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STATE OF NEW JERSEY,

Plaintiff,

v.

CARLIA M. BRADY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION- SOMERSET COUNTY
Indictment No. 15-05 00240

Criminal Action

MOTION TO DISMISS INDICTMENT

APPENDIX ON BEHALF OF DEFENDANT CARLIA M. BRADY IN SUPPORT OF MOTION TO DISMISS INDICTMENT

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September 11, 2015

Honorable Kimarie Rahill, J.S.C.
Somerset County Courthouse
20 North Bridge Street
Somerville, NJ 08876-1262

Re: State of New Jersey v. Carlia M. Brady
Indictment No. 15-05-00240

Honorable Judge:

This letter brief with appendix is submitted in support of defendant's motion to dismiss the indictment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 10, 2013, defendant, who had been sworn in as a Superior Court Judge on April 5, 2013, went to the Woodbridge Police Department to report that her car was missing and possibly stolen. She informed the police of the involvement of her then-boyfriend, Jason Prontnicki, in the matter. The police ran a record check on him and discovered that there were two warrants outstanding for his arrest, including a warrant for second-degree robbery[1] out of Old Bridge, and also that his license had been suspended.

Woodbridge Sergeant Bukowski advised defendant of Prontnicki's record. He also told her, quoting his grand jury testimony, that she was "an an officer of the court" and "had an obligation or it would be in [her] best interest to let us know if Jason is somewhere that he is now

[1] Although the warrant was for second-degree robbery, defendant was advised that it was alleged that Prontnicki had attempted to rob a pharmacy while armed with a crowbar.

or if once we left, if she [*sic*] came back [to her residence, where he frequently stayed] that she was – it would be her duty to call us and let us know." (3GJT25-4 to 13).[2] Neither Sergeant Bukowski nor any other member of the Woodbridge Police Department informed defendant that the police had been actually actively looking for Prontnicki or that, based on her appearance at headquarters, they would now be actively looking for him.

Later that day, Prontnicki appeared at defendant's home to drop off her car. He remained there, speaking to defendant, for approximately one hour. Prontnicki also appeared at defendant's home the next day. On that next day, the 11th, the police were, unbeknownst to defendant, watching defendant's home. As Prontnicki pulled up to defendant's home, he spotted the police and knew he would be arrested as soon as he left her home. He remained in her home for approximately one hour. After he left, he was indeed arrested by the Woodbridge police.

While defendant left two voice messages with the Woodbridge Police during the 10th and 11th, and in those messages asked the police to call her back, she did not in either message advise the police of Prontnicki's precise whereabouts. (Exhibit D). She did advise the police in her voice message of the 10th that Prontnicki was in Woodbridge and had just left her home. While Prontnicki was at defendant's home on the 10th and 11th, defendant did not call the police to advise them that he was presently at her home. Also, she did not telephone the police to advise them that she knew (according to one of Prontnicki's statements to the police given after his and defendant's arrest) that Prontnicki would be coming to her home on the 11th.

Within minutes of Prontnicki's arrest, the police arrested defendant without a warrant at her home. They thereafter obtained two complaint-warrants from Middlesex Judge Ferencz,

[2] GJT refers to grand jury transcript of April 29, 2015. 2GJT refers to grand jury transcript of May 6. 2-15. 3GJT refers to grand jury transcript of May 13, 2015.

J.S.C., charging defendant with hindering the apprehension of Prontnicki by failing to telephone the police to advise them of Prontnicki's whereabouts. (Exhibit F).

Prontnicki gave three statements to the police following his arrest. (Exhibits A, B, C). His statements are the primary foundation of the indictment returned against defendant for hindering apprehension, even though in his statements he told the police that defendant wanted him to turn himself in, that he had told her that he intended to do so, and that he had stated to her on both occasions when he was in her house that he needed to leave as soon as possible.[3]

On June 10th and 11th, 2013, defendant was on vacation from her position as a Superior Court Judge.

The indictment was returned on May 13, 2015. Count one of the indictment charges second-degree official misconduct, contrary to N.J.S.A. 2C:30-2b. Count two charges third-degree hindering apprehension by harboring or concealing, contrary to N.J.S.A. 2C:29-3a(1). Count three charges third-degree hindering apprehension by other means, contrary to N.J.S.A. 2C:29-3a(2). (Exhibit G).

LEGAL ARGUMENT

POINT I

THE CHARGE OF OFFICIAL MISCONDUCT MUST BE DISMISSED BECAUSE THE SUPREME COURT HAS EXPLICITLY RULED THAT THE ENFORCEMENT OF WARRANTS IS NOT A JUDICIAL FUNCTION. OTHER REASONS EXIST AS WELL REQUIRING THE DISMISSAL OF THIS COUNT OF THE INDICTMENT.

Count one of the indictment is irretrievably flawed. The primary reason that it is defective is this. Its allegation that a judge has an inherent duty to enforce an arrest warrant

[3] It is to be noted that in her grand jury testimony, defendant adamantly denied those allegations in Prontnicki's statements that the State would contend constitute proof of her guilt of the charges set forth in the indictment. Defendant understands, however, that where her grand jury

contravenes a New Jersey Supreme Court ruling that no such judicial duty exists or could exist consistent with the separation-of-powers clause of the New Jersey Constitution. While that defect alone requires the dismissal of count one, other reasons as well mandate the dismissal of this count.

A. The Supreme Court has explicitly ruled that the enforcement of warrants is not and cannot be a judicial function.

A Somerset County grand jury cannot overrule the New Jersey Supreme Court. Hence, the official misconduct count of the instant indictment must be dismissed. It is that simple.

Count one of the indictment charges defendant with official misconduct because she did "refrain from performing a duty clearly inherent in the nature of her office as a Judge of the Superior Court, that is, said defendant knowingly did fail to enforce an arrest warrant for Jason Prontnicki by failing to adequately notify the Woodbridge Police Department of Jason Prontnicki's intended appearance or presence at her residence." (Emphasis added). Yet, in In re P.L. 2001, Chapter 362, 186 N.J. 368 (2006), the Supreme Court ruled, "[I]t is the duty of ... law enforcement agencies to execute arrest warrants. .... Those are executive, not judicial, branch functions." Id. at 391. It is unfathomable that the State, knowing of the P.L. case, and even having referenced it in its grand jury instructions, told the grand jurors that they could return an official misconduct count if they determined that defendant had an inherent judicial duty to enforce an arrest warrant.

In P.L., supra, the Supreme Court considered the constitutionality of the Probation Officer Community Safety Unit Act (Act), L. 2001, c. 362 (codified at N.J.S.A. 2B:10A-1 to -3, 2C:39-6(c)(17)). The Act created "in the heart of the judiciary" a law enforcement unit

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testimony and Prontnicki's statements clash, this Court, for the purpose of this motion, will not give weight to defendant's denials.

comprised of probation officers who were authorized to carry firearms and arrest probation violators. Id. at 372. The Act authorized those probation officers "to carry . . . firearm[s]" and "to enforce warrants for the apprehension and arrest of probationers who violate the conditions of their probation sentence." Id. at 374 (emphasis added).

The Supreme Court in P.L. had no difficulty declaring the Act unconstitutional because it was "completely irreconcilable with [the Supreme] Court's exclusive administrative authority over the State's court system under Article VI and the separation of powers under Article III." Id. at 392.

The Supreme Court first observed that the separation-of-powers provision of the State Constitution, found at Article III, Paragraph 1 of the New Jersey Constitution, states:

> The powers of government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

The Court next stated that probation officers were not members of the executive branch, but were an integral part of the judiciary. Id. at 382, 384. The Court further explained that probation officers play a "vital role in the administration of justice, both in the criminal and civil courts." Id. at 386. The Supreme Court noted that it had accordingly "steadfastly" maintained that probation officers must avoid any perception of being on law enforcement's side in conducting court business. Id. And, to that end, the Court had "prohibited" probation officers "from performing traditional police functions." Id. Indeed, the P.L. Court pointedly observed that as far back as 1974, the Administrative Office of the Courts had advised probation officers that their work was "not law enforcement." Id.

Quoting an administrative ruling that the Court had made in 1994 regarding its long-standing policy of prohibiting probation officers from joining law enforcement organizations, In

re Proceedings Concerning Probation Officers' Membership in Law Enforcement Organizations and Proposed Affiliation of PANJ with the N.J. State Policemen's Benevolent Ass'n, Inc. (July 8, 1994), digested in 137 N.J.L.J. 1124, 1166 (July 18, 1994), the Court reiterated that it was essential to the integrity of the judiciary that the functions of the two separate branches of government, the judiciary and the executive, remain separate:

> Our decision rests on the fundamental difference between probation and police organizations. Probation is an integral part of the judiciary; everything that probation does it does as an arm of the judiciary.
>
> * * *
>
> Put simply, the functions of police and probation--one serving the prosecution the other serving the courts--are not only different, but incompatible. Separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary.
>
> [P.L., supra, 186 N.J. at 387 (quoting the Court's prior administrative ruling at 3-4) (emphasis added).]

