SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0117-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
	:	
Plaintiff-Respondent,		On Appeal from a Judgment of
	:	Conviction of the Superior Court
v.		of New Jersey, Law Division,
	:	Essex County.
ANTHONY L. GIBSON A/K/A ANTHONY GIBSON,	:	Indictment Nos. 19-06-1759-I, 19-07-1907-I, 22-01-0099-I
Defendant-Appellant.	:	
		Sat Below:
	:	
		Hon. Patrick J. Arre, J.S.C., and a Jury.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT-APPELLANT

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Dated: May 24, 2024

DEFENDANT IS CONFINED

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INDEX TO APPENDIX

[1] At the direction of the case manager, the indictments were placed in a confidential appendix. This Court should clarify whether unsealed indictments must be filed in a confidential appendix under R. 2:6-1(a)(3) and R. 1:38-3(c)(3).

TRANSCRIPT KEY

Da – Defendant's appendix
1T – Transcript of August 24, 2020 motion hearing
2T – Transcript of March 6, 2023 jury trial
3T – Transcript of March 7, 2023 jury trial
4T – Transcript of March 8, 2023 jury trial
5T – Transcript of March 30, 2023 plea hearing
6T – Transcript of April 28, 2023 sentencing proceeding

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PRELIMINARY STATEMENT

Anthony Gibson spent 25 years working for the Newark Police Division (NPD) before he went on sick leave in March 2018. While on leave, he continued to work his second job as a private security officer at a hospital, in violation of NPD policies. He was charged with theft and official misconduct and found guilty of both offenses following a trial.

This Court must vacate Mr. Gibson's official misconduct conviction and enter a judgment of acquittal because the State failed to prove an essential element of the offense: that he committed an act constituting an "unauthorized exercise of his official functions." In addition, a new trial is required on the theft charge because the court erroneously deprived Mr. Gibson of his constitutional right to counsel of choice by arbitrarily forcing him to proceed with a public defender rather than the attorney he sought to hire.

Alternatively, both convictions must be reversed because multiple errors deprived Mr. Gibson of a fair trial. First, the State relied entirely on inadmissible hearsay to prove that Mr. Gibson worked his second job while on sick leave. This improper admission requires reversal because without the inadmissible hearsay, the jury would have had no basis to convict. Second, the jury was not properly instructed on the law of theft. The court failed to instruct on the claim of right defense despite its applicability, failed to tailor the theft instruction and

instead read the model charge verbatim -- which was misleading in this case -- and failed to appropriately respond to a jury question about the absence of evidence on the theft charge. Third, the prosecutor improperly shifted the burden of proof to the defense and commented on facts not in evidence, misleading the jury as to the law and the facts in the record. Finally, the State introduced irrelevant and highly prejudicial other-bad-acts evidence that compromised the integrity of the verdict, as there is no guarantee that the jury did not convict merely because they believed Mr. Gibson committed other uncharged crimes.

Because Mr. Gibson did not get a fair trial, his convictions must be reversed. Additionally, because the State failed to prove official misconduct, this Court should reverse in part the denial of the motion for a judgment of acquittal.

PROCEDURAL HISTORY

Essex County Ind. 19-6-1759 charged Mr. Gibson with third-degree theft by unlawful taking, N.J.S.A. 2C:20-3a, and second-degree official misconduct, N.J.S.A. 2C:30-2a. (Da 1-3) Essex County Ind. 19-7-1907 charged Mr. Gibson with third-degree theft by unlawful taking, N.J.S.A. 2C:20-3a, third-degree passing bad checks, N.J.S.A. 2C:21-5b, and second-degree official misconduct, N.J.S.A. 2C:30-2a. (Da 4-7) Essex County Ind. 22-1-99 charged Mr. Gibson with second-degree conspiracy to distribute CDS, N.J.S.A. 2C:5-2, 2C:35-5a(1),

b(1), first-degree distribution of CDS, N.J.S.A. 2C:35-5a(1), b(1), and second-degree official misconduct, N.J.S.A. 2C:30-2a. (Da 8-13)

Trial began on Ind. 19-6-1759 on March 6, 2023, before the Hon. Patrick J. Arre, J.S.C., and a jury. (2T) On March 7, the State rested, and defense counsel moved for a judgment of acquittal, which the court denied. (3T 6-22 to 7-25) On March 8, the jury returned a guilty verdict on both counts (theft and official misconduct). (4T 8-19 to 9-9; Da 14-15)

On March 30, Mr. Gibson pleaded guilty to Counts 1 (amended to third-degree conspiracy to distribute CDS) and 2 (bad checks) of Ind. 19-7-1907 and Count 3 (official misconduct) of Ind. 22-1-99. (5T 3-13 to 23; Da 16-21) In exchange, the prosecutor agreed to recommend an aggregate sentence of five years with a five-year parole ineligibility period, to run concurrent with the sentence Mr. Gibson would receive on Ind. 19-6-1759. (5T 3-23 to 4-3; Da 19)

On April 28, the court sentenced Mr. Gibson on all three indictments to concurrent sentences of five years in prison on each conviction, with the two official misconduct counts each carrying a five-year period of parole ineligibility. (6T 14-7 to 18; Da 22, 25, 28) The remaining charges were dismissed. (Da 25, 28) Mr. Gibson also forfeited his public employment and was disqualified from any future public employment. (6T 15-7 to 14; Da 22, 28) A notice of appeal was filed on September 18, 2023, as within time. (Da 31-36)

STATEMENT OF FACTS

A. Mr. Gibson's Career At The Newark Police Division

Mr. Gibson joined the NPD in 1993. (2T 62-1 to 3) In 1996, after several years of working as a patrol officer, he was promoted to detective and from there was assigned to various specialized units. (3T 16-10 to 21-1) In 1997, he received permission to work a second job as a private security officer at Saint Michael's Hospital. (3T 45-21 to 24, 78-20 to 79-4) He continued to work at Saint Michael's throughout his career at the NPD. (3T 79-5 to 7)

At some point, Mr. Gibson was involved in a car accident and also sustained a major back injury after being thrown down a flight of steps while breaking up a fight. (3T 20-3 to 7) In 2018, the NPD placed Mr. Gibson on administrative sick leave. (3T 25-15 to 26-18, 77-6 to 10) An officer is placed on administrative sick leave when they are expected to be absent from work for more than five days, and medical documentation validating the officer's absence is required. (2T 94-3 to 95-22) According to NPD records, Mr. Gibson was on administrative sick leave from March 6 to November 2, 2018.[2] (2T 42-8 to 14)

B. NPD Policies Regarding Sick Time And Outside Employment

The NPD provides unlimited sick leave for ill or injured employees, during which time they receive full pay. (2T 44-19 to 45-3) Pursuant to the sick

[2] Mr. Gibson disputes the admissibility of his sick leave record, in addition to other evidence. See Point III, infra.

leave policy, an employee is "considered injured when they incur an on duty physical infliction which renders [them] unable to capably perform their assigned duties." (2T 45-6 to 47-9)

Pursuant to the NPD's outside employment policy, employees are permitted to work a second job subject to certain restrictions. (2T 59-13 to 60-8) Under the policy in force when Mr. Gibson began working at Saint Michael's, a request to work a second job would be denied if it appeared from "'the applicant's sick record or other evidence that outside employment might impair his ability to discharge his police department obligations.'" (2T 61-20 to 62-21)

The outside employment policy was updated in 1999, two years after Mr. Gibson began working at Saint Michael's. (2T 63-7 to 12) The updated policy provided that when employees are on sick leave, the permission that had been granted for outside employment is automatically rescinded for the duration of the leave, including on scheduled days off. (2T 63-11 to 65-3) The policy further stated that "'personnel who are off for illness and/or injury and engage in extra duty employment or outside employment may be committing a criminal act.'" (2T 64-11 to 13) Although the policy was updated several times before 2018, those provisions remained in each updated version. (2T 59-13 to 61-13)

Lt. John Neves, an executive officer at the NPD's Internal Affairs (IA) Division, testified about the process for informing officers of NPD policy

changes. (2T 33-22 to 35-22) Neves explained that the police director writes a memo advising the officers of any new or revised policies and detailing their contents. (2T 50-19 to 51-4) According to Neves, prior to 2018, new or revised policies were disseminated to officers during roll call before a shift. (2T 48-21 to 50-9) Officers were required to sign a roster sheet to acknowledge receipt of a physical copy of any such policy. (2T 50-4 to 9)

With respect to the 1999 version of the outside employment policy, the director's memo states: "'This memo shall be distributed to all personnel with the January 6, 2000 payroll checks and shall be subject of roll call training for a period of two weeks.'" (2T 64-16 to 65-12) The director's memo that advised employees of changes to that policy in 2002 similarly provided that the memo "shall be the subject of roll call training for a period of two weeks." (2T 67-7 to 68-16) The policy was updated again in 2003 and in 2010, but Neves did not read into the record any director's memos from these policy revisions.

Neves testified that he has no personal knowledge of whether Mr. Gibson was trained on or received any new or revised policies during his time at the NPD. (2T 77-2 to 6) Neves was not aware of any documents in Mr. Gibson's file indicating that he signed a roster attesting to his receipt of any policies, and Neves did not know if Mr. Gibson was required to attend roll call as a detective, as it is typically up to the specific command. (2T 76-9 to 77-1)

Neves also testified about NPD procedures for investigating officer misconduct. According to Neves, the IA Division reviews any complaints that are "not criminal in nature," including "someone calling out sick when they're not supposed to be sick." (2T 35-15 to 36-17) When a complaint contains a criminal allegation, the Division makes a referral to the prosecutor's office. (2T 37-17 to 38-7) The prosecutor's office responds in one of two ways: either it will advise the IA Division to halt its investigation so the prosecutor's office can take over, or it will advise the Division to continue the investigation and contact the prosecutor's office once the Division has gathered certain information. (2T 38-11 to 18) The latter response is more common. (2T 38-19 to 23)

Neves testified that a "great amount of officers . . . get administratively charged for violating the sick policy." (2T 33-22 to 34-17) In many cases, the situation is handled internally, and no criminal charges are filed. (2T 74-17 to 75-1) Neves also testified that none of the versions of the outside employment policy explain when violating the policy is considered a crime. (2T 75-14 to 20)

C. Investigation Into Mr. Gibson

In February 2018, the IA Division received a criminal allegation against Mr. Gibson.[3] (2T 35-14 to 22, 39-6 to 14) The content of this allegation was not

[3] Mr. Gibson challenges the admissibility of any evidence regarding this allegation under N.J.R.E. 404(b). See Point VI, infra.

disclosed at trial. As is its practice, the Division contacted the prosecutor's office to inform them of the allegation. (2T 37-24 to 38-7, 39-15 to 21) Captain Carlos Olmo was the lead investigator on Mr. Gibson's case. (2T 121-21 to 122-3)

