criminal prosecution. It ineluctably follows that what the School District and defendant were signing on to by signing on to the Code was a Code that both must have understood, so long as the District and defendant understood the English language, articulated a set of principles the violation of which could not lead to a criminal prosecution. This also means that by signing on to the Code, defendant not only had no notice that by doing so he was subjecting himself to criminal liability, but that in

signing on to the Code he was receiving an assurance that he was not subjecting himself to criminal liability.

It is also to be observed that the portion of the NEA Code that the State references is virtually identical to N.J.S.A. 52:13D-23(e)(3) of the State Code of Ethics. As previously noted, in Thompson, supra, this Court ruled that "general and generic" codes of conduct may not form the basis for liability under the official misconduct statute.

Moreover, the Handbook merely "endorses" the Code. When one endorses a matter, one expresses one's approval of that matter or commends that matter to others. One does not mandate adherence to a matter by endorsing it.

Last, the NEA Code also says that teachers should not embarrass students. Would doing so also constitute official misconduct?

For all of these reasons, the NEA Code is irrelevant to the validity of the indictment.

POINT VII

JUDGE FERENCZ PROPERLY DISMISSED THE INDICTMENT FOR THE REASONS EXPRESSED BY THE COURT.

The State attacks Judge Ferencz's reasoning, relying primarily upon State v. Parker, 124 N.J. 628 (1991), cert. denied, 503 U.S. 939 (1992). It is all well and good for the State to quote Parker's statement that official misconduct need not be criminal. But it remains true in Parker that the

underlying acts of the defendant were actually criminal acts, even if the defendant was not convicted of those acts. The same holds true for all of the other official misconduct cases relied on by the State in presenting its argument on this point. Hence, Judge Ferencz's rationale was correct. Defendant commends to this Court the opinion of Judge Ferencz below on this question.

Moreover, in further support of Judge Ferencz's rationale, defendant submits that even assuming official misconduct can be predicated upon misconduct not prohibited as criminal, and leaving aside for the moment the (dispositive) argument that the sex acts at issue did not involve any "official" action, due process notice requirements demand that the basis for characterizing conduct as wrongful enough to constitute an element of the crime of official misconduct must come from somewhere solid and ascertainable. It must be grounded in some clear, specific authority somewhere. See Thompson, supra (official misconduct charges cannot be based on "general and generic" codes of conduct). It cannot be that actions that are not criminal can form the basis for a charge of official misconduct, carrying a mandatory five-year prison term, because those actions are wrong or immoral in the mind of the assistant prosecutor presenting the matter to the grand jury. Here, there was absolutely nothing presented by the State to the grand jury

demonstrating why the acts in question, acts of consensual sex between two adults, in and of themselves legal, constituted such wrongful acts that they were somehow condemnable as official misconduct. Before the grand jury, the State cited no law, no rule, no regulation, no known prohibition of any kind from any source—nothing whatsoever—to establish that the acts at issue were improper and thus could constitute an element of the crime of official misconduct.

And, as Judge Ferencz pointed out, if defendant was indictable for official misconduct, because his two acts of sex with the alleged victim were related to his office simply because he was a teacher, and those sex acts were—although the State never explains how—an unauthorized "exercise of his [defendant's] official functions," apparently simply because he was a teacher(State's brief at 11), any judge who engages in a romantic relationship with a law clerk ought to be indicted for having done so. Likewise, any government supervisor who engages in a romantic relationship with a subordinate is indictable. Further, given that the sex between defendant and the alleged victim was legal and, thus, it cannot be the fact that they consummated their relationship that makes the difference, it follows that even a nonconsummated, or entirely chaste, yet nonetheless romantic, relationship between any government supervisor and a subordinate is indictable conduct.

(And, again, the State has never shown that the two acts of sex between defendant and the alleged victim derived from or were in any manner furthered by any official action taken by defendant or that they were somehow an exercise by defendant of his official functions undertaken in an unauthorized manner.)

Hence, Judge Ferencz properly dismissed the instant indictment. He reasoned correctly and, as important, several other reasons exist to support his judgment.

CONCLUSION

Not every inappropriate act by a government employee constitutes official misconduct. The essence of official misconduct is an abuse of power. Absent such an abuse, inappropriate actions by government employees must be dealt with outside the criminal justice system. Here, the State apparently saw wrongdoing in the relationship between defendant and the alleged victim, but also knew that their relationship was not criminal. Rather than allowing the school system to respond to defendant's actions, the State turned to the official misconduct statute to condemn his conduct as a crime. But the facts here do not involve an abuse of power by defendant. They do not involve any use of power by defendant in connection with his relationship with the alleged victim. Hence, these facts do not fit the crime of official misconduct. For this reason, as well as

the other arguments set forth above, defendant respectfully asks this Court to affirm the order below dismissing the indictment.

Respectfully submitted,
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