The P.L. Court additionally stated, again referencing its 1994 administrative ruling, that probation officers could not even be perceived in any way as law enforcers: "In recognition of the unique role they play as agents of the judiciary, we noted that probation officers would be less likely to win the trust of those they supervise 'if they were perceived in any way as 'law enforcers,' as 'police,' or if they acted as such.'" P.L. at 387 (quoting its administrative ruling at 18). And, again quoting that administrative ruling, the P.L. Court observed that probation officers, as part of the judiciary, could not be identified with the police: "[I]f probation officers were allowed to identify themselves with the police, 'the impartiality of the judicial branch of government' would be cast in doubt both 'in fact and in appearance.'" P.L. at 387 (quoting its administrative ruling at 42).

Summing up its past precedents on the issue, the P.L. Court stated, "Thus, through its decisions and directives, the Supreme Court has made clear that the special role of the judiciary in our constitutional scheme requires that there be no entangling alliances between law enforcement and judiciary employees." Id. at 388 (emphasis added).

Finally, as if the Court had foreseen the instant case, the P.L. Court unambiguously declared that enforcing warrants was an "executive, not judicial, branch function[]":

> [I]t is the duty of the many municipal, county, and state law enforcement agencies to execute arrest warrants, including those of probation violators. Those are executive, not judicial, branch functions. It is not our place to pass judgment on the wisdom of legislation, and we do not do so here. It is our responsibility, however, to enforce the dictates of the Constitution and to restrain one branch of government when it oversteps its bounds and threatens the independence of another.
>
> [P.L. at 391 (emphasis added).]

Of course, if probation officers cannot execute warrants, or even be perceived as being on the side of the police, because they are members of the judicial branch, it is painfully obvious that judges, the quintessential members of the judicial branch, have no inherent duty to enforce arrest warrants.

The holding and rationale of P.L. and count one of this indictment are diametric opposites. Indeed, given P.L., it is impossible to comprehend why the State allowed the grand jury to deliberate on this charge.

On this basis alone, count one of this indictment must be dismissed.

B. The Official Misconduct Charge Is Fatally Defective On Other Grounds.

While it is bringing coals to Newcastle to point out other reasons why the official misconduct charge must be dismissed, defendant will nevertheless do so. First, no proofs were presented to the grand jury that defendant was aware of an inherent judicial duty to enforce an

arrest warrant. Of course, this would have been impossible to do as there is no such duty. Second, at all times relevant, defendant was not acting in her official capacity as a judge, but was acting as a private citizen. Third, the count does not specify what benefit was obtained, by either defendant or another, by defendant's supposed misconduct, contrary to the reasoning of State v. Schenkolewski, 301 N.J. Super. 115 (App. Div.), certif. denied, 151 N.J. 77 (1997). Fourth, based on the grand jury record, one can guess that the State intends to assert that defendant received the benefit of not being embarrassed by Prontnicki's arrest. But there are no proofs to support that assertion. One might also guess from that record that the State will argue that defendant intended that Prontnicki receive the benefit of his arrest being hindered. But that claim would fail as well because asserting such a benefit would collapse two of the elements of the crime into one, contrary to State v. Thompson, 402 N.J. Super. 177 (App. Div. 2008).

1. **No proofs were presented to the grand jury that defendant was aware of an inherent judicial duty to enforce an arrest warrant.**

Defendant Brady adamantly denied before the grand jury that she was aware of any inherent judicial duty to enforce an arrest warrant. This is not surprising, as no such duty has ever existed. And for that same reason, that is, because no such duty has ever existed, the State was not able to present proofs that defendant Brady was actually aware of such a duty.

In State v. Kueny, 411 N.J. Super. 392 (App. Div. 2010), the Appellate Division recognized that in order for a public servant to be guilty of a failure to perform a duty of his or her office, that servant must have been aware of the existence of that duty. Quoting from the Final Report of the New Jersey Criminal Law Revision Commission, the Court stated:

> *N.J.S.A. 2C:30-2(b)* reads as it did when the Code of Criminal Justice was first introduced in 1971, with the additional language in the introductory clause regarding the purpose to benefit oneself or deprive another. I *Final Report of the New Jersey Criminal Law Revision Commission, Report and Penal Code* 109 (1971). The Comment to the subsection reads:

> Subsection b, the "omission to act" phase of this offense, has reference to a public servant who consciously refrains from performing an official non-discretionary duty, which duty is imposed upon him by law or which is clearly inherent in the nature of his office. In addition, the public servant must know of the existence of such non-discretionary duty to act. Thus, such duty must be either one that is imposed by law, or one that is unmistakably inherent in the nature of the public servant's office, *i.e.*, the duty to act is so clear that the public servant is on notice as to the standards that he must meet. In other words, the failure to act must be more than a mere breach of good judgment. In the absence of a duty to act, there can be no conviction.
>
> [II *Final Report of the New Jersey Criminal Law Revision Commission, Commentary* 291 (1971).]

[Kueny, 411 N.J. Super. at 406 (emphasis added).]

Likewise, the Model Jury Charge for official misconduct, relying upon the same Commission Commentary, states, "[T]he public servant must know of the existence of such non-discretionary duty to act." Model Jury Charge, Official Misconduct (Revised 9/11/06) at 2, n. 3. Similarly, in State v. Grimes, 253 N.J. Super. 75 (App. Div.), certif. den., 118 N.J. 222 (1989), the Appellate Division, albeit discussing section a of 2C:30-2a, ruled stated that a defendant's knowledge of the law is an element of the crime of official misconduct:

> A public servant is guilty of official misconduct under *N.J.S.A. 2C:30-2a* only if he knows his act, relating to his office, is unauthorized or committed in an unauthorized manner. Unlike most crimes, as to which ignorance of the law is not material, *see N.J.S.A. 2C:2-4*, an essential element of this kind of official misconduct is defendant's knowledge that the act he commits is unauthorized.
>
> [Id., at 89.]

Hence, in this matter, where the State presented no proofs to the grand jury that defendant was aware that as a judge she had an inherent duty to enforce an arrest warrant—and, indeed, given P.L., it would have been impossible for the State to have presented such proofs—the official misconduct charge is fatally defective.

Defendant recognizes that despite P.L., the State might seek to rely on the following grand jury testimony by Sergeant Bukowski in support of an argument that it presented evidence of this element of the crime:

> Q. And did you say anything to her about her status as an officer of the court?
>
> A. Yes, I did.
>
> Q. What did you say?
>
> A. I told her that you're an officer of the court, you have an obligation or it would be in your best interest to let us know if Jason is somewhere that he is now or if once we left, if she came back that she was – it would be her duty to call us and let us know if Jason came home."
>
> [GT transcript of May 13, 2015 at 25-4 to 13.]

There are multiple reasons why this testimony cannot salvage the official misconduct charge.

Most obviously, God help us all if a person can be criminally charged with knowledge of the law based upon a police officer's opinion as to what the law is.

Second, Sergeant Bukowski did not advise defendant that she had an inherent duty as a judicial officer to enforce an arrest warrant. He advised her either that it would be in her best interest or—and we do not know which—that she had a duty as an "officer of the court," that is, as a lawyer, to tell the police of Jason Prontnicki's whereabouts. But defendant was not indicted for violating an inherent judicial duty to do what would have been in her best interest. Making the guess that Sergeant Bukowski actually told her she had a duty as an "officer of the court," to report Prontnicki's whereabouts, no one, including lawyers and judges, is legally obligated to inform law enforcement of the whereabouts of a fugitive. See, e.g., United States v. Stacey, 896 F.2d 75, 77 (5th Cir. (1990); United States v. Yarbrough, supra; United States v. Foy, 416 F.2d

940, 941 (7th Cir. 1969); State v. Durgin, 959 A.2d 196, 198 (N.H. Sp. Ct. 2008); Burns v. State, 562 N.E.2d 770, 772 (Md. App. 1989); People v. Donelson, 359 N.E.2d 1225, 1227 (Ill. App. Ct. 4th Dist. 1977). The State even conceded this point—effectively admitting that Sergeant Bukowski was dead wrong in his advice—in its grand jury instructions.

Third, knowledge of the law must be rooted in an acknowledged authority. It cannot be obtained from the mouth of a police officer any more than it can be obtained from the mouth of the guy sitting on the next bar stool. Indeed, Due Process requires as much:

> [D]ue process bars courts from applying a novel construction of a criminal statute to the conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within the statute's scope. ... [T]he touchstone is whether the statute, either standing alone or as construed by the courts, made it reasonably clear at the time of the charged conduct that [the defendant's] conduct was criminal.
>
> [United States v. Lanier, 520 U.S. 259, 266 (1997).]