Olmo testified that he obtained Mr. Gibson's sick leave and pay records from the NPD and his work schedule and payroll documents from Saint Michael's. (2T 43-4 to 15, 122-4 to 124-16) Cross-referencing these records, Olmo made a spreadsheet logging the dates that Mr. Gibson worked at Saint Michael's while on sick leave from the NPD and scheduled to work there. (2T 124-23 to 125-6) The spreadsheet indicated that starting on March 20, 2018, Mr. Gibson worked a total of 31 days at Saint Michael's during which he was scheduled to work at the NPD. (2T 125-17 to 127-20) Using the NPD pay records, Olmo calculated Mr. Gibson's hourly pay rate and determined that he earned approximately $11,217.04 in sick pay for those 31 days. (2T 152-9 to 18, 153-11) Olmo also learned that Mr. Gibson bought a new pickup truck in the summer of 2018 for approximately $60,000. (2T 128-2 to 13)

D. Other Testimony At Trial

The State presented evidence about the work of officers in the NPD's Communications Division, where Mr. Gibson was transferred in early 2018 before he went on sick leave. (3T 19-15 to 19) John Rawa, the former Captain of that unit, testified that the duties of officers assigned there are mostly

administrative, as the unit's purpose is to oversee and process 9-1-1 calls. (2T 98-15 to 18, 99-11 to 100-5) According to Rawa, officers in the Communications Division are not required to go out into the streets. (2T 100-5 to 6)

The State also presented evidence about Mr. Gibson's duties as a security officer at Saint Michael's. Walter Pagan, who was the Director of Public Safety, Security, and Emergency Management at Saint Michael's from 2006 to 2016 and returned to that role in 2020, testified that Mr. Gibson often worked in the ER. (2T 106-23 to 107-19, 109-4 to 13) According to Pagan, officers assigned to the ER must deescalate situations involving disorderly individuals and keep the nursing staff safe while they restrain such individuals. (2T 109-17 to 110-22)

Because Pagan did not work at the hospital in 2018, he was not there when Mr. Gibson was on sick leave from the NPD. (2T 107-17 to 19, 117-9 to 11) Pagan testified that he has no knowledge of Mr. Gibson's duties at Saint Michael's in 2018 or whether Mr. Gibson was required to do anything physically strenuous during that time. (2T 118-12 to 21)

Mr. Gibson testified regarding his awareness of the relevant NPD policies. He stated that while he attended roll call as a patrol officer from 1993 to 1996, he was not informed about the sick leave and outside employment policies during that time. (3T 20-18 to 21-5) He also could not recall ever signing for the physical receipt of a policy. (3T 22-4 to 10) Once he became a detective, he did

not attend roll call. (3T 22-11 to 19) He was therefore not aware of the various updates to the outside employment policy and "didn't have a clear understanding of the policy" when he went on sick leave. (3T 27-5 to 14, 64-21 to 66-23)

Mr. Gibson also described his work in the Communications Division before he went on sick leave. He explained that it was his responsibility to gather cases of audiotapes and deliver them to various destinations. (3T 24-3 to 25) This required lifting boxes that weighed 45-70lbs, which exacerbated his back injury. (3T 25-1 to 14) He was also required to wear a duty belt weighing up to 45lbs, which similarly caused his back injury to worsen. (3T 76-9 to 77-5)

In rebuttal, the State called Antonio Dominguez, a retired NPD officer and former Captain of the IA Division. (3T 87-17 to 90-25) Dominguez testified that officers are expected to be aware of NPD's policies and that ignorance of a policy is not an excuse. (3T 93-14 to 94-9) Dominguez also testified that if a supervisor failed to disseminate a policy update to his subordinates, that supervisor would be disciplined. (3T 96-8 to 25) This occurred sometimes, as supervisors did not always disseminate policies as instructed. (3T 97-15 to 25)

Dominguez recalled that during his tenure in the IA Division, officers were disciplined for violating the outside employment policy. (3T 95-20 to 96-7) Sometimes the infraction was handled internally while other times criminal charges were filed. (3T 99-5 to 14) According to Dominguez, there is no policy

that tells an officer when a violation of the outside employment policy will be handled criminally as opposed to merely administratively. (3T 99-15 to 18)

LEGAL ARGUMENT

POINT I

A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED AS TO THE OFFICIAL MISCONDUCT CHARGE BECAUSE DEFENDANT'S VIOLATION OF INTERNAL POLICE DEPARTMENT POLICIES WAS NOT "AN UNAUTHORIZED EXERCISE OF HIS OFFICIAL FUNCTIONS." (3T 6-22 to 7-25)

In any criminal prosecution, the State must prove the defendant guilty of every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970); State v. Vick, 117 N.J. 288, 293 (1989). Where the State fails to meet this burden, a court must grant a motion for a judgment of acquittal. R. 3:18-1; State v. Reyes, 50 N.J. 454, 458-59 (1967). Here, the motion for a judgment of acquittal should have been granted as to the official misconduct charge because the State failed to prove the second element of the offense: that the defendant committed an act constituting "an unauthorized exercise of his official functions." N.J.S.A. 2C:30-2a. This Court must reverse in part the trial judge's denial of the motion for a judgment of acquittal. (3T 6-22 to 7-25)

The offense of official misconduct, as charged in this case, contains three elements: the defendant (1) was a public servant at the relevant time; (2) committed an act relating to his office but constituting an unauthorized exercise

of his official functions; and (3) acted with the purpose of benefitting himself or another or injuring or depriving another of a benefit. Model Jury Charges (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" (rev. Sep. 11, 2006). With respect to the second element, a defendant commits an unauthorized exercise of his official functions when he breaches "some prescribed duty of the public servant's office" that is either "imposed upon the public servant by law (such as statute, municipal charter or ordinance) or clearly inherent in the nature of his[ ] office." Ibid. See State v. Maioranna, 225 N.J. Super. 365, 371 (Law. Div. 1988), aff'd and remanded, 240 N.J. Super. 352 (App. Div. 1990) (concluding that "official functions" include "those duties which are imposed by law or are clearly inherent or implicit in the nature of the office").

In this case, the State charged Mr. Gibson with official misconduct for "obtaining the benefit of payment for sick time in violation of Newark Police Division policies and procedures" -- namely, the outside employment policy and the sick leave policy. (Da 3; 3T 147-12 to 17) But regardless of whether the State succeeded in proving these policy violations, it still failed to satisfy the second element of official misconduct: that Mr. Gibson committed "an unauthorized exercise of his official functions." N.J.S.A. 2C:30-2a. First, the State did not show that Mr. Gibson breached a duty "imposed upon [him] by law," as the sick time and outside employment policies are internal agency regulations, not law.

Model Jury Charges, Official Misconduct; Maioranna, 225 N.J. Super. at 371. Second, the State did not show that Mr. Gibson breached a duty "clearly inherent in the nature" of his office, as the duty to abide by the sick time and outside employment regulations is not "clearly inherent" in the nature of his position as a police officer. Ibid.; Model Jury Charges, Official Misconduct. Accordingly, the State failed to prove that Mr. Gibson committed official misconduct, and the motion for a judgment of acquittal should have been granted as to that charge.

A. The Sick Time And Outside Employment Policies Do Not Establish Duties Imposed "By Law."

The sick time and outside employment policies are administrative in nature and therefore do not establish duties imposed "by law." Maioranna, 225 N.J. Super. at 371. See also Model Jury Charges, Official Misconduct. In State v. Duble, this Court held that an administrative regulation of a police department does not establish a "duty imposed . . . by law" within the meaning of the Legislature's enactments criminalizing misconduct of a public officer. 172 N.J. Super. 72, 74 (App. Div. 1979). There, the defendant was convicted of the statutory offense of neglect of official duty, which criminalized a public official's willful refusal or neglect "to perform any duty imposed upon him by law." See N.J.S.A. 2A:135-1; L. 1898, c. 235, § 23. Although N.J.S.A. 2A:135-1 was repealed in 1979, the offense of neglect of official duty is subsumed by the current official misconduct statute, which was enacted that same year. See

N.J.S.A. 2C:30-2b (dictating that a person is guilty of official misconduct when "[h]e knowingly refrains from performing a duty which is imposed upon him by law"); Maioranna, 225 N.J. Super. at 368-69 (citing N.J.S.A. 2A:135-1 and observing that, "[p]rior to the adoption of the Criminal Code in 1979, the offense of official misconduct . . . existed under both statutory and common law").

The charges in Duble stemmed from the defendant police officer's failure to file a written report about an incident in which he took possession of heroin which was later found in his private locker. Id. at 73. Pursuant to the police department's rules and regulations, an officer was required to file a written report following an investigation. Id. at 74. The relevant question, then, was whether those rules created a duty imposed upon the defendant "by law," such that his behavior amounted to neglect of official duty. This Court held that they did not and reversed the defendant's conviction. Id. at 74-75.

The Duble decision was based in part on the "settled principle that a municipal resolution, unlike an ordinance, is not a law." Id. at 75. In addition, the Court reasoned that it would be absurd to vest the head of a police department with the authority to create internal rules for its officers which, if violated, would subject the officers to criminal penalties. As the Court explained:

> The rule in question is purely administrative in character, affecting only the internal operation of the department and the conduct of its members. For breach thereof disciplinary proceedings may be available. . . . But it was never intended that such should be

> prosecuted by indictment under the criminal statute. To conclude otherwise would authorize department heads and municipal governing bodies to create broad classes of indictable offenses chargeable against public officers merely by administrative regulations covering the most commonplace and inoffensive forms of conduct and agency procedure. [Id. at 74-75 (emphasis added, internal citation omitted)].

As in Duble, the policies here are administrative in nature; they regulate a police officer's ability to take sick leave and work a second job. They do not, for instance, regulate the way an officer conducts a traffic stop or questions someone as part of an investigation. In short, these policies govern a police officer's behavior as an employee, not as a public official who is in a position of authority vis-à-vis the public. See State v. Perez, 185 N.J. 204, 206 (2005) (the purpose of N.J.S.A. 2C:30-2 is to "prevent the perversion of governmental authority"). These policies therefore do not establish duties imposed "by law" for purposes of the official misconduct statute and violating them does not amount to an "unauthorized exercise" of Mr. Gibson's "official functions" as a police officer. Maioranna, 225 N.J. Super. at 371; see also id. at 371-74 (noting that the internal procedures of the Bergen County Office of Community Development are not "law" for purposes of the official misconduct statute).

B. The Duty To Abide By The NPD's Sick Time And Outside Employment Policies Is Not "Clearly Inherent In the Nature" Of A Police Officer's Public Position.