Echoing such Due Process concerns, in State v. Grimes, supra, 253 N.J. Super. 75, the Appellate Division held that to prosecute someone for committing an unauthorized act, "there must be an available body of knowledge by which the officer had the chance to regulate his conduct." Id. at 89. Further, the Grimes Court stated, "The law must give a person of ordinary intelligence fair warning what conduct is proscribed, so that he may act accordingly." Id. at 89-90. Of course, it would be preposterous to assert that by the term "the law," the Appellate Division meant a police officer's opinion as to what the law is. Cf. N.J.R.E. 201(a) ("Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.").

Accordingly, even with Sergeant Bukowski's bad advice to defendant and defendant's testimony that she had been momentarily bamboozled by Bukowski, the grand jury record provides no proofs whatsoever that defendant Brady knew that she had an obligation (that P.L. clearly states she actually did not have) as a judge to enforce the arrest warrant for Jason Prontnicki.

2. At all times relevant, defendant was not acting in her official capacity as a judge, but was acting as a private citizen.

Yet another fatal defect in the official misconduct charge is that defendant Brady was not acting in her capacity as a judge on either June 10th or 11th, 2013. Rather, she was at home and on vacation from her judicial position on those days. Thus, her status was that of a private citizen.

In State v. Kueny, 411 N.J. Super. 392 (App. Div. 2010), the Appellate Division reversed a conviction for official misconduct under section b of the statute based on a police officer's fraudulent use of a credit card while he was off-duty, on vacation and outside of his jurisdiction. Id. at 406. The Court reasoned, "A public servant's private misconduct cannot be punished as official misconduct; the private misconduct can only be punished to the extent that the same conduct by a private citizen can be punished." Id. at 407 (citations omitted). The Court next stated, "Stated differently, the misconduct must somehow relate to the wrongdoer's public office. There must be a relationship between the misconduct and public office of the wrongdoer, and the wrongdoer must rely upon his or her status as a public official to gain a benefit or deprive another." Id. (citation omitted). Thus, the Court concluded, because the defendant "simply did not use his status as a police officer to commit the crime of fraudulent use of a credit card," his private criminal conduct was not official misconduct. Id. at 407-08.

In State v. Hupka, 203 N.J. 202 (2010), the question before the Court was whether an act of criminal sexual conduct by a Sheriff's Officer was sufficiently related to his office to require him to forfeit public employment. Under the forfeiture statute, he would be disqualified from public employment if his criminal conduct involved or touched upon his office. The Court ruled that the officer was not subject to forfeiture because at the time of the incident, the officer was not on duty, was not in uniform, and he did not use or threaten the use of his office in any way to commit the offense. Id. at 239.

Applying this case law to the instant matter, it is readily seen that because defendant's status at all times relevant was that of a private citizen, that is, she was at home and on vacation on June 10th and 11th, 2013, her actions could not have constituted official misconduct.

3. The first count of the indictment is defective for failing to state the benefit obtained by defendant or another.

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. It is submitted that logic dictates that this requirement should apply to all of the elements of the crime of official misconduct. Here, as stated, the indictment did not allege the benefit supposedly obtained by defendant or another as a consequence of defendant's actions. Hence, pursuant to Schenkolewski, this count of the indictment must be dismissed.

4. The official misconduct charge cannot be sustained on the theory that defendant was attempting to avoid embarrassment or confer upon Prontnicki the benefit of not being arrested.

Guessing that the indictment intended to indict defendant for obtaining the supposed benefit of not being embarrassed by the fact of Prontnicki's arrest or that the benefit to another was the benefit to Prontnicki of not being arrested, this count must still be dismissed. As to

defendant's supposed embarrassment, she denied before the grand jury that she would be embarrassed by Prontnicki's arrest. While one could speculate that she might be, speculation is not proof. Certainly, a myriad of emotions might have been prompted by Prontnicki's arrest. But no proofs were presented to that effect.

Defendant is aware of the following passage from Prontnicki's statement to Sergeant Fodor:

> Prontnicki: She said I think you should go in with an attorney.
>
> Fodor: Okay.
>
> Prontnicki: But she said don't assume, because you don't wanna be embarrassed or, because we just had a function with, ah, Supreme Court Justices, ah, lawyers, judges, policemen, I had, two days ago, I had no idea I had a warrant. We were with all these people in New Brunswick.
>
> [Exhibit A at19].

It is difficult to make heads or tails out of the comment referencing Prontnicki being embarrassed. But the passage seems to reflect advice from defendant Brady to Prontnicki that he should turn himself in and not be embarrassed in doing so. Certainly, Prontnicki does not state that defendant Brady confided to Prontnicki that she would be embarrassed by the fact of his arrest.

Defendant acknowledges that in State v. Quezada, 402 N.J. Super. 277 (App. Div. 2008), the Court held that when a volunteer firefighter calls in a false alarm, the benefit element of the crime of official misconduct can by satisfied by "the joy or gratification of participating in the response or even by giving the unit work to keep it in existence." Id. at 281. But in that case "a number of witnesses, including family members, ... testified to defendant's desire to serve, and enjoyment in being, a firefighter." Id. at 282. The State also adduced testimony that the defendant had "always wanted to be a firefighter and enjoyed his participation on the force." Id.

285. Based on that evidence—the sort of evidence absent here—the Appellate Division concluded that there was sufficient evidence in the record to sustain the defendant's conviction based upon a finding of a benefit. Id.

Stated otherwise, the State cannot simply argue that all non-comatose humans feel emotions whenever they act and, therefore, it can always be inferred that a defendant who acted felt a particular emotion. Rather, there must be some evidence in the record to support the State's claim. Here, there was no evidence presented that defendant was attempting by her actions on the 10th and 11th to avoid being embarrassed by the future arrest of Prontnicki.

As to the benefit of allowing Prontnicki to avoid being arrested, presenting that as a benefit would be improper under State v. Thompson, 402 N.J. Super. 177 (App. Div. 2008). In Thompson, the Appellate Division disallowed the filing of an official misconduct charge by the expedient of 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.

Under this rationale, the benefit-to-another allegation of the official misconduct count of the indictment must be struck.

For all of the foregoing reasons, count one of the indictment must be dismissed.

In addition, if the official misconduct count is not dismissed by this Court, defendant hereby requests, pursuant to R. 3:7-5 (Bill of Particulars), that the State particularize the benefits it alleges.

POINT II

COUNT TWO, CHARGING A VIOLATION OF N.J.S.A. 2C:29-3(a)(1) MUST BE DISMISSED AS DEFENDANT DID NOT HARBOR OR CONCEAL A FUGITIVE.

The only grounds for the harboring or concealing allegations are that defendant allowed Prontnicki to enter her residence for approximately 1 hour on the 10th and the 11th, and that because her walls were not made of glass, his presence within the four walls of her home meant he was not visible from the street. Such acts do not constitute either harboring or concealing a fugitive.

In addition, no proofs were presented to the grand jury that defendant allowed Prontnicki into her home for those brief periods for the purpose of hindering his apprehension. Indeed, the proofs were overwhelming that: (1) she wanted no involvement with him until he had straightened out his legal difficulties, (2) she repeatedly advised Prontnicki to turn himself in, and (3) Prontnicki repeatedly assured her that he intended to do so.

Moreover, on both dates, there is no doubt that Prontnicki appeared at defendant's residence not to stay or to hide from the police, but simply, on the 10th, to drop off defendant's car, and on the 11th, to retrieve some of his clothes, which, because they were his, he had the legal right to obtain. On both occasions, Prontnicki advised defendant that he wanted to leave her residence as soon as possible.

Finally, no proofs were presented to the grand jury that defendant was aware that the Woodbridge police were actually actively looking for defendant on either date. Rather, the proofs showed that Prontnicki's warrant came to the attention of the police quite by accident

(because of defendant's appearance at headquarters) and defendant had no reason to believe that their efforts to arrest him for his warrant out of Old Bridge, not Woodbridge, went beyond their desire to hear from her if she learned of his whereabouts.

Common sense and case law establish that the proofs presented to the grand jury do not support a charge of hindering the apprehension of a fugitive by acts of harboring or concealing.

A. Allowing a fugitive into one's home is not harboring or concealing.

New Jersey case law is undeveloped as to the meaning of the terms "harbor or conceal." But those terms are well-defined under the analogous federal statute, 18 U.S.C. § 1071. As explained, for example, by the Seventh Circuit in United States v. Foy, supra, 416 F.2d 940, to "harbor" means "'to lodge, to care for after secreting the offender,'" and to "conceal" means "'to hide, secrete or keep out of sight.'" Id. at 941 (quoting United States v. Thornton, 178 F. Supp. 42, 43 (E.D.N.Y.1959)).

In applying this criminal statute, the courts construe the terms narrowly. See, e.g., United States v. Shapiro, 113 F.2d 891, 892 (2d Cir. 1940). Thus, not every interaction with a fugitive is considered harboring or concealing. As the Ninth Circuit explained in United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir.), cert. denied, 488 U.S. 866 (1988), "Not all acts that provide some form of 'assistance' to a fugitive constitute a violation of the statute." Id. at 1543. Rather, the case law "almost universally" requires some "'affirmative physical action'" to harbor or conceal a fugitive to find guilt under the statute. United States v. Hanny Fouad Bahna, 413 F. Supp. 2d 1095, 1099 (C.D. Cal. 2005) (quoting United States v. Lockhart, 956 F.2d 1418, 1423 (7th Cir. 1992). As similarly stated in United States v. Shapiro, supra, 113 F.2d 891, where the Court was interpreting 18 U.S.C. § 246, the predecessor of § 1071, the words harbor and conceal must be construed narrowly to refer to "some *physical* act tending to the secretion of the body of

the offender." Id. at 892 (italics in original; internal quotations and citations omitted). The Shapiro Court also observed that the word harbor and conceal "are active verbs, which have the fugitive as their object." Id.

Under the umbrella of these broad concepts, the case law more particularly holds that the mere act of allowing a fugitive into one's home does not constitute harboring or concealing. Rather, the case law considers such passive conduct to be the equivalent of being aware of a fugitive's whereabouts and not providing that knowledge to the police.

Hence, in United States v. Vizzachero, 1997 U.S. Dist. LEXIS 14327 (E.D.Penn. 1997) (copy appended as Exhibit H) the defendant was convicted of aiding her sister in harboring or concealing a fugitive, Ms. Vizzachero's boyfriend, by staying with him at her sister's home, while aware that her boyfriend was a fugitive. The Court granted the defendant's motion to set aside the verdict and enter a judgment of acquittal. The Court reasoned:

> Even viewing the evidence in the light most favorable to the prosecution, although the acts of giving Mr. Mastrangelo tea, cookies, companionship, and a bed for the night, can be viewed formalistically as physical actions providing food and shelter, they were not acts intended to provide assistance or aid to Mr. Mastrangelo in avoiding detection and apprehension. The government proved only that Ms. Vizzachero knew there was a warrant outstanding for her boyfriend's arrest. That alone did not obligate her to inform on him or turn him in. The government failed to establish facts from which a jury could find beyond a reasonable doubt that she engaged or caused others to engage in physical acts aiding Mr. Mastrangelo with the intent to prevent his detection and apprehension.
>
> [Id. at *21.]

Notably, the Court also remarked that "no evidence was presented that Ms. Vizzachero knew federal agents were outside her sister's house; no evidence was presented that Ms. Vizzachero or her sister did anything they would not normally have done if Mr. Mastrangelo were not a fugitive." Id. at *19.

In keeping with this observation of the Vizzachero Court, that is, that it was significant that neither the defendant nor her sister did anything out of the ordinary with regard to the fugitive in that case, in Brady v Hearst Corp., (DC Mass. 1968) 281 F Supp. 637 (DC Mass. 1968), a libel case, the Court held that a certain newspaper article attributed to the defendant contained nothing which could be construed as accusing the plaintiff of, among other things, harboring or concealing her husband, where the substance of that article was that a fugitive had planned a combination Christmas and birthday reunion with unnamed members of his family. The Court pointed out that if the article at issue was read in a "natural sense," the article conveyed to mankind in general only that the fugitive's family, like any other normal family group, desired to spend Christmas with the head of the family.

In United States v. Costello, 666 F.3d 1040 (7th Cir. 2012), the Court ruled that a defendant who had allowed her boyfriend, whom she knew to be in the country illegally, to live with her, but who provided no other effort to assist or conceal him, was not guilty of harboring an alien under 8 U.S.C. § 1324(a)(1)(A)(iii) (prohibiting harboring or concealing an illegal immigrant). The Court concluded that the harboring element of the statute, which prohibits concealing, harboring or shielding an illegal immigrant, requires that the government demonstrate something more than "simple sheltering" in order to incur criminal liability. It found that the government had not shown that the defendant's actions were critical in aiding the defendant to avoid detection and no evidence suggested the defendant had the purpose of encouraging, protecting or secreting illegal aliens.

In State v. Durgin, supra, 959 A.2d 196, the New Hampshire Supreme Court held that the evidence was insufficient to convict the defendant of harboring and concealing where, upon learning of the warrant for her daughter's arrest, defendant lied to the police and required them to

obtain a warrant before entering her home, where her daughter, in fact, was at the time, and where, soon after the police left, the defendant went with her daughter to the police station so that the daughter could turn herself in.

In United States v. Foy, supra, 416 F.2d 940, the Seventh Circuit held that the defendant did not harbor or conceal a fugitive when he lied to the police, telling them that he had not seen the fugitive since the day before, even though the fugitive and defendant were, in fact, in the same apartment at the time.

In Roberts v. State, 318 So.2d 166 (Fla. DCA 1975), the Court ruled that the defendant had not committed the Florida crime of aiding a fugitive with the intent that he should escape detention by sharing an apartment with him while aware that he was a fugitive.

By way of useful contrast to the above cases, that show that mere passive sheltering of an individual does not constitute harboring or concealing, one can examine, for example, the case of United States v. Stacey, 896 F.2d 75, 77 (5th Cir. 1990). There, the court ruled that the defendant harbored or concealed the fugitive when, knowing that the police were driving by looking for the fugitive, the defendant closed and locked the fugitive's front door. Similarly, in United States v. Yarbrough, 852 F.2d 1522, 1543 (9th Cir.), cert. denied, 488 U.S. 866 (1988), the defendants harbored or concealed a fugitive when they took him to a hotel in a different city and purchased a car for him under a false name to use as a getaway vehicle.

Defendant anticipates that the State will attempt to distinguish some of this case law on the ground that some of the cases were focused on the questions of whether lying to the police or not informing the police as to a fugitive's whereabouts constituted hindering apprehension by harboring or concealing. That may be true, but it cannot be refuted that the courts could only have focused on those questions based upon the underlying legal position that merely having a

known fugitive in one's home does not constitute hindering apprehension. Otherwise, the cases would have dismissed the contentions regarding lying or not providing the police with information as moot points. That is, in each case where the facts included that the fugitive was at the defendant's home, the courts would have reasoned that whether the defendant lied to the police or withheld information from the police was not material to the defendant's guilt as there was no issue that the defendant had allowed the fugitive to be present in his or her home while aware of that person's fugitive status, and even while aware (unlike the instant case) that the police were actively looking for the fugitive. Yet, as set forth above, in each of the cases including such facts, the courts nonetheless reversed the defendants' convictions for harboring or concealing a fugitive.

In addition, the Commentary of the New Jersey Criminal Law Revision Commission clearly shows that New Jersey's hindering statute should be construed in accordance with the above case law, distinguishing between active conduct to thwart the efforts of law enforcement to apprehend a fugitive and mere passive interactions with a fugitive. The Commentary to the hindering statute does not state that merely having a fugitive in one's home constitutes harboring or concealing. Rather that Commentary states: "[H]arboring or concealing [a] fugitive ... requires proof that [the fugitive] was hidden or secreted by the actor." Final Report of the New Jersey Criminal Law Revision Commission, Volume II: Commentary (1971), Comment on § 2C:29-3 at 284. Indeed, if merely having a known fugitive in one's home sufficed to constitute harboring or concealing, the Revision Commission did a terrible job of drafting its proposed penal code.

Similarly, the ALI Model Penal Code, from which New Jersey's penal code was derived, states that "harboring or concealing a fugitive ... requires proof that the defendant acted to hide

or secrete the other person or lodge or care for him after secreting." American Law Institute, Model Penal Code, Commentary to § 242.3 at 233 (emphasis added).

Returning to the instant facts, Prontnicki entered and left defendant's home of his own volition for the limited purposes of dropping off defendant's vehicle, retrieving his clothes and conversing with defendant. As Prontnicki stated to Detective Floyd regarding his appearance at defendant's home on the 11th, "I said [to defendant], ... I don't wanna be here, let me just get the stuff and get out." (Exhibit C at 11; emphasis added). As he said to Sergeant Fodor regarding the visit of the 10th, "I said [to defendant's father] no, I gotta get outta here. She just wanted to talk to me so we talked for a little bit and I said alright, I gotta leave." (Exhibit A at 6). Furthermore, Prontnicki on both the 10th and the 11th declared his intent to leave defendant's residence as soon as he could in the context of an understanding between the two that he was going to surrender himself to the police. And it is worth repeating that Prontnicki appeared at defendant's residence while defendant had no knowledge that the police were then actually out searching for him.