The State also failed to show that Mr. Gibson breached a duty "clearly inherent in the nature" of his office by violating the sick time and outside

employment policies. This Court has narrowly prescribed the duties that are "clearly inherent in the nature" of a public office. In State v. Brady, the Court held that a Superior Court judge did not have an inherent duty to enforce an arrest warrant and thus did not commit official misconduct by failing to notify police that her boyfriend, for whose arrest police had a warrant, was planning to come to her house. 452 N.J. Super. 143, 162-174 (App. Div. 2017). The Court reasoned that "it is the judge's obligation to see that justice is done in every case that comes before him or her." Id. at 172 (emphasis added). "A judge who refrains from performing her official duty in a case that comes before her, coupled with the purpose to bestow a benefit on herself or another, subjects herself to criminal prosecution for official misconduct." Id. at 172-73. Stopping there, however, the Court rejected the State's argument that a judge has an inherent duty "to enforce the order of another court," let alone to do so "wherever he or she may be, twenty-four hours a day, 365 days per year." Ibid.

By contrast, in Maioranna, the Law Division held that the defendant, formerly the Executive Director of the Bergen County Office of Community Development, could be charged with official misconduct for approving the payment of $10,000 in Community Development funds without the consent of the Township municipal council. 225 N.J. Super. at 367, 374. In so doing, the Court noted that the duty to "preserve and not permit misuse of public funds"

was inherent in the defendant's role. Id. at 372-373. The Court further reasoned that by failing to obtain the required consent before approving the distribution of public funds, the defendant breached her "fundamental duty as a trustee of the public weal." Id. at 373. The Appellate Division affirmed this portion of the Law Division's decision. Maiorana, 240 N.J. Super. at 362.

Brady and Maioranna demonstrate that the duties inherent in a public office are the narrow set of obligations that are essential to carrying out the public functions of the office. With respect to a police officer, the public functions of the office are law enforcement and the promotion of public safety. See, e.g., State v. Hinds, 143 N.J. 540, 546-58 (1996) (concluding that an off-duty police officer engaged in official misconduct by failing to arrest someone committing a crime in his presence). While the NPD surely has policies that govern the way its officers perform their law enforcement and public safety functions, the policies that Mr. Gibson violated are categorically different; they regulate his behavior as an employee entitled to certain benefits, not as a public servant with official duties. Violating these policies thus did not amount to a breach of the duties "clearly inherent" in Mr. Gibson's role as a police officer.

Because Mr. Gibson did not breach a duty imposed "by law" or "clearly inherent in the nature" of his public office, he did not commit an act constituting an "unauthorized exercise of his official functions." Maioranna, 225 N.J. Super.

at 371; Model Jury Charges, Official Misconduct. The State thus failed to prove that Mr. Gibson committed official misconduct, and acquittal is required.

POINT II

DEFENDANT WAS ERRONEOUSLY DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO COUNSEL OF CHOICE. (1T 13-25 to 15-17)

Before this matter was set for trial, the court granted a motion by Mr. Gibson's counsel to withdraw from the case. (1T 8-16 to 20) The court then instructed Mr. Gibson that he had seven days to hire new counsel, and when Mr. Gibson asked for more time because the person he planned to hire was on vacation, the court refused to consider the request. Instead, the court repeatedly told Mr. Gibson that if he failed to hire private counsel within seven days, he would be represented by a public defender. (1T 13-25 to 15-17) This arbitrary ruling deprived Mr. Gibson of his constitutional right to counsel of choice and amounted to structural error, requiring a new trial. U.S. Const. amends. VI, XIV; N.J. Const. art. I, ¶ 10; State v. Kates, 216 N.J. 393, 397 (2014).

On August 24, 2020, Mr. Gibson's private attorney filed a motion to withdraw as counsel, citing a breakdown in the attorney-client relationship. (1T 4-6 to 18) The State opposed the motion, arguing that Mr. Gibson was "simply attempting to delay matters." (1T 5-11 to 25) After granting the motion, the court asked counsel to hold on to the discovery until the public defender's office

assigned someone. (1T 13-16 to 20) Mr. Gibson then told the court that he was hiring new private counsel, which prompted the following exchange:

> **THE COURT:** Sir, if you don't have a private attorney assigned in the next seven days whoever is appointed is your attorney. I can not have this case wait any longer, it's been over a year. There is no more delays --
>
> . . . .
>
> **THE COURT:** But if it is not by, today is Monday, if it not by the 31st of August, whoever is appointed by the Public Defender's Office that is your attorney.
>
> . . . .
>
> **DEFENDANT**: Well, Judge, the person I was going to hire is out of his office for vacation. Can you give me more than seven days?
>
> **THE COURT**: Sir, that's not my issue. This case is over, the cases are over a year old, going on a year and a half, not my issue. Okay, I will see everyone on the 23rd of September, and Mr. Gibson, if you're going to hire an attorney do it very soon because their papers need to be in by next Monday, or else whoever is appointed is the person the Court will recognize as your attorney.

[(1T 13-25 to 15-17) (emphasis added)]

Mr. Gibson failed to hire private counsel within the allotted seven days and proceeded to trial with an attorney assigned by the public defender's office.

"The Sixth Amendment of the United States Constitution and article 1, paragraph 10 of the New Jersey Constitution guarantee a criminal defendant the right to counsel at trial." State v. Crisafi, 128 N.J. 499, 508 (1992). This right entitles a non-indigent defendant to choose who will represent him. Kates, 216 N.J. at 395-97. Because "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of

defense, selection of the jury, presentation of the witnesses," and so on, the right to counsel of one's choice is significant, and the impact of its deprivation is hard to measure. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006). For these reasons, a violation of the right to counsel of choice is structural error, requiring a new trial without a showing of prejudice. Ibid.

Of course, the right to counsel of choice is not limitless, and the court may balance this right -- which often involves a request for a continuance -- against the demands of its calendar. State v. Kates, 426 N.J. Super. 32, 45 (App. Div. 2012), aff'd, 216 N.J. 393. When presented with a request for an adjournment to retain new counsel, the court should consider the following factors identified in State v. Furguson, 198 N.J. Super. 395, 402 (App. Div. 1985):

> the length of the requested delay; whether other continuances have been requested and granted; the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court; whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; whether the defendant has other competent counsel prepared to try the case, including the consideration of whether the other counsel was retained as lead or associate counsel; whether denying the continuance will result in identifiable prejudice to defendant's case, and if so, whether this prejudice is of a material or substantial nature; the complexity of the case; and other relevant factors which may appear in the context of any particular case.

Kates, 216 N.J. at 396. The court may deny the adjournment request after engaging in a "reasoned, thoughtful analysis" of these factors. Ibid.

In Kates, the defendant requested an adjournment to hire new counsel on the first day of trial after learning that lead counsel might be deployed overseas during the trial and the second chair would have to take over. 216 N.J. at 394-95. Without any further inquiry, the court denied the request. Ibid. The Appellate Division ordered a new trial because "the trial court did not adequately elicit facts and apply the relevant factors to reasonably balance defendant's desire to retain counsel of his choice against the court's need to proceed with the scheduled trial." Ibid. The Supreme Court affirmed, holding that structural error is triggered when the court "summarily" or "arbitrarily" "denies an adjournment to retain private counsel without considering the relevant factors, or abuses its discretion in the way it analyzes those factors." Id. at 396-397.

In State v. Maisonet, the Supreme Court affirmed and clarified the holding of Kates. 245 N.J. 552, 559 (2021). The Court explained that "if a trial judge does not conduct the proper analysis" when confronted with an adjournment request to retain counsel of choice, "it may be necessary to reverse a conviction and start anew." Id. at 560. However, "[w]hen a reviewing court can glean or infer the relevant considerations from the record, it may evaluate the appropriate factors" on its own to determine whether the denial of the request was an abuse of discretion. Ibid. In other words, "courts cannot presume structural error from a trial court's failure to ask questions or make explicit findings about the

Furguson factors if the record otherwise reveals that an adjournment to seek to hire new counsel was not appropriate under the circumstances." Id. at 566-67.

In this case, the trial court failed to undertake any assessment of the Furguson factors before denying Mr. Gibson's request for additional time to hire a new attorney. Instead of engaging in the "thoughtful, reasoned analysis" that Kates requires, the court summarily rejected Mr. Gibson's explanation for seeking more time, stating, "that's not my issue" and reiterating that the cases had been pending for a while. (1T 15-10 to 17) To the extent that the relevant considerations may be gleaned from the record, this Court must conclude, under Maisonet, that the denial of Mr. Gibson's request was an abuse of discretion.

As to the first factor, "the length of the requested delay," the court did not even ask Mr. Gibson how much more time he needed to hire new counsel, which alone suggests an abuse of discretion. Given that he sought more time because the attorney he planned to hire was on vacation, it is safe to assume that he needed no more than an extra week or so. Unlike in Maisonet, where the defendant sought a continuance to hire private counsel on the first day of a murder trial, and counsel would have required "considerable" time to prepare the case, this factor supports granting Mr. Gibson's request. 245 N.J. at 569-70.

Turning to the second factor, "whether other continuances have been requested and granted," a seven-day continuance had already been granted, but

the impetus for that continuance was counsel's motion to withdraw. Considering the context, this factor is neutral.

The third factor, "the balanced convenience or inconvenience to the litigants, witnesses, counsel, and the court" weighs heavily in favor of granting the request. As explained in Maisonet, this factor "is measured, in part, by the timing of an adjournment request." 245 N.J. at 570. When the request comes on the first day of trial, for instance -- after jurors have been summoned, witnesses prepared, and the court's schedule cleared -- the inconvenience is substantial. See ibid. Here, however, the case had not even been placed on the trial calendar. What's more, the record reveals that Essex County was not holding in-person trials at the time due to the pandemic. (1T 7-21 to 24) Defense counsel thus pointed out that "at this time it's not a real delay because there's no trials going on." (1T 7-22 to 24) As case in point of this statement's accuracy, Mr. Gibson's trial was not held until well over two years later. Consequently, the resulting inconvenience of granting the request, if any, would have been minimal.

As to "whether the requested delay is for legitimate reasons, or whether it is dilatory, purposeful, or contrived," Mr. Gibson offered a legitimate reason for the delay: that the attorney he sought to hire was on vacation. While the prosecutor suggested earlier in the proceeding that Mr. Gibson had dilatory motives, no factual basis was presented to support this accusation. Moreover,

defense counsel argued that the delay was due to the ongoing pandemic and discovery issues. (1T 6-5 to 7-3) Accordingly, this factor, as well as the fifth factor, "whether the defendant contributed to the circumstance which gives rise to the request for a continuance," weighs in favor of granting the request. Cf. Maisonet, 245 N.J. at 570-71 (where the defendant worked with the same public defender for over a year yet waited until the day of trial to seek an adjournment to hire private counsel, he alone contributed to the need for a delay).