Under all of these circumstances, particularly considering Prontnicki's statements to defendant that he wanted to leave defendant's home as soon as he could, the conclusion is irresistible that defendant did not harbor or conceal Prontnicki by her passive conduct of allowing him into her home for approximately one hour on June 10th and 11th, 2013.

B. No proofs were presented that defendant had a purpose to hinder Prontnicki's apprehension. Overwhelming proofs to the contrary were presented.

The proofs before the grand jury overwhelming demonstrated that defendant at no time intended to assist Prontnicki in evading the police. Most significantly, she repeatedly advised him that he needed to surrender himself and he repeatedly assured her that he would. No contrary proofs, showing that she at any time possessed the purposeful intent to assist Prontnicki

in evading the police, were presented to the grand jury. The objective surrounding facts also proved that she never had a purpose to assist Prontnicki in evading the police.

1. **Purposefulness is the Code's highest form of intent. One acts purposefully only if one has the prohibited goal as one's conscious object. Even knowing that a prohibited result will come about by one's actions does not constitute purposefulness if one also does not also consciously desire that result.**

As a threshold matter, it is important to recall the mental state that constitutes purposefulness under the Penal Code. Under N.J.S.A. 2C:2-2b(1), "A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." Purposefulness is the highest mental state within the Penal Code. It means more than acting knowingly. Knowing conduct, under N.J.S.A. 2C:2-2b(2), is defined as follows: "A person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result."

Hence, the State could only prove defendant's guilt of hindering if it could show that it was her conscious object to cause Prontnicki's arrest to be hindered by her actions. She had to have wanted to hinder his arrest by her actions. It would not be enough for the State to show that she knew that it was practically certain that her actions would hinder Prontnicki's arrest. That would simply be a showing that she acted knowingly—a showing short of proof that she acted purposely.

One case in particular points out the distinction between acting purposely and knowingly in a manner that is directly relevant to the instant case. In State v. Pineiro, 385 N.J. Super. 129 (App. Div. 2006), the defendant's factual basis for his plea to the crime of absconding from

parole established that he knew that his parole officer would not be able to find him once he had moved from his assigned residence, a motel, but that he had nonetheless left that motel because he could not afford the rent, and he did not have the medications he needed to treat his mental illness. His factual basis also showed that he had unsuccessfully tried to telephone his parole officer while he was living on the streets. The Appellate Division ruled that this admission was insufficient as a basis for a plea of guilty to absconding from parole as that crime required a purpose to evade supervision.

With the Code's restrictive definition of purposefulness in mind, it is clear that the State's proofs did not demonstrate that defendant possessed the requisite mental state for the crime of hindering.

2. Defendant's repeatedly stated intention, Prontnicki's repeatedly stated intention, and the objective facts overwhelming proved that defendant had no intent to assist Prontnicki in evading arrest.

The proofs before the grand jury showed that from the moment defendant was advised of Prontnicki's warrant to the point of her arrest, her consistent stance was that he could no longer stay with her and he needed to turn himself in. Likewise, Prontnicki consistently assured defendant that he intended to surrender himself to the police. Added to their explicitly stated intentions, when Prontnicki was at defendant's residence, defendant had no knowledge that the Woodbridge police were actually actively searching for him. Rather, she simply knew that they had discovered by pure happenstance that he was wanted for an armed robbery not in Woodbridge, but in Old Bridge. And, when the police asked for her help, they never told her that they were actually making any affirmative efforts to find him. As far as she knew, the Woodbridge police were not interested in Prontnicki until she had come to their headquarters with her complaint and their interest extended no further than a desire for her to advise them as

to his whereabouts if she learned that information. All of these facts—the repeatedly stated subjective intentions of defendant and Prontnicki and the surrounding objective circumstances—overwhelming show that defendant did not allow Prontnicki into her home with an intent to thereby hinder his arrest. And no contrary proofs, showing that defendant indeed acted with a purpose to hinder the arrest of Prontnicki, were presented to the grand jury.

Again turning to the New Jersey Revision Commission Commentary, we know that merely demonstrating that a defendant engaged in acts that might be considered acts of assistance to a fugitive is not sufficient to prove a purpose to hinder that fugitive's apprehension. Hence, the Commission's Commentary states:

> A purpose to aid the offender to avoid arrest is not proved merely by showing that defendant gave succor to one who was in fact a fugitive. A fugitive is likely to seek from his friends and relatives shelter, food, and money to sustain himself. Their provision of such personal relief betokens other motivations than the objective of impeding law enforcement.
>
> [Final Report of the New Jersey Criminal Law Revision Commission, Volume II: Commentary (1971), Comment on § 2C:29-3 at 284.]

Defendant acknowledges that the Commission also recognizes that a friend or relative could act with mixed motives. But, of course, the main point of this commentary is that any improper motive would have to be proved and could not be assumed from the mere fact that the sort of assistance named in the commentary had been provided.

The Commission then goes on to observe (in the course of discussing the significance of providing money to a fugitive) that a distinction must be made between "a general desire to promote the offender's plan to remain at large," and a specific effort to "facilitate escape efforts." Id. at 284-5.

As stated, in this matter, beyond the fact that none of the conduct of defendant, in and of itself, objectively amounted to harboring or concealing, there were no proofs presented that

defendant allowed Prontnicki into her home in a purposeful effort to harbor or conceal him from the police. Once again, the proofs of her intent not to engage in any such effort were overwhelming.

Prontnicki's lengthy statement to Sergeant Fodor (Exhibit A) is replete with proofs that defendant at all times intended to act within the bounds of the law and had every reason to believe that Prontnicki was not attempting to hide from the police. That is to say, Prontnicki's statement, the very foundation of the State's hindering charges, undeniably demonstrates that defendant did not possess the mental state, a purpose to hinder Prontnicki's apprehension, needed to bring such charges:

> Fodor: ... I know I brought you back to June 9th, and when she talked to you on the phone about the warrant, did she tell you what the warrant was for?
>
> Prontnicki: She told me you have a warrant out for your arrest and your license is suspended. I'm like what, this if [*sic*] the first I'm hearing about this.
>
> Fodor: Okay
>
> Prontnicki: I said I don't care. She said you can't be here. I said no problem, I'm just gonna drop off you [*sic*] car and leave, and that's what I did.
>
> Fodor: So she told you you couldn't be at the house?
>
> Prontnicki: I mean I went in the house, I'm not gonna lie. I put (inaudible) with her, I went in the house, I talked to her.
>
> [Exhibit A at 5-6; emphasis added.]
>
> * * *
>
> Fodor: This is when you brought the car back, so this is Monday on the 10th.
>
> Prontnicki: Yes, I went in, I didn't go in by myself, I rang the bell. Her father answered, they were eating and he asked me if I wanted to eat. I said no, I gotta get outta here. She just wanted to talk to me so we talked for a little bit and I said alright, I gotta leave.
>
> Fodor: What did you guys discuss when you were, cause it's ...

Prontnicki: Well, it's kinda weird situation cause she's pregnant.

Fodor: Okay

Prontnicki: And, ah, I knew she was a judge so I'm like I don't wanna get you in any trouble so let me leave. I don't know what's going on. I said I wanna hire an attorney and turn myself in.

Fodor: Okay

Prontnicki: So then, um, I just walked, I walked to my brother's house.

[Exhibit A at 6; emphasis added.]

* * *

Fodor: Do you guys discuss the pending warrant for your arrest that they told her about?

Prontnicki: Yeah, I told her, I said I'm gonna, you know, hire an attorney, turn myself in, figure out what's going on and then we'll deal with it.

[Exhibit A at 7-8; emphasis added.]

* * *

Fodor: Okay. You guys are discussing this, um, you [*sic*] issues, your legal issues, your warrant for your arrest.

Prontnicki: No, that was very brief. We were just discussing everything like, you know, straighten this out, straighten that out and then we'll see what's going on kinda thing cause she's pregnant.

[Exhibit A at 9; emphasis added.]

* * *

Fodor: Okay did you discuss the warr [*sic*], did you discuss the warrant with her [the next day], that you were still trying to take care of this?

Prontnicki: I said yeah, I said I'm going to hire an attorney and turn myself in.

Fodor: Alright, so you told her again on that, at that 10:00 [a.m.] phone call.

Prontnicki: Yes

Fodor: Good, cause I'm sure that that is an issue. Alright? She is a Superior Court judge. I'm sure this is something that you wanted to get handled quickly as possible.

Prontnicki: Oh, yeah.

Fodor: And I'm sure she wanted you to get it handled as quickly as possible. So...

Prontnicki: But also, I ...

Fodor: Go ahead, go ahead.

Prontnicki: ...just wanna say one thing, too. Ah, the cops came to my mom's house in Bayonne and they said there was not a warrant...

[Exhibit A at 11-12; emphasis added.]

* * *

Prontnicki: After the cops said that, I didn't know what was going on.

Fodor: Okay, you were confused.

Prontnicki: I was confused.

Fodor: Okay

Prontnicki: But I still was gonna hire an attorney.

[Exhibit A at 13; emphasis added.]

* * *

Prontnicki: And I asked her what time she was going to be home so I could just pick up clothes and, ah, I told her what was going on, you know, I was going to hire an attorney, turn myself in. I said I'd rather go in with an attorney than by myself.

Fodor: Right, what did she tell you?

Prontnicki: And, ah, she'll be home between 3 and 4.

Fodor: Okay. Does she tell you anything about the warrant? Anything of that nature when you're saying no I'm not going to go in by myself, what does she say to you when you say that to her?

Prontnicki: She said I should turn myself in, yeah.

[Exhibit A at 15-16; emphasis added.]

* * *

Fodor: Right, was she, now were you staying, not staying there [on the 11th] because of the warrant for your arrest?

Prontnicki: I personally said I wanna get outta here.

Fodor: So you didn't put her in that situation?

Prontnicki: Yes

Fodor: Okay, but that was the reason why you were taking your overnight bag and going to your brother's house.

Prontnicki: Yeah

Fodor: Okay, I didn't know if you were moving out, you guys decided to split, I didn't understand the purpose of...

Prontnicki: No, everything was up in the air, we would figure it out as it went. I just said I need to get outta here for now.

[Exhibit A at 17; emphasis added.]

* * *

Fodor: Okay. Alright. Other than cab money, did she provide you any other resources to avoid this arrest warrant being taken care of?

Prontnicki: Meaning?

Fodor: Meaning did she provide you any type of, you said she provided you cab money,[4] did she provide you with any other type of funds so that you could avoid being apprehended by law enforcement?

Prontnicki: Oh, no, that was not the idea, no.

Fodor: Okay. What was the idea?

[4] This was an error on Sergeant Fodor's part. Prontnicki had said that she did not provide him with money.

Prontnicki: To turn myself in once I got my attorney.

Fodor: Okay, and that's what you discussed with her.

Prontnicki: That's what I told her.

Fodor: Yes, that's what you told her.

Prontnicki: Yes

Fodor: And what was, what did she think of that idea?

Prontnicki: She said I think you should get an attorney.

[Exhibit A at 18-19; emphasis added.]

Prontnicki also gave a lengthy statement to Woodbridge Police Detective Christopher Floyd. Regarding his appearance at defendant's home on the 11th, Prontnicki stated the following: "I said [to defendant], ... I don't wanna be here, let me just get the stuff and get out." (Exhibit C at 11; emphasis added).

Furthermore, the police also took a statement from Christopher Prontnicki, Jason Prontnicki's brother. In that statement Christopher Prontnicki stated that his brother had told him that he "couldn't stay at Brady's house because some people had gotten in trouble with the car and he couldn't be associated with anyone." (GJT55-12 to 56-2).

Defendant's texts throughout the two days in question further prove that she had no intent to assist defendant in avoiding the police.

On the 10th, at 12:43 p.m., defendant sent a text to a Mr. Munchy stating, "I can't have him in my house because I would now be harboring a criminal. I'd have to report him." (GJT51-13 to 17).

On the 10th, at 1:37 p.m., defendant sent a text message that reads, "He just called me to tell me he got the car and will bring it home. I told him, he can't stay with me cause he has a

warrant out for his arrest and I am required to notify authorities when I know someone has a warrant. So I told him he must leave after he drops the car off as I must go to the police." (GJT53-5 to 15).

On the 11th, at 2:14 p.m., defendant sent a text stating, "Prontnicki said he will turn himself in with when his lawyer is able to come with him and cooperate fully with the cops by giving them everything he knows. He can't stay in my house because he has an arrest warrant right now and I have a duty as a judge to report all crimes and anyone with an arrest warrant, so he's at his brother's house." (GJT66-8 to 21).

On June 11th, at 4:58 p.m., as Prontnicki was being arrested and minutes before her own arrest, defendant sent the following lengthy text:

> He just came by for clothes and he said the cops were at his mom's house. He was there this afternoon too and spoke with them. According to him the cops didn't arrest him and there is no arrest warrant.
>
> Also, he is not charged with anything. There is no complaint against him. He was just wanted for questioning. He said that there is no warrant, but I said without written verified proof he and I can't be seen or stay at my house together. He said, he knows so he will have his lawyer, who he paid today,[5] get all documents related to the crimes to show that he was never named as a defendant, but since his car was involved he was named as wanted for question.
>
> His lawyer called, who searched for warrants and complaints, said there were no warrants or complaints against him, but he, lawyer, will get him documentation so that Jason can give that to me.
>
> [GJT72-10 to 73-11 (emphasis added).]

Cumulatively, these excerpts from Prontnicki's statements and defendant's texts should sound the death knell for both hindering-apprehension counts of the indictment.

[5] This comment, that Prontnicki had paid his lawyer that day, is significant because it shows that, as far as defendant knew, Prontnicki had already retained a lawyer.

In addition, two particular comments by Prontnicki devastate the State's "harboring or concealing" case all by themselves. First, speaking of his visit to defendant's residence on the 10th, Prontnicki said, "I said [to defendant's father] no, I gotta get outta here. She just wanted to talk to me so we talked for a little bit and I said alright, I gotta leave." (Exhibit A at 6). Speaking of the visit of the 11th, he said, "I said [to defendant], ... I don't wanna be here, let me just get the stuff and get out." (Exhibit C at 11; emphasis added). How, in the face of these statements by Prontnicki, could anyone rationally conclude that defendant harbored or concealed Prontnicki? Did she do so against his will?

Hence, the proofs before the grand jury overwhelming showed that defendant never had it as her conscious object to harbor or conceal Prontnicki or, for that matter, to assist him in any manner in evading the police.

3. The allegations of count three cannot be utilized to support the harboring or concealing allegation of count two.

Defendant notes that the allegations of count three cannot be utilized to support the charge of harboring or concealing of count two.

To begin with, the structure of the hindering statute demonstrates that the Legislature considers harboring or concealing, prohibited by subsection a(1), and other forms of aid to a fugitive, prohibited by subsection a(2), to be distinct means of committing the crime of hindering apprehension. See United States v. Shapiro, supra, 113 F.2d. at 893 ("To pay money to a fugitive so that he may shelter, feed or hide himself is not within the accepted meanings of to 'harbor or conceal' him."); United States v. Yarbrough, supra, 852 F.2d at 1543 ("Supplying financial assistance to a fugitive does not rise to the level of harboring or concealing.") (internal quotation marks omitted).

Second, the alleged conduct of offering Prontnicki money for cab fare and packing his duffle bag would not support an inference that defendant sought to harbor or conceal Prontnicki within her residence for the obvious reason that those acts had as their goal getting Prontnicki out of her house.

4. Defendant's remarks in the police car while being transported to headquarters do not prove an intent to assist Prontnicki in evading arrest. Those remarks must be suppressed as they were obtained in violation of the Fourth Amendment and, hence, they should not have been presented to the grand jury.

i. Defendant's remarks in the police car while being transported to headquarters do not prove an intent to assist Prontnicki in evading arrest.

In the face of overwhelming proofs that defendant did not at any time possess an intent to assist Prontnicki in evading the police, the State may seek to rely upon her comment, "All I did was help this person," that she made toward the conclusion of a long, rambling monologue as she was being transported to police headquarters. (Exhibit E).

In the abstract, that comment has no significance. In context, it cannot reasonably be taken as supporting the inference that defendant acted with a purpose to assist Prontnicki in evading arrest.

The context, of course, is all of defendant's statements during June 10 and 11th, to her friends and to Prontnicki himself, to the effect that she could have nothing to do with him until he had turned himself in and straightened out his legal problems, all of Prontnicki's statements seeking to assure her both that no warrant actually existed and that, in any event, he intended to surrender himself to the police, and the objective fact that defendant had no idea that the police were actually actively looking for Prontnicki either on the 10th or the 11th. That evidence has been laid out above and need not be repeated here.

The immediate context of the sentence at issue is the other comments made by defendant while being transported to headquarters. That is:

> He told me there was no arrest warrant and that he's getting the paperwork, he's just getting the stuff he needs for work, so he can have some clothes to wear the next few days. . . . I did call yesterday and I called again this afternoon to find out if I can talk to the officer, also if I need to come in, and once I came in I was goanna talk to the sergeant to see if it was true that there was no actual warrant ... but I wasn't trying to break the law, I never would do that. * * * I tried calling last, yesterday. No one called me back and then he's telling me, calling you and telling me that, um, he doesn't have an arrest warrant and that when we get the documents you should talk to the police I said I may, actually when they call me back I'm gonna go in to talk to them straight ahead, forget the documents, to see if it's true what you're saying, and I said you get me your documents, too, cause I don't know who to believe. I can't believe this. Why would he do this to me if, why would he come to my house when I told him you can't. If there's no arrest warrant, then I'll talk to the cops. Why would he do this to me, why is he doing this. Oh my God. All I did was help this person. He was my boyfriend. There was never any incident before this.
>
> [Exhibit E.]