With respect to the sixth factor, "whether the defendant has other competent counsel prepared to try the case," Mr. Gibson did not. His prior counsel had just withdrawn, and there is no indication that he consulted with any attorneys aside from the one he sought to hire. As for the seventh factor, "whether denying the continuance will result in identifiable prejudice to defendant's case," the answer is certainly yes. Denying the request meant that Mr. Gibson could not hire his counsel of choice and would be forced to accept representation from the public defender's office. Finally, "the complexity of the case," the eighth factor, is irrelevant here, as a new attorney was taking over the case no matter what. The only question was whether that attorney would be the one that Mr. Gibson sought to hire or one that would be assigned to him.

In sum, to the extent that the Furguson factors may be analyzed on this record, they plainly weigh in favor of granting Mr. Gibson's request for

additional time to hire new counsel. The court arbitrarily decided that seven days was sufficient to retain new counsel, and when confronted with information indicating that it was not, the court refused to reconsider, even though the case had not yet been put on the trial calendar and Essex County was not holding in-person trials at the time. This abuse of discretion deprived Mr. Gibson of his constitutional right to counsel of choice, and a new trial is required.

POINT III

DEFENDANT WAS DENIED THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW DUE TO THE ERRONEOUS ADMISSION OF HEARSAY EVIDENCE. (Not Raised Below)

The key evidence at trial consisted of Mr. Gibson's sick leave and pay records from the NPD and pay records and work schedule from Saint Michael's. Relying on these documents, the State argued that Mr. Gibson worked at Saint Michael's while on sick leave, including on days he had a scheduled NPD shift. According to the State, this conduct proved both theft and official misconduct. (3T 145-20 to 147-17) Critically, however, the records at issue were pure hearsay, and the State failed to demonstrate that they fell under any exception. See N.J.R.E. 802. The court permitted witnesses to read these hearsay statements aloud to the jury and permitted the records to be entered into evidence. (2T 41-4 to 44-17, 122-24 to 123-19) Because the reliability of the records was not established, and because they went to the heart of the State's case, the admission

of this evidence was plain error requiring reversal. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

Hearsay is "a statement" that "the declarant does not make while testifying at the current trial or hearing" that is offered "in evidence to prove the truth of the matter asserted." N.J.R.E. 801. Hearsay is inadmissible at trial unless an exception to the rule against hearsay applies. N.J.R.E. 802. The party offering the hearsay evidence bears the burden of proving its admissibility. State v. Harvey, 151 N.J. 117, 167 (1997).

The records at issue here are clearly hearsay since they were offered to prove the truth of what they assert: that Mr. Gibson worked at Saint Michael's while on sick leave from the NPD and was paid a certain amount by each entity. Nevertheless, the State did not even try to establish that this evidence fell into any hearsay exception. The only exception that potentially applied is the business records exception, but the State failed to demonstrate that its requirements were satisfied. Because the State neglected to meet its evidentiary burden, these records were patently inadmissible.

The business records exception permits the introduction of a hearsay statement where the statement is (1) "contained in writing or another record," (2) "made at or near the time of observation by a person with actual knowledge or from information supplied by such a person," (3) "made in the regular course

of business," and (4) "it was the regular practice of that business to make such a writing or other record." N.J.R.E. 803(c)(6). Before business records can be admitted into evidence, a proper foundation must be laid to demonstrate that the requirements of N.J.R.E. 803(c)(6) are satisfied. State v. Sweet, 195 N.J. 357, 370 (2008). With respect to systematically prepared computer records, "[a] witness is competent to lay the foundation for . . . [the] records if the witness (1) can demonstrate that the computer record is what the proponent claims and (2) is sufficiently familiar with the record system used and (3) can establish that it was the regular practice of that business to make the record." Hahnemann Univ. Hosp. v. Dudnick, 292 N.J. Super. 11, 18 (App. Div. 1996).

The sick leave and pay records from the NPD were entered into evidence while Neves was on the witness stand. (2T 41-4 to 43-22) Neves testified that he provided these records to the prosecutor's office but did not testify that he was familiar with the system used to create and maintain them, nor did he testify that it was the regular practice of the NPD to make these records. (2T 41-17 to 20, 43-9 to 15) The Saint Michael's pay records and work schedule were never entered into evidence, though they were discussed while Olmo was on the witness stand.[4] (2T 122-24 to 123-19) Olmo explained that the they were given

[4] When discussing these records with Olmo, the prosecutor stated that they were already in evidence. (2T 122-24 to 25, 123-10 to 11) Nothing in the transcripts indicates that this is the case. See Exhibit List at 2T 2.

to him by Saint Michael's as a result of a grand jury subpoena, but Olmo similarly did not testify as to his familiarity with the systems and practices of Saint Michael's in creating and maintaining the records. (2T 160-2 to 15)

Because no foundation was laid for the admission of these documents as business records, their reliability was not established, and they should not have been admitted. Furthermore, their admission was plain error because they were the sole evidence demonstrating that Mr. Gibson worked at Saint Michael's while on sick leave. These records thus established that Mr. Gibson committed the actus reus components of theft and official misconduct, and without them, the jury would have had no basis to convict Mr. Gibson of either offense.

The prejudice caused by the erroneous admission of this hearsay evidence is exemplified by the questionable reliability of the Saint Michael's work schedule record. Both the prosecutor and defense counsel noted that the work schedule record contained typographical errors. (3T 73-6 to 74-3, 77-11 to 78-12) In numerous instances, the record erroneously indicated that Mr. Gibson worked a 20-hour shift from 10:00am until 6:00am the following morning. (3T 77-11 to 78-12) These errors call into question the reliability of the record's contents, illustrating the rationale for the requirement that a foundation be laid prior to the admission of purported business records. Because the trial court committed plain error by admitting this hearsay evidence, reversal of Mr.

Gibson's trial convictions is required. See State v. Branch, 182 N.J. 338, 353-54 (admission of hearsay evidence was plain error requiring reversal).

POINT IV

THE THEFT CONVICTION MUST BE REVERSED BECAUSE THE COURT FAILED TO INSTRUCT THE JURY ON THE CLAIM OF RIGHT DEFENSE, FAILED TO TAILOR THE THEFT INSTRUCTION, AND FAILED TO PROPERLY RESPOND TO A JURY QUESTION ABOUT THE ABSENCE OF EVIDENCE. (Not Raised Below)

The trial judge has a mandatory duty to "instruct the jury as to the fundamental principles of law which control the case." State v. Butler, 27 N.J. 560, 595 (1958). Given the importance of jury instructions in safeguarding a defendant's right to due process, "erroneous instructions are almost invariably regarded as prejudicial." Vick, 117 N.J. at 289. Even if there was no objection, errors in instructions that are crucial to the jury's deliberations require reversal of a defendant's conviction. State v. Jordan, 147 N.J. 409, 422-23 (1997).

In this case, the theft instructions contained two fatal errors. First, the court failed to instruct on the claim of right defense, which provides that a defendant is not guilty of theft if he is not aware that he lacks permission to take the relevant property. At the heart of this case was whether Mr. Gibson knew that he was not entitled to his NPD salary while on sick leave, and yet the jury was not instructed on this central issue. A claim of right instruction was made

even more necessary by the State's improper suggestion, via its rebuttal witness, that Mr. Gibson's mental state was irrelevant to the jury's determination of whether he committed theft. Second, the court relied entirely on the model jury charge for theft without tailoring the instructions to the facts of this case. The court should have told the jury that they had to decide whether Mr. Gibson forfeited his right to his sick pay by violating the outside employment policy. The model charge did not convey this critical detail. To make matters worse, the judge responded in an insufficient manner to a jury question on this topic. These errors, separately and together, require reversal of the theft conviction. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

A. It Was Plain Error To Omit A Claim Of Right Charge Where The Evidence Established The Defense And The State Improperly Suggested That Defendant's Mental State Was Irrelevant To The Jury's Determination Of Whether He Committed Theft.

Under the Criminal Code, "[i]t is an affirmative defense to prosecution for theft that the actor . . . [a]cted under an honest claim of right to the property or service involved." N.J.S.A. 2C:20-2c(2). This defense codifies the straightforward notion that a person is not guilty of theft if he does not consciously misappropriate property; in other words, "he is not a thief if he mistakenly supposes that the owner has consented." State v. Ippolito, 287 N.J. Super. 375, 380 (App. Div. 1996). Where there is evidence to support the claim of right defense, it is the State's burden to disprove it beyond a reasonable doubt.

N.J.S.A. 2C:1-13b(1); Model Jury Charges (Criminal), "Claim of Right Defense to Theft Offenses (N.J.S.A. 2C:20-2c(2))" (app. Nov. 4, 1996).

With respect to charging this defense, "[t]he general rule is that it is plain error for a court to omit a charge concerning a statutory affirmative defense that has been established by evidence in the case, 'regardless of what requests counsel may make.'" Ippolito, 287 N.J. Super. at 381 (quoting State v. Moore, 113 N.J. 239, 287-288 (1988)). Thus, in Ippolito, this Court reversed the defendant's theft conviction on the grounds that it was plain error for the trial judge to omit an instruction on the claim of right defense. 287 N.J. Super. at 384. The Court reasoned that "the claim of right defense should have been apparent to the trial judge through defendant's testimony and his attorney's summation." Id. at 382. As a result, it was "not a situation where the court would have been required on its own meticulously to sift through the entire record to determine whether the issue properly was before the jury." Ibid. (cleaned up).

As in Ippolito, the claim of right defense was clearly apparent in this case based on Mr. Gibson's testimony and defense counsel's summation, both of which made clear that Mr. Gibson's intent to steal from the NPD was a central issue. Mr. Gibson testified that he did not understand the outside employment policy and was not aware that he was committing a crime by continuing to work at Saint Michael's while on sick leave. (3T 27-5 to 14, 33-21 to 34-3) In closing,

defense counsel conceded that Mr. Gibson violated the outside employment policy but argued that the policy is not clear in that it fails to explain when a policy violation amounts to a crime. (3T 115-13 to 14, 114-8 to 12) Thus, while the State's theory was that Mr. Gibson committed theft by virtue of violating the outside employment policy, the defense theory was that Mr. Gibson either did not know that he was violating the policy or did not know that because he violated the policy, he was not entitled to his paycheck from the police department. Had the jury accepted the defense theory, it would have had to find Mr. Gibson not guilty of theft due to a lack of conscious misappropriation.

Not only was the jury not told this -- since no claim of right charge was given -- but also the State improperly suggested via its rebuttal witness that Mr. Gibson's intent to steal was irrelevant. Dominguez testified on direct that officers are responsible for knowing all the NPD policies and would still be disciplined for violating a policy even if they claimed they were not aware of it; in other words, ignorance is not a defense. (3T 93-22 to 94-9) The prosecutor then asked Dominguez if that same standard applies "for 2C crimes . . . [in] criminal cases as well," to which he responded that it does. (3T 94-10 to 13) This exchange incorrectly suggested that a defendant does not need to know that he is stealing property to be convicted of theft. Hearing this testimony, the jury could have believed that merely by violating the outside employment policy, Mr.

Gibson committed theft, regardless of whether he knew he was violating the policy or that by doing so he forfeited his right to his sick pay.

Because the claim of right defense was established by the evidence, the trial court was required to instruct the jury on it. See Ippolito, 287 N.J. Super. at 381. An instruction on the defense was made even more essential by the State's suggestion that Mr. Gibson's intent to steal was irrelevant. The failure to charge claim of right was thus plain error requiring reversal of the theft conviction.

B. The Court's Failure To Tailor The Theft Instruction And To Properly Respond To A Jury Question About The Absence Of Evidence Mandate Reversal.

A trial judge "has the right, and oftentimes the duty" to tailor the jury instructions to the specific facts of the case. State v. Concepcion, 111 N.J. 373, 379-80 (1988) (citation omitted). Simply reading the model jury charges "is not always enough." Ibid. "Ordinarily, the better practice is to mold the instruction in a manner that explains the law to the jury in the context of the material facts of the case." Ibid. Doing so is particularly necessary where "the statement of relevant law, when divorced from the facts, [is] potentially confusing or misleading to the jury." State v. Robinson, 165 N.J. 32, 42 (2000).

In this case, when instructing the jury on the theft offense, the court read verbatim the model jury charge for theft of moveable property. The model charge directs the court to read the language of the statute: "A person is guilty of theft

if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof." Model Jury Charges (Criminal), "Theft of Moveable Property (N.J.S.A. 2C:20-3a)" (rev. Feb. 11, 2008). The model charge then provides that "[t]he State must prove each of the following elements beyond a reasonable doubt: (1) that defendant knowingly took or unlawfully exercised control over movable property; (2) that the movable property was property of another; [and] (3) that defendant's purpose was to deprive the other person of the movable property." Ibid. (emphasis added). With respect to the first element, the model charge merely defines "property, "moveable property," and the mental state of "knowing." Ibid.

Mapped onto the facts of this case, the model charge suggests that the jury merely had to find that Mr. Gibson "knowingly took" money that was given to him by the NPD with the intent of not giving it back. But in every case where an employee accepts a paycheck from his employer, he knowingly takes money with the intent of not returning it. Such an act is criminal only if the employee is not legally entitled to the money. The problem with relying solely on the model charge in the context of this case, then, is that it fails to convey that the defendant must take property that he is not entitled to take.

Here, Mr. Gibson was charged with stealing his own paychecks, which were provided to him with the consent of the NPD. The State's theory was that,

by continuing to work a second job while on sick leave, Mr. Gibson violated the outside employment policy and thereby forfeited his right to his sick pay. (See 3T 145-23 to 25) Thus, in the context of this case, the judge should have tailored the model charge to ensure that the jury understood the necessity of making a factual finding that Mr. Gibson took property to which he was not legally entitled by virtue of violating the outside employment policy.

The misleading nature of the theft instruction was compounded by the judge's inadequate response to a question from the jury during deliberations. The jury asked: "Where in the evidence does it show that if you take a second job while on sick leave you are not entitled to your compensation from the police department?" (4T 5-14 to 21) The jury's note suggests that it perceived a gap in the evidence with respect to whether Mr. Gibson was entitled to his pay despite violating the outside employment policy. In response to the note, the judge read the instruction on further deliberations, which simply encourages the jury to continue consulting with one another to reach an agreement. (4T 5-22 to 6-11)

"Jury questions present a glimpse into a jury's deliberative process." State v. Parsons, 270 N.J. Super. 213, 224 (App. Div. 1994). "A question from a jury during its deliberations means that one or more jurors need help and that the matter is of sufficient importance that the jury is unable to continue its deliberations until the judge furnishes that help." Id. at 221. Thus, as our

Supreme Court recently reaffirmed, "[w]hen a jury requests clarification, a trial judge 'is obligated to clear the confusion'" by answering the questions posed in a clear and accurate manner. State v. Berry, 254 N.J. 129, 145-46 (2023) (quoting State v. Savage, 172 N.J. 374, 394 (2002)). The failure to adequately respond to a jury question "may require reversal." Ibid.

In this case, the judge's response in no way aided the jury in confronting the absence of evidence that it was worried about. An appropriate response would have been to remind the jury that the State bears the burden of proof, such that any missing evidence cannot be held against the defendant. Or, the judge could have instructed the jurors that their recollection of the evidence controlled and that they could ask for the playback of any testimony if they wanted it. By instructing the jury to continue deliberating, however, the judge implied that the question did not warrant a response. This non-response suggested that the absence of the evidence identified by the jury was immaterial to its decision.

In conjunction with the failure to tailor the theft instruction to the specific facts of the case, the judge's inadequate response left the jury with the false impression that whether the evidence proved that Mr. Gibson was not entitled to his sick pay from the NPD was a non-issue. Had the jury found that Mr. Gibson was entitled this pay, however, it would have had to find him not guilty of theft. Given the highly misleading nature of the jury instructions and the judge's

inadequate response to the jury note, the verdict cannot stand. See State v. Tucker, 280 N.J. Super. 149, 153 (App. Div. 1995) (reversing defendant's robbery conviction where the trial judge failed to tailor the jury instructions).

POINT V

THE PROSECUTOR'S IMPROPER BURDEN-SHIFTING AND COMMENTS ON FACTS NOT IN EVIDENCE REQUIRE REVERSAL. (Not Raised Below)

During summation, the prosecutor made multiple comments that deprived Mr. Gibson of a fair trial. First, as a means of arguing that Mr. Gibson "wasn't really sick" during the time that he was on sick leave, the prosecutor pointed out that Mr. Gibson had not produced any evidence of his back injury "other than his own statements." (3T 135-9 to 25) In so doing, the prosecutor improperly suggested that Mr. Gibson had the burden of proving that he was sick and was thus entitled to take leave, when in fact that burden remained with the State. Second, when discussing how Mr. Gibson's case evolved from an administrative matter into a criminal one, the prosecutor made several statements that were not based in the record. The prosecutor stated that his office "immediately took over the investigation" upon learning about it from the NPD, and he proceeded to explain that this case was treated "differently" because "it's egregious." (3T 131-3 to 5, 133-13 to 134-17) However, no testimony was admitted as to how the prosecutor's office responded to the NPD informing it of the allegations against

Mr. Gibson, and no testimony was presented as to the reason that Mr. Gibson's case was treated as a criminal matter and not an administrative one. The remarks were therefore not supported by the record and may have misled the jury.

"The duty of the prosecutor is as much to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." State v. Williams, 244 N.J. 592, 607 (2021) (cleaned up). When a "prosecutor's remarks stray over the line of permissible commentary," the appellate court must examine "the severity of the misconduct and its prejudicial effect on the defendant's right to a fair trial." State v. McNeil-Thomas, 238 N.J. 256, 275 (2019). This determination must be made "within the context of the trial as a whole." Ibid. In addition, the Court must consider "(1) whether defense counsel made timely and proper objections to the improper remarks; (2) whether the remarks were withdrawn promptly; and (3) whether the court ordered the remarks stricken from the record and instructed the jury to disregard them." Williams, 244 N.J. at 608 (citation omitted).

Here, although the prosecutor's improper statements were not objected to, they had a clear capacity to "le[a]d the jury to a result it otherwise might not have reached." State v. Atwater, 400 N.J. Super. 319, 336 (App. Div. 2008) (citation omitted). With respect to the burden-shifting comment, the State argued that Mr. Gibson was guilty of official misconduct because he took sick leave

despite not actually being sick. (3T 147-13 to 15) Yet the State's evidence on this issue was weak, consisting only of testimony about Mr. Gibson's duties at Saint Michael's by a witness who did not even work there during the relevant time period, i.e. when Mr. Gibson was on sick leave. With respect to the comments that lacked record support, these went to the central issue of whether Mr. Gibson merely violated employment policies or whether his conduct was criminal. Via these unsupported comments, the prosecutor sought to fill a gap in the State's case as to when a policy violation is a crime and why the jury should hold Mr. Gibson criminally liable. Because these errors, separately and together, deprived Mr. Gibson of a fair trial, his trial convictions must be reversed. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

A. The Prosecutor Improperly Shifted The Burden Of Proof To The Defense On The Factual Question Of Whether Defendant Violated The Sick Leave Policy By Faking Being Sick.

It is "a basic tenet of our criminal jurisprudence that a defendant has no obligation to establish his innocence." State v. Jones, 364 N.J. Super. 376, 382 (App. Div. 2003). A defendant may rely on the presumption of innocence and need not call witnesses, assume the stand to testify, or offer evidence on his own behalf. Ibid.; State v. Hill, 199 N.J. 545, 559 (2009). As a result, a prosecutor's comment on a defendant's decision not to produce evidence at trial is improper. "When a prosecutor's comments infringe upon such a basic right, the facts and

circumstances must be closely scrutinized to determine whether the defendant's right to a fair trial has been compromised." Id. at 383 (cleaned up).

In this case, the State sought to show that Mr. Gibson engaged in official misconduct by violating both the sick leave policy and the outside employment policy. With respect to the former, the prosecutor argued in summation that Mr. Gibson was "not sick" because he was working at Saint Michael's while on sick leave. (3T 147-12 to 15) The prosecutor also made the following comments, which improperly shifted the burden of proof to the defense:

> So we heard a lot about a back injury, right, that Defendant had a back injury? He didn't produce any evidence of this other than his own statements. But if you look at the actual records . . . It doesn't cite a back injury. It cites gout. Migraine headaches before that. So I don't know -- I don't know. I -- he may have been sick. But it doesn't appear to be what they're saying it is. [(3T 135-23 to 136-8) (emphasis added)]

By noting that Mr. Gibson "didn't produce evidence" of his back injury "other than his own statements," the prosecutor improperly insinuated that it was Mr. Gibson's burden to prove that he was not faking sick. To make matters worse, the prosecutor suggested that Mr. Gibson failed to meet this burden because, although he did testify, he did not offer any other evidence of his injuries. These comments ran completely awry of the bedrock principle that a defendant has no obligation either to testify or to offer any other evidence in his defense. See Jones, 364 N.J. Super. at 382-83 (in weapons possession case, prosecutor

improperly shifted the burden of proof by noting in closing that the defendant did not perform fingerprint tests on the weapon to establish that it was not his).