It is plain that defendant was trying to explain to the police that she thought that she had not violated the law. In the context of the totality of her comments while in the police car and the totality of the facts before the grand jury, it would be patently illogical to interpret her statement, "All I did was help this person," as conveying the proposition: I intended to help Prontnicki escape arrest. Rather, she was obviously bemoaning the fact that Prontnicki had been her boyfriend, she had planned to start a family with him, had given him free room and board and had allowed him free use of her car, and he, in return, had repaid her many kindnesses with lies and criminality. Again, how could it be that by her comment she was saying that she had attempted to help Prontnicki evade the police when for two days she had consistently told Prontnicki and others that he needed to surrender himself and he had consistently told her that he would?

ii. Defendant's remarks in the police car must be suppressed as they were obtained in violation of the Fourth Amendment and, hence, they should not have been presented to the grand jury.

Defendant's rambling monologue in the police car was made in the immediate aftermath of her arrest. At that point, the only basis the police had for arresting her was their mistaken belief that she was subject to arrest for hindering because she had not telephoned the police to inform them of Prontnicki's whereabouts.[6] At that point, obviously Prontnicki had not yet spoken to Sergeant Fodor. Also, although the police had looked into Prontnicki's duffle bag upon arresting him, the police knew nothing as to how Prontnicki came into possession of that duffle bag or its contents.

It is thus indisputable that defendant's remarks were the product of an illegal arrest, that is, an arrest not supported by probable cause.

A confession obtained as a consequence of an illegal arrest should be suppressed unless the chain of causation between the illegal arrest and the confession was sufficiently an act of free will to purge the taint of the arrest. State v. Worlock, 117 N.J. 596, 621 (1990). The burden of showing such attenuation is on the State. Brown v. Illinois, 422 U.S. 390 (1975. New Jersey uses the three-part test promulgated in Brown to decide this question. State v. Johnson, 118 N.J. 639, 650 (1990). Those prongs are: (1) the temporal proximity between the illegal conduct and the challenged evidence; (2) the presence of intervening circumstances; and (3) the flagrancy and purpose of the police misconduct. Id. at 653. In State v. Barry, 86 N.J. 80, 87 (1981), the Court also explained, "The inquiry for determining whether a defendant's statements are tainted by

[6] While the police also knew that Prontnicki had been inside defendant's residence for approximately one hour on the 11th, the case law set forth at Point II A above demonstrates that that knowledge did not provide probable cause to arrest defendant for harboring or concealing. Even the Woodbridge police seemed to understand this as the original warrant-complaints were both based solely upon defendant's failure to telephone the police.

antecedent illegality is not a factual one, neither of forseeability on the part of police, nor casual connection . . . but rather it is a question of judgment."

Here, defendant's statement came immediately upon the heels of her arrest. Mere minutes had passed from the point of the announcement of her arrest to her rambling monologue in the police car. It is indisputable that her comments were the direct result of her shock and dismay at being placed under arrest.

As to the presence of intervening circumstances, it is true that her comments were not the result of any direct police interrogation, but it is also true that she was questioned by the police immediately preceding her arrest. Hence, this circumstance should not be considered a consequential intervening circumstance.

As to the flagrancy of and purpose of the police misconduct, that misconduct could not have been more flagrant. Both the plain language of the hindering statute and every case throughout the country that discusses whether noncooperation with the police violates the statute, shows that one cannot commit the crime of hindering by failing to inform the police of the whereabouts of a fugitive. No citizen has such a duty and no "officer of the court" has such a duty. On top of that, the police had not even bothered to check Officer Bartko's voice mail, revealing two cooperative phone calls from defendant, both asking to be called back, until after they had arrived at headquarters following the arrest. Last, the inference is palpable that the police only arrested defendant because they had told her to call them, they believed that she hadn't, they were therefore offended, and they wanted defendant to pay for her failure to obey their directive. To speak bluntly, this arrest was payback.

For all of these reasons, this Court should decide, on this "question of judgment," that defendant's comments in the police car on the way to headquarters should be suppressed.

In United States v. Calandra, 414 U.S. 338 (1974), the Court held that under the Federal Constitution a grand jury witness could not refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure. New Jersey courts have not yet endorsed Calandra's holding. They also have yet to resolve the related issue, presented here, of whether evidence obtained as a result of a Fourth Amendment violation (as opposed, of course, to questions based on such evidence) may be presented to a grand jury.

In State v. Hogan, 144 N.J. 216 (1996), our Supreme Court had no difficulty rejecting federal precedent giving free rein to prosecutors to disregard exculpatory evidence in presenting matters to the grand jury. In rejecting that precedent, the Hogan Court observed:

> [O]ur precedents make clear that this Court may invoke its supervisory power to remedy perceived injustices in grand jury proceedings. *See, e.g., Murphy, supra, 110 N.J. at 33, 538 A.2d 1235*; *Del Fino, supra, 100 N.J. at 157, 165, 495 A.2d 60*; *see also R. 3:6-1* to -11 (setting forth procedures to be followed in grand jury proceedings). Moreover, we have often extended greater protections to defendants' rights than have the federal courts.
>
> [Hogan, supra, at 231.]

Given that our Supreme Court has been much more protective of the rights of the accused with regard to grand jury proceedings than has the United States Supreme Court, and further given that our Supreme Court has often interpreted the New Jersey State Constitution's search-and-seizure provision more expansively than the federal Fourth Amendment, see, e.g., State v. Novembrino, 105 N.J. 95, 109 (1987), it is submitted that this Court should conclude that the State acted unjustly in presenting the statement of defendant while in the police car to the grand jury. Thus, that statement should not be considered by this Court in determining the sufficiency of the State's grand jury presentation.

It would, moreover, be particularly unjust if the sole proof of defendant's intent—and, hence, the sole proof allowing this matter to proceed to trial—is evidence obtained in violation of

the Fourth Amendment and our own State Constitution's search-and-seizure provision, which evidence may not be presented by the State at trial.

POINT III

ALL OF COUNT THREE, CHARGING THAT DEFENANT HINDERED PRONTNICKI'S APPREHENSION BY VARIOUS MEANS, MUST BE DISMISSED.

Defendant will first address the allegations that she provided money or transportation to Prontnicki and then will address the allegation that she provided him with clothing.

A. The allegations of count three that defendant violated N.J.S.A. 2C:29-3a(2), because she "did offer to provide to or aid" Prontnicki in obtaining money or transportation must be dismissed as such conduct is not hindering.

Count three charges that defendant violated N.J.S.A. 2C:29-3a(2), because she "did offer to provide to or aid the said Jason Prontnicki in obtaining money [or] transportation ... as a means to avoid discovery or apprehension or effecting escape." But these allegations are not supported by the grand jury record. According to Prontnicki, defendant only conditionally offered him money for cab fare and did not offer transportation. That is, to quote Prontnicki's statement, she "offered me if I didn't have money, cab fare." He then goes on to state that he did not accept her offer. (Exhibit A at 10).[7] By the plain language of the hindering statute, making such an offer, as opposed to actually providing or aiding in the provision of money or transportation, is not hindering.

N.J.S.A. 2C:29-3a(2) prohibits providing or aiding in providing a weapon, money, transportation, disguise or other means of avoiding discovery or apprehension or effecting escape." Hence, the statute requires that the weapon, money, transportation, disguise or other assistance actually be provided. Defendant did not actually provide any such aid to Prontnicki (assuming the truth of Prontnicki's statement). Rather she offered him money for cab fare, if he

had no money, andhe declined that offer. Such a conditional and unaccepted offer actually provides, or aids in providing, nothing. Accordingly, these allegations do not meet the requirements of the hindering statute.

The State may argue that if such actions do not constitute hindering, her offer amounted to an attempt to hinder Prontnicki's apprehension. Such an argument would fail as well. In order for an actor to be guilty of attempt, under N.J.S.A. 2C:5-1a, the actor must:

> (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a reasonable person would believe them to be;
>
> (2) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing such result without further conduct on his part; or
>
> (3) Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Here, none of these three subsections would apply.

Subsection (1) would not apply because it only applies "where the defendant has done everything that would have constituted the crime," as where a defendant fires a gun with the purpose to kill another person and the gun misfires. Cannel, Criminal Code Annotated (Gann), Comment 4, N.J.S.A. 2C:5-1.

Subsection 2 would not apply because further conduct on defendant's part was necessary. That is, after having made the offer, Prontnicki would have had to have accepted it and defendant would then have had to have actually given Prontnicki some money.