In the context of the entire trial, the prosecutor's improper burden-shifting had a clear capacity to bring about an unjust result because the State's evidence on this factual issue was decidedly weak. Under the sick leave policy, an employee is "considered injured when they incur an on duty physical infliction which renders [them] unable to capably perform their assigned duties." (2T 45-6 to 47-9) The only direct evidence that the State produced to show that Mr. Gibson was not incapable of performing his assigned duties at the NPD was the bare fact that he was working at Saint Michael's while on sick leave. True, the State presented evidence that Mr. Gibson's duties under Pagan's supervision were just as physically strenuous, if not more so, than his duties at the NPD, but critically, Pagan did not work at Saint Michael's when Mr. Gibson was on sick leave. (2T 107-17 to 19, 117-9 to 11) Consequently, even if the jury found Pagan to be credible, Pagan himself admitted that he had no knowledge of Mr. Gibson's duties at Saint Michael's in 2018 or whether Mr. Gibson was required to do anything physically strenuous during that time. (2T 118-12 to 21)

Considering the weakness of the State's case on this issue, the prosecutor's attempt to improperly shift the burden of proof to the defense was highly prejudicial. The jury may have overlooked the State's failure to prove

beyond a reasonable doubt that Mr. Gibson was not sick as defined by the NPD policy, instead wrongfully focusing on whether Mr. Gibson proved the opposite. Mr. Gibson's official misconduct conviction must be reversed in light of this prosecutorial misstep. See State v. Supreme Life, 473 N.J. Super. 165, 172-73, 176 (App. Div. 2022) (plain error reversal was required where the prosecutor's comments "seemingly blurr[ed] which party had the burden of proof").

B. The Prosecutor Relied On Facts Not In Evidence When Attempting To Explain Why Defendant Was Criminally Prosecuted For Violating Internal Police Department Policies And Offered His Personal Belief In Defendant's Guilt.

Although a prosecutor is entitled to "make forceful arguments in summation," the prosecutor's comments must be "based on the evidence in the case and the reasonable inferences" to be drawn therefrom. State v. Bradshaw, 195 N.J. 493, 510 (2008) (citations omitted). References to matters extraneous to the evidence may amount to prosecutorial misconduct that prejudices a defendant's right to a fair trial. State v. Jackson, 211 N.J. 394, 408 (2012). Here, the prosecutor made several statements that were not based in the record relating to how and why Mr. Gibson's case evolved from an administrative matter into a criminal one. First, when recounting Neves's testimony, the prosecutor noted that in most cases when the NPD informs the prosecutor's office of a criminal allegation, the prosecutor's office "tell[s] the department just carry on, do your investigation and then report back to us, what did you do. . . . And then we'll

look at it. We'll do attorney review and determine whether a crime occurred." (3T 130-7 to 20) In a smaller number of cases, however, the prosecutor's office "immediately takes over the investigation." (3T 130-22 to 24) The implication -- although not spoken aloud -- was that some cases are so obviously criminal that the prosecutor's office treats them as such immediately. The prosecutor then said, with no basis in Neves's testimony: "that's what happened in this case. The prosecutor's office immediately took over the investigation." (3T 131-3 to 5)

In fact, during direct examination of Neves, the judge sustained defense counsel's objection to the prosecutor asking Neves how the prosecutor's office responded to the NPD advising it of the allegations against Mr. Gibson. (2T 39-15 to 40-21) Thus, not only was there no evidence to support the prosecutor's statement that his office immediately took over the case, but also the judge ruled that this evidence was inadmissible. The prosecutor acted wholly improperly by stating, as if it were a fact in evidence, that Mr. Gibson's case was treated as a criminal matter by the prosecutor's own office from the outset.

The harm caused by this improper comment was compounded by a line of argument that the prosecutor made later in his summation in which he attempted to explain why Mr. Gibson was prosecuted criminally when not all NPD policy violations trigger criminal charges. The prosecuted stated:

> So obviously, there are degrees of everything. Right? There are degrees of sick time abuse. You know, maybe an officer cuts out to

> go to his daughter's softball game or soccer game or go play a round of golf with a friend who's in town, you know, from New Orleans or to fix a leaky pipe in his bathroom. And that might be a violation of policy. Right? Those things are against the policy. But those are – things are pretty de minimis. Right?
>
> ….
>
> So what's different about this case, you know, from the other cases that we mentioned is that it's egregious. Right? The policy said it might be a crime. Maybe there's a line.
>
> ….
>
> So this is -- the -- the conduct here is egregious and that's what makes it different. It's egregious. It's flagrant.
>
> ….
>
> So a difference of a degree is still a difference. Right? A difference of 5 days, 10 days, 31 days, that's a lot different. It's a lot different from, you know, just bangin' out to go play a round of golf with a friend. So that's why he was treated differently -- that's why he was treated differently. [(3T 131-15 to 134-17) (emphasis added)]

Despite the prosecutor's assertions, no testimony was presented as to the reason that Mr. Gibson's case was treated as a criminal matter and not merely an administrative one. Not only that, but when asked on cross-examination why some policy violations are treated as crimes and some are not, Neves testified that he "wouldn't know" because the prosecutor's office makes the decision. (2T 89-21 to 90-1, 91-24 to 92-14) The prosecutor was thus attempting to fill a gap in the State's case by explaining in summation that Mr. Gibson's case was handled criminally because it was "egregious." (3T 133-13 to 15)

These comments were tantamount to unsworn testimony by the prosecutor. See State v. Adames, 409 N.J. Super. 40, 56-63 (App. Div. 2009)

(prosecutor's comments in summation on the defendant's demeanor and conduct during trial amounted to unsworn testimony and required reversal). They were not fair inferences to be drawn from the facts in evidence, because not a single witness offered testimony as to why certain cases are handled administratively rather than criminally. Cf. Feaster, 156 N.J. at 21, 61 (prosecutor's statement that defendant's friend drove him to the murder scene was a "logical inference[] that [could] be drawn" from a witness's testimony that she gave the friend her car keys and saw the friend in the driver's seat with the defendant as passenger).

Not only were the prosecutor's comments not based in the record, but they also problematically conveyed the prosecutor's own belief in Mr. Gibson's guilt. A prosecutor may not offer his belief in the defendant's guilt, and doing so is grounds for reversal. Supreme Life, 473 N.J. Super. at 174, 176. Here, the prosecutor's statement that his office reviews allegations against NPD officers and "determine[s] whether a crime occurred," in conjunction with his repeated description of this case as "egregious," was akin to telling the jury that his office was firmly convinced of Mr. Gibson's guilt, and by extension so was he. (3T 130-7 to 134-17) These comments were thus improper on multiple grounds.

The prosecutor's improper statements necessitate reversal. The crux of the defense theory was that Mr. Gibson may have violated internal NPD policies, but doing so was not a crime. The defense leaned on the ambiguity of the NPD

outside employment policy, which states that "'personnel who are off for illness and/or injury and engage in extra duty employment or outside employment may be committing a criminal act.'" (2T 64-11 to 13) (emphasis added) To rebut the defense theory, the State endeavored to show that the ambiguity of the policy was irrelevant because Mr. Gibson's conduct was so obviously criminal. The prosecutor's comment that his office "immediately took over the case" supported that rebuttal effort, as did his comments about Mr. Gibson's case being "treated differently" because it was "egregious." (3T 133-13 to 15, 134-14 to 17) Because these comments were not grounded in the record and improperly conveyed the prosecutor's own belief in Mr. Gibson's guilt, and because they were made to rebut the defense theory of the case, the comments were clearly capable of unjustly impacting the jury's verdict. See Atwater, 400 N.J. Super. at 336. In the face of such a grave risk, Mr. Gibson's trial convictions cannot stand.

POINT VI

THE IMPROPER ADMISSION OF OTHER-BAD-ACTS EVIDENCE REQUIRES REVERSAL. (Not Raised Below)

While Neves was on the witness stand, the prosecutor elicited testimony from him that "in February 2018" the IA Division "receive[d] a criminal complaint or criminal allegation against Officer Gibson." (2T 39-6 to 9) Neves did not describe the content of that complaint, but he explained that he contacted the prosecutor's office and advised them of it. (2T 39-15 to 21) At the same time,

the State presented evidence that Mr. Gibson's sick leave did not begin until March 6, 2018 -- after a criminal allegation against Mr. Gibson had already been made. (2T 17-14 to 16, 42-6 to 11, 51-25 to 52-2, 149-4 to 6) The State also offered evidence indicating that the first date that Mr. Gibson worked at Saint Michael's while on sick leave was not until March 20, 2018 -- several weeks later. (2T 124-19 to 126-3) Given that the conduct underlying the theft and official misconduct charges did not begin until late March 2018, the February 2018 criminal allegation that both the prosecutor and Neves were referring to was premised on some other criminal conduct that Mr. Gibson allegedly engaged in.[5] This reference to other criminal conduct was improper and highly prejudicial, suggesting to the jury that Mr. Gibson committed other uncharged crimes. See N.J.R.E. 404(b); State v. Cofield, 127 N.J. 328 (1992). A new trial is required due to the erroneous admission of this other-bad-acts evidence. R. 2:10-2; U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10.

Under N.J.R.E. 404(b), "evidence of other crimes, wrongs or acts is not admissible to prove a person's disposition in order to show that on a particular occasion the person acted in conformity with such disposition." This limitation

[5] Tellingly, Mr. Gibson was charged in a separate indictment with conspiracy to distribute drugs "between August 2017 and November 2018." (Da 11) It is likely that this behavior was the basis of the criminal allegation that the IA Division received in February 2018.

is essential to guard against the risk "that the jury may convict the defendant because he is a 'bad' person in general" and not because the evidence adduced at trial establishes guilt beyond a reasonable doubt. Cofield, 127 N.J. at 336. For this reason, evidence of past misconduct is admissible only when it is relevant to a material issue in dispute, such as "motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, or accident." N.J.R.E. 404(b).

"N.J.R.E. 404(b) is a rule of exclusion rather than a rule of inclusion." State v. Carlucci, 217 N.J. 129, 140 (2014). Thus, when the State seeks to use other-bad-acts evidence at trial, it must provide notice and "identify the specific, non-propensity purpose" for which it seeks to use the evidence. State v. Rose, 206 N.J. 141, 181 (2011). Moreover, the State must show that the evidence is (1) "relevant to a material issue;" (2) "similar in kind and reasonably close in time to the offense charged;" (3) "clear and convincing;" and, (4) its probative value is not "outweighed by its apparent prejudice." Cofield, 127 N.J. at 338.

Here, the State provided no notice of its intention to introduce other-bad-acts evidence at trial. Even if it had, the State could not have established admissibility because the evidence was entirely irrelevant yet highly prejudicial. Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." State v. Gillispie, 208 N.J. 59, 86 (2011) (quoting N.J.R.E. 401). The date on which the NPD received a

criminal allegation against Mr. Gibson was by no means a "fact of consequence" in Mr. Gibson's trial; the jury could have convicted Mr. Gibson of the charged offenses without having known that date. On the other hand, the reference to Mr. Gibson's other criminal conduct was highly prejudicial. Caselaw recognizes that other-bad-acts evidence "has a unique tendency to prejudice a jury." State v. Skinner, 218 N.J. 496, 514 (2014). "Studies confirm that the introduction of a defendant's prior bad acts 'can easily tip the balance against the defendant.'" Ibid. Here, the other-bad-acts evidence was particularly harmful because the jury was tasked with deciding whether Mr. Gibson's violations of internal policies amounted to criminal behavior. Defense counsel argued they did not, while the prosecutor insisted they did. (2T 32-6 to 9, 3T 145-20 to 25) In that context, the suggestion that Mr. Gibson committed other crimes beyond working a second job while on sick leave could have easily affected the verdict. The jury may have been more inclined to find that Mr. Gibson intended to steal from the NPD (a necessary component of theft) if they viewed him as a criminal.

In sum, the improper admission of this other-bad-acts evidence was clearly capable of producing a verdict that was based on a belief that Mr. Gibson was the type of person who commits crimes, rather than proof of the crimes charged beyond a reasonable doubt. Reversal of Mr. Gibson's trial convictions is required due to this plain error. R. 2:10-2; State v. Foglia, 415 N.J. Super. 106,

127-28 (App. Div. 2010) (admission of irrelevant other-bad-acts evidence was plain error requiring reversal of defendant's conviction).

POINT VII

THE CUMULATIVE EFFECT OF THE ERRORS DEPRIVED DEFENDANT OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL SUCH THAT HIS TRIAL CONVICTIONS SHOULD BE REVERSED AND HE SHOULD BE GIVEN THE OPPORTUNITY TO WITHDRAW FROM HIS SUBSEQUENT GUILTY PLEA. (Not Raised Below)

If the Court does not find that any one error warrants a new trial, it must find that their total effect "casts doubt on the propriety" of the verdict, State v. Jenewicz, 193 N.J. 440, 474 (2008), such that reversal is required. State v. Orecchio, 16 N.J. 125, 129 (1954); U.S. Const. amends. VI, XIV; N.J. Const. art. I, pars. 1, 9, 10. A central issue was whether Mr. Gibson committed an administrative infraction by violating internal NPD policies or whether his conduct was criminal. To resolve this issue, the jury had to consider both whether his actions amounted to theft and whether he had the specific intent to commit theft. Multiple of the errors discussed above could have impacted the jury's decision-making on those very issues, and when considered together, the likelihood that they did so presents an unacceptable risk of an unjust verdict.

In particular, the improper admission of other-bad-acts evidence suggested that Mr. Gibson committed other crimes that the jury was not told about, which could have swayed its assessment of whether Mr. Gibson had the

intent to steal from the NPD in this case, making his conduct criminal. Against the backdrop of this error, the court's failure to instruct the jury on claim of right was even more harmful because it implied that Mr. Gibson's intent to steal had been established by the evidence and the jury did not even need to consider it.

Similarly, the prosecutor's improper statements that this case is "egregious" and that his office immediately took over the investigation from the NPD suggested to the jury that Mr. Gibson's behavior clearly fell into the criminal category and that it was not even a close call. The harm caused by this prosecutorial misconduct was amplified by the court's failure to tailor the theft instruction and the judge's erroneous response to the jury question on the absence of evidence; these errors likely prevented the jury from considering the key question of whether, by violating NPD policies, Mr. Gibson forfeited his right to his sick pay and thus committed the act of stealing by retaining that money. Accordingly, when considered together, the myriad of trial errors that occurred in this case tainted the jury's verdict and require reversal.

If reversal is ordered, Mr. Gibson should be allowed to withdraw his subsequent guilty plea to the offenses contained in Ind. 19-7-1907 and 22-1-99. As demonstrated in State v. Hager, 462 N.J. Super. 377 (App. Div. 2020), a defendant should be allowed to withdraw a guilty plea entered as a result of a mistaken legal ruling or unfair procedure. In Hager, the defendant was convicted

of resisting arrest and then entered a guilty plea to a severed gun charge. Id. at 380-81. This Court reversed the resisting arrest conviction based on an evidentiary error and vacated the guilty plea because it "accept[ed the] defendant's representation" on appeal that the improper ruling "led directly" to his plea. Id. 388-89. The same remedy is needed here. Mr. Gibson sought to defend himself at trial, and it was only after he was convicted that he pleaded guilty to offenses set forth in the other indictments. This demonstrates, and Mr. Gibson now represents, that he would not have pleaded guilty in exchange for a five-year sentence, to run concurrent with his trial sentence, if he had not already been facing a mandatory minimum term of five years due to being convicted of official misconduct following a flawed trial. Mr. Gibson should be permitted to withdraw his guilty plea if his trial convictions are reversed.

POINT VIII

THE OFFICIAL MISCONDUCT CONVICTIONS SHOULD MERGE, RESPECTIVELY, WITH THE THEFT AND CONSPIRACY CONVICTIONS. (Not Raised Below)

If Mr. Gibson's trial convictions are not reversed, they should merge because they are premised on the same conduct. The same goes for Mr. Gibson's official misconduct and conspiracy convictions following his guilty plea. "The doctrine of merger is based on the concept that an accused who committed only one offense cannot be punished as if for two." State v. Tate, 216 N.J. 300, 302

(2013) (cleaned up). "[M]erger implicates a defendant's substantive constitutional rights," ibid., and the failure to order merger where appropriate violates a defendant's Fifth Amendment right against double jeopardy, as well as his Fourteenth Amendment right to due process and corresponding state constitutional rights. U.S. Const. amends. V, XIV; N.J. Const. art. I, pars. 1, 11.

New Jersey follows a "flexible approach" with respect to merger issues. State v. Hill, 182 N.J. 532, 542 (2005). This approach requires courts "to focus on the elements of the crimes and the Legislature's intent in creating them, and on the specific facts of each case." Ibid. Under this approach, courts should analyze the evidence by considering

> the time and place of each purported violation; whether the proof submitted as to one count of the indictment would be a necessary ingredient to a conviction under another count; whether one act was an integral part of a larger scheme or episode; the intent of the accused; and the consequences of the criminal standards transgressed.

Tate, 216 N.J. at 307 (quoting Davis, 68 N.J. at 81).

This court has repeatedly held that a conviction for official misconduct merges with the underlying substantive offense, the commission of which constituted official misconduct. State v. Quezada, 402 N.J. Super. 277, 290 (App. Div. 2008); State v. Malone, 269 N.J. Super. 414, 417 (Law. Div. 1993); State v. Lore, 197 N.J. Super. 277, 283–84 (App. Div. 1984). In Lore, for instance, the defendant police officer was convicted of assault and official

misconduct after he used excessive force during an arrest. Id. at 280-83. The Court held that the convictions should merge because "they occurred at the same time and place" and "the State relied upon the simple assault to establish the official misconduct," such that "the simple assault bec[ame] a necessary ingredient to a conviction for official misconduct." Id. at 284. Merger was thus required so that the defendant was not "punished twice for one offense." Ibid.

As in Lore, the State here relied upon the same conduct to establish that Mr. Gibson was guilty of both official misconduct and theft -- that Mr. Gibson worked at Saint Michael's while obtaining sick pay from the NPD. The theft and official misconduct thus "occurred at the same time and place." Lore, 197 N.J. Super. at 284. Similarly, the State relied upon the same conduct to establish that Mr. Gibson was guilty of both official misconduct and conspiracy to distribute drugs -- that Mr. Gibson entered into an agreement with two individuals whereby he would give them money to buy and sell drugs. (5T 17-23 to 19-21) Once again, the conspiracy and the official misconduct occurred contemporaneously. Merger is necessary to avoid Mr. Gibson being punished twice for one offense.

POINT IX

RESENTENCING IS REQUIRED BECAUSE THE SENTENCING PROCEEDING WAS REPLETE WITH ERRORS. (6T 13-14 to 14-20)

The court sentenced Mr. Gibson to concurrent prison terms of five years on each offense with the two official misconduct charges carrying a five-year

period of parole ineligibility. (6T 14-7 to 20) In reaching this sentence, the court committed numerous errors. First, the court failed to explain why it did not find mitigating factor 8 -- conduct was the result of circumstances unlikely to recur -- and mitigating factor 9 -- character and attitude of the defendant indicate that he is unlikely to reoffend. N.J.S.A. 2C:44-1b(8), (9). (6T 4-23 to 5-16, 14-1 to 6) There was ample evidence in the record to support these factors, and defense counsel argued, explicitly with respect to the former and implicitly with respect to the latter, that they should apply. Second, the court did not state its reasons for finding aggravating factor 9 -- the need to deter. N.J.S.A. 2C:44-1a(9). (6T 14-1 to 6) Third, the court failed to assign weight to any of the factors it found. And finally, the court failed to separately consider the application of the aggravating factors to each individual offense, instead determining that aggravating factors 4, 9 and 10 were generally applicable. (6T 14-1 to 6) These errors, separately and together, require resentencing. Although Mr. Gibson received the mandatory minimum on the two official misconduct charges, he received the statutory maximum on the three third-degree convictions. A proper application of the factors should result in lower sentences on those offenses.

A. The Sentencing Court Failed To Explain Why It Did Not Find Applicable Mitigating Factors 8 And 9.

"[O]ur case law and the court rules prescribe a careful and deliberate analysis before a sentence is imposed." State v. Fuentes, 217 N.J. 57, 71 (2014).

The court must identify whether any of the aggravating and mitigating factors apply, then assign weight to each factor based on a qualitative assessment, and then balance the factors to determine the right sentence. Id. at 72-73. "[W]hen the mitigating factors preponderate, sentences will tend toward the lower end of the range, and when the aggravating factors preponderate, sentences will tend toward the higher end of the range." State v. Natale, 184 N.J. 458, 488 (2005).

The court has an obligation to apply any mitigating factor that is "amply based in the record," regardless of whether defense counsel raises it. State v. Case, 220 N.J. 49, 64 (2014). Where defense counsel does argue for the application of a particular factor, the court must explain why it does not find that factor applicable. Ibid. Here, while defense counsel argued that mitigating factor 8 should apply and implied that mitigating factor 9 should as well, the court did not mention either factor when pronouncing the sentence. (6T 4-23 to 5-16) Resentencing is required due to this error.

Mitigating factor 8 applies where "[t]he defendant's conduct was the result of circumstances unlikely to recur." N.J.S.A. 2C:44-1b(8). Defense counsel pointed out that, due to his convictions, Mr. Gibson forfeited his job and is disqualified from future public employment. (6T 4-25 to 5-6) Defense counsel thus argued that "[h]e's not going to have that type of authority or -- or the ability to do the things that he did do that -- lead us here today." (6T 5-1 to 3) Given

that Mr. Gibson's theft conviction stems from unlawfully receiving sick pay from the NPD and his conspiracy conviction stems from using his role as a police officer to influence others to participate in a drug distribution scheme, the record clearly supports a finding of mitigating factor 8, and the Court should not have simply ignored this factor. See State v. Rice, 425 N.J. Super. 375, 383 (App. Div. 2012) (mitigating factor 8 applied where defendant had to forfeit his job as a police officer due to his official misconduct conviction).