Subsection 3 would not apply because defendant's offer was not a "substantial step." This is because N.J.S.A. 2C:5-1(b) states: "Conduct shall not be held to constitute a substantial

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[7] He also had stated earlier that she did not provide him with any money. (Exhibit A at 9).

step under subsection a. (3) of this section unless it is strongly corroborative of the actor's criminal purpose." The Revision Commentary flat-out states, "Providing a fugitive with funds is an act of equivocal significance." Final Report of the New Jersey Criminal Law Revision Commission, Volume II: Commentary (1971), Comment on § 2C:29-3 at 284. An act which is of "equivocal significance" cannot be an act that is "strongly corroborative" of a criminal purpose.

Accordingly, these allegations would not support a charge of attempted hindering.

Of equal importance, these allegations are also fatally defective because we need not guess at defendant's intent in supposedly offering money for cab fare to Prontnicki. Prontnicki himself, the sole source of these allegations, made it crystal clear that the offer of cab fare was not made with the intent to assist him to escape apprehension. Here is what Prontnicki told Sergeant Fodor when the sergeant attempted to get him to say that defendant was seeking to help him escape apprehension by her supposed offer of money for a cab:

> Fodor: Okay. Alright. Other than cab money, did she provide you any other resources to avoid this arrest warrant being taken care of?
>
> Prontnicki: Meaning?
>
> Fodor: Meaning did she provide you any type of, you said she provided you cab money,[8] did she proved you with any other type of funds so that you could avoid being apprehended by law enforcement?
>
> Prontnicki: Oh, no, that was not the idea, no.
>
> Fodor: Okay. What was the idea?
>
> Prontnicki: To turn myself in once I got my attorney.

[8] This was an erroneous characterization of Prontnicki's statement. He had said she had offered him money for cab fare if he didn't have any, but he had money (Exhibit A at 10), and also that she had not provided him with money. (Exhibit A at 9)

Fodor: Okay, and that's what you discussed with her.

Prontnicki: That's what I told her.

Fodor: Yes, that's what you told her.

Prontnicki: Yes.

Fodor: And what was, what did she think of that idea?

Prontnicki: She said I think you should go in with an attorney.

Fodor: Okay.

[Exhibit A at 18-19.]

Hence, despite Sergeant Fodor's leading question, Prontnicki unequivocally advised the sergeant that the "idea" was for him to surrender himself to the authorities and there was no intent to do otherwise.

It also needs to be said that even assuming that a conditional offer of cab fare was made, the reason that offer was (assumedly) madeis quite obvious. It was made to get rid of Prontnicki. Hence, we see the absurdity of this indictment. That is, the State alleges that defendant committed the act of hindering by allowing Prontnicki to enter her home while simultaneously asserting that she committed the act of hindering by offering Prontnicki money to get him out of her home.

For these reasons, the allegations of count three that defendant committed hindering by offering money or transportation to Prontnicki must be dismissed.

B. The allegations of count three that defendant violated N.J.S.A. 2c:29-3a(2), because she "did offer to provide to or aid" Prontnicki in obtaining clothing must be dismissed as defendant did not do so. Even assuming defendant did so, her conduct did not aid Prontnicki and was not done for the purpose of assisting him in avoiding discovery, apprehension or effecting an escape.

The following passages appear in Prontnicki's long statement to Sergeant Fodor:

Fodor: Alright, alright, um, so you have that telephone call with her. She's going off on you. What happens next?

Prontnicki: Ah, I went out with my brother.

Fodor: Okay

Prontnicki: And I asked her what time she was going to be home so I could just pick up clothes and, ah, I told her what was going on, you know, I was going to hire an attorney, turn myself in. I said I'd rather go in with an attorney than by myself.

Fodor: Right, what did she tell you?

Prontnicki: And, ah, she'll be home between 3 and 4.

Fodor: Okay. Does she tell you anything about the warrant? Anything of that nature when you're saying no I'm not going to go in by myself, what does she say to you when you say that to her?

Prontnicki: She said I should turn myself in, yeah.

Fodor: Okay. So what time do you go to pick up, what time were you saying you're going to pick up these clothes at?

Prontnicki: Ah, between 3 and 4 she was going to be home, so I pulled in front of her house at 4, called her from my brother's phone.

Fodor: Alright, your brother's phone?

Prontnicki: And she said yes, I'm home. She opened the garage, I went in and I got a bag of overnight clothes and ...

Fodor: Okay

Prontnicki: ... a razor and just stuff like that.

Fodor: And why were you taking clothes out of there?

Prontnicki: Ah, because I was soaked from the day before, I was walking in the rain.

Fodor: But were you planning on moving out or what was...

Prontnicki: No

Fodor: ...the situation?

Prontnicki: All my stuff's still there.

Fodor: All your stuff's still there. Okay.

Prontnicki: I took an overnight bag, I was staying with my brother, like I said I was going to try to get in touch with my lawyer.

Fodor: Right, was she, now were you staying, not staying there because of the warrant for your arrest?

Prontnicki: I personally said I wanna get outta here.

Fodor: So you didn't put her in that situation?

Prontnicki: Yes

[Exhibit A at 15-16.]

* * *

Fodor: Did she help you load anything into the vehicle?

Prontnicki: Oh no. I put everything in my bag.

Fodor: Okay

Prontnicki: She put the stuff in the bags.

Fodor: Okay

Prontnicki: Cause I had my stuff upstairs in bags and she left it in like a sun room. Then I just took it and put it in a duffle bag.

Fodor: Okay

Prontnicki: Like a small one. She gave me a big one and I'm like I'm not taking all that stuff. I took enough for like a day.

Fodor: Okay

J.B.[9] When did you notice the police.

Prontnicki: I saw them on the corner when I pulled in.

[9] "J.B." is either another, unidentified police officer or a typo that should have read J.F.

[Exhibit A at 20-21.]

* * *

Fodor: Did you tell Ms. Brady that they were out there?

Prontnicki: No.

Fodor: No? What'd you think was gonna happen?

Prontnicki: I knew what was gonna happen. I just didn't want it to happen in the house.

[Exhibit A at 21].

From these passages it appears that defendant did not pack the duffle bag of clothes that Prontnicki took with him from the house. Rather, Prontnicki stated, "I put everything in my bag," "I just took [my stuff] and put it in a duffle bag," and "I took enough for like a day."

It is hard to know what to make of Prontnicki's comment, "She put the stuff in the bags," as it is contradicted by his statement, "Cause I had my stuff upstairs in bags and she left it in like a sun room." But it is the State's burden, not defendant's, to make out a *prima facie* case. If all the State has are contradictory comments that do not quite make sense, and which require one to guess at what was truly meant, the State simply does not have a *prima facie* case. It is the State's problem, not defendant's, that the Sergeant Fodor did not ask follow-up questions that might have allowed one to make sense of Prontnicki's contradictory comments.

It is true that Prontnicki also states, "She gave me a big one," but he also states that he did not take that big bag. Also, it appears that what Prontnicki is saying is that defendant gave him a large empty bag to put his clothes in, not that she packed a large bag with clothes and tried to give that to him. Hence, this supposed conduct by defendant did not aid Prontnicki.

Moreover, it is clear beyond dispute that Prontnicki came to the house to obtain some clothing—clothing that was legally his and that he therefore had a right to possess. Hence,

whatever defendant may or may not have done with that clothing, or with the large bag, there can be no dispute that when Prontnicki left her house, he was going to leave with some of his clothing. For this reason as well, defendant's conduct, whatever it may have been, did not aid Prontnicki.

Of equal significance, it is clear as day from the above excerpts, as well as the other evidence already pointed out by defendant in this brief, that defendant's intent was never to help Prontnicki avoid being arrested. Rather, her intent was to have him turn himself in and he repeatedly reassured her that he intended to do so.

It is also critical to recognize that defendant's statement following her arrest demonstrates that, even somehow assuming that she gave a bag of clothing to Prontnicki—despite his statements, "I put everything in my bag," "I just took [my stuff] and put it in a duffle bag," and "I took enough for like a day"—she did not do so with an intent to help him evade the police. As part of her statement, defendant said, "He told me ... he's just getting the stuff he needs to work, so he can have some clothes to wear for the next few days." Giving someone clothing so that that person can go to work is giving a person clothing so that person can follow his or her usual routine. Following one's usual routine, that is, going to work, where the police would presumably know where to look for one, is the opposite of assisting a person to evade the police.

For all of these reasons, the State did not show that defendant gave any clothing to Prontnicki or that any of her actions were done for the purpose of having Prontnicki evade the police.

For these reasons, the allegation of count three that defendant provided clothing to Prontnicki to hinder his apprehension must be dismissed**CONCLUSION**

For the foregoing reasons, defendant respectfully submits that this Court should dismiss the indictment.

Respectfully submitted,
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