Mitigating factor 9 applies where "the character and attitude of the defendant indicate that he is unlikely to commit another offense." N.J.S.A. 2C:44-1b(9). A defendant's expression of remorse weighs in favor of applying this factor. See State v. Vanderee, 476 N.J. Super. 214, 237 (App. Div.), cert. denied, 255 N.J. 506 (2023) (affirming sentencing court's rejection of mitigating factor 9 where the court acknowledged defendant's remorse but concluded that his crimes stemmed from a severe addiction which would be lifelong). While defense counsel did not explicitly ask the court to find mitigating factor 9, he emphasized his belief that Mr. Gibson is "truly remorseful." (6T 5-6 to 12) Mr. Gibson's sister, who spoke at sentencing, similarly stated that he is "very remorseful," adding that "he's never been in any trouble," that this was a "bad mistake," and that "this will never happen again." (6T 6-3 to 12) Finally, and most importantly, Mr. Gibson apologized for his behavior, explaining that he

made a "bad decision" and is "extremely sorrowful for that." (6T 12-8 to 17) Based on these statements, Mr. Gibson was entitled to a finding of mitigating factor 9, or at the very least some consideration of whether it applied.

B. The Sentencing Court Did Not Provide A Factual Basis For Its Application Of Aggravating Factor 9.

Resentencing is also required because the court failed to provide a factual basis for its application of aggravating factor 9. The court must "state on the record . . . the factual basis supporting its finding of particular aggravating or mitigating factors." N.J.S.A. 2C:43–2e. See R. 3:21-4(h). "The finding of any factor must be supported by competent, credible evidence in the record." Case, 220 N.J. at 64. Regarding aggravating factor 9, the court should consider the defendant's "unique character and qualities," State v. Randolph, 210 N.J. 330, 349 (2012), as well as the defendant's history, Fuentes, 217 N.J. at 78.

Here, the court stated without explanation that it "does find aggravating factor[] . . . nine." (6T 14-1 to 2) The court did not point to any evidence in the record as to why Mr. Gibson, a first-time offender with a decades-long career as a police officer in good standing, was particularly in need of deterrence. See Randolph, 210 at 349; Fuentes, 217 N.J. at 78. The failure to explain why there was any need for specific deterrence necessitates resentencing. See id. at 80-81 (remanding for resentencing in part based on the sentencing court's failure to sufficiently explain its reasons for applying aggravating factor 9).

C. The Sentencing Court Did Not Assign Weight To Any Of The Factors It Found.

The court also erred by failing to assign weight to any of the factors it found. This step is essential to a proper balancing of the aggravating and mitigating factors because the balancing process is not simply a tallying of "whether one set of factors outnumbers the other." Case, 220 N.J. at 65. Instead, the court must qualitatively assess the factors, assigning each its appropriate weight. Ibid. (citing Fuentes, 217 N.J. at 72). Because the court did not assign any weight to the factors it found, its conclusion that the "aggravating factors . . . clearly outweigh the mitigating factors" appears to have been the result of simply counting the number of aggravating factors (three) and determining that that number exceeded the amount of mitigating factors (one). (6T 14-5 to 6) Indeed, there is no indication that the court engaged in any qualitative assessment of the relevant factors or thoughtfully considered how to balance them. See Case, 220 N.J. at 64-65. Resentencing is required due to this error.

D. The Sentencing Court Failed To Consider The Application Of The Aggravating Factors To Each Individual Offense.

Finally, the court failed to separately consider the application of the aggravating factors to each offense, instead determining that aggravating factors 4, 9, and 10 were generally applicable. (6T 14-1 to 6) This determination was flawed for several reasons, one of which is that aggravating factors 4 and 9 are clearly inapplicable to Mr. Gibson's conviction for passing bad checks. Those

factors apply where the offense involved "a breach of the public trust" and a "fraudulent or deceptive practice[] committed against . . . the State." N.J.S.A. 2C:44-a(4), (10). Yet, Mr. Gibson's bad checks conviction stemmed from him having provided checks to a car dealership for amounts that exceeded the funds in his bank account. (5T 12-18 to 13-24) This behavior did not involve "a breach of the public trust," nor was it a fraudulent act committed against the State. Consequently, it was error to find that aggravating factors 4 and 9 applied to this offense and more broadly to fail to evaluate the aggravating factors in the context of each individual offense. Resentencing is therefore required.

CONCLUSION

For the reasons set forth above, Anthony Gibson's convictions should be reversed, the denial of his motion for a judgment of acquittal should be reversed in part, and he should be permitted to withdraw his subsequent guilty plea. Alternatively, several convictions should merge and the matter should be remanded for resentencing.

Respectfully submitted,

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Dated: May 24, 2024

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ANTHONY L. GIBSON A/K/A ANTHONY GIBSON,

Defendant-Appellant.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000117-23T

CRIMINAL ACTION

On Appeal from a Judgment of Conviction entered in the Superior Cou of New Jersey, Law Division, Essex County.

Sat Below: Hon. Patrick J. Arre, J.S.C., and a Jury.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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e-filed: July 29, 2024

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Counterstatement of Procedural History

For purposes of this appeal, the State adopts the defendant's Statement of Procedural History and adopts the defendant's transcript designation codes. See (Db 4-5, n. 1).

Counterstatement of Facts

The defendant was employed as a Newark Police officer when he called in sick from March 6, 2018, to November 2, 2018. (2T 41:12 to 42:14). He was paid his regular salary during that period. (2T 43:10 to 45:5). He worked as a security guard at St. Michael's Medical Center during that time. (2T 122:4-23). Newark Police policy prohibited outside employment while an officer was out sick. (2T 59:13 to 61:13).

Legal Argument

Point I

The jury properly found the defendant guilty of official misconduct based on substantial evidence.

The defendant erroneously asserts that his conviction must be overturned because his actions did not constitute official misconduct. Under N.J.S.A. 2C:30-2, a public servant is guilty of official misconduct "when, with the purpose to obtain a benefit for himself or another... He commits an act relating to his office but constituting an unauthorized exercise of his official functions,

knowing that such act is unauthorized or he is committing such act in an unauthorized manner."

There was no dispute that the defendant was a public servant, or that he called in sick and worked a second job while out sick. There was no dispute that he was being paid by the Newark Police for the same days that he worked at St. Michael's Medical Center.

The defendant's appeal centers on his assertion that his acts did not relate to his office or constitute an unauthorized exercise of his official functions.

Definitions of misconduct in office are necessarily broad. State v. Maioranna, 225 N.J. Super. 365, 369 (Law Div. 1988). Official misconduct includes breach of duties which are (1) imposed by law or (2) are clearly inherent or implicit in the nature of the office. Id. at 371. The defendant's conduct falls into both of these categories.

First, the duty of the defendant to abide by the policies of the Newark Police Department was imposed on him by law. He violated the sick leave policy by calling in sick for months when he was clearly physically able to work; he was working a similar job on the same days he called in sick. The sick leave policy was read into the record and moved into evidence at trial. (2T 55:23 to 59:11).

The defendant also violated the outside employment policy of the Newark Police Department. Although the policy was revised over the years during which the defendant was employed with the Newark Police, all relevant versions were read at trial and entered into evidence. (2T 60:20 to 70:23). All versions of the policy prohibit outside employment on days when an officer calls out sick. It was not disputed at trial that the defendant engaged in outside employment while he called out sick to the Newark Police Department.

Regarding the second category of breached duties that may constitute official misconduct, the defendant clearly breached a duty "inherent or implicit in the nature of the office" by calling in sick for months while he was clearly able to perform the job. This may not be true for most jobs, but unlike most jobs, Newark Police officers get unlimited sick time. (2T 44:19 to 45:5). This is in recognition of the physical difficulty inherent in the job. The defendant took advantage of this unique aspect of his job as a police officer by calling in sick for months and working at a similar job.

Official misconduct "must somehow relate to the wrongdoer's public office." State v. Kueny, 411 N.J. Super. 392, 407 (App. Div. 2010). "There must be a relationship between the misconduct and public office of the wrongdoer." Id. This is precisely why the defendant was found guilty of official misconduct: he exploited a unique characteristic of his position as a

Newark Police Officer by taking advantage of the unlimited sick time to receive his normal pay while still working a second job when he was not sick.

Point II

The defendant had ample time to hire the trial counsel of his choice.

On August 24, 2020, the trial court gave the defendant one week to hire a new attorney. (1T). Trial commenced on March 6, 2023, more than two years later. (2T). The defendant had ample time to hire the trial counsel of his choice.

The defendant's counsel asked to be relieved on August 24, 2020. The defendant claims that his right to counsel was infringed when the trial judge gave him only one week to find new counsel. But the trial just also told the defendant that a public defender would be appointed to represent him if he did not find new counsel. (1T 15:10-17, 14:16-19).

The defendant was initially represented by Howard Bailey. (1T 9:4-5). Mark-Anthony Bailey (no relation) substituted in for Howard Bailey. The defendant was represented by Ernest Ianetti at trial. (3T). There is no evidence that the defendant was prevented from being represented by the counsel of his choice at any stage of the case. There is no evidence that the defendant sought to hire different counsel in the years between the withdrawal of his second counsel and the trial.

The defendant's reliance on State v. Kates, 426 N.J. Super. 32 (App. Div. 2012), has no bearing on this case. The defendant in Kates asked for an adjournment to hire private counsel on the day jury selection was scheduled to begin. Id. at 41-42. The court denied the adjournment request and the Appellate Division reversed, finding that the trial court failed to engage in an analysis of whether the adjournment should be granted.

Conversely, in the present case, the defendant asked for an adjournment to hire new counsel, and the adjournment was granted. The defendant was unhappy with the length of the adjournment, but the record does not show that the defendant was unable to hire the counsel of his choice or that he sought any additional adjournment. The trial in Kates proceeded immediately upon the denial of an adjournment, while the trial in this case did not commence until years after the requested adjournment.

Point III

Records concerning the defendant's double employment were properly admitted as business records.

The defendant incorrectly asserts that records of his employment were improperly admitted as hearsay. The defendant did not object to these documents being offered into evidence at trial. As such, the defendant must

show any error was "plain," meaning that it was "clearly capable of producing an unjust result." R. 2:10-2; State v. Singh, 245 N.J. 1, 13-14 (2021).

The records of the defendant's employment and sick time were properly admitted under N.J.R.E. 803(c)(6), which provides that hearsay is admissible if it is:

> [a] statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

Three requirements must be met to admit a hearsay statement under this rule: (1) the writing must be made in the regular course of business, (2) it must be prepared within a short time of the act, condition or event being described, and (3) the source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence. State v. Sweet, 195 N.J. 357, 370 (2008).

The pay records from the Newark Police Department and the Medical Center meet these requirements. They were created within the regular course of business because they were payroll records of an employee. They were created contemporaneously with the crimes that occurred in this case. And the

source of the information, the two employers of the defendant, show the reliability of the information which justify allowing them into evidence.

The defendant's attorney did not object to admitting any of these records into evidence. The employment of the defendant by both the Newark Police Department and the Medical Center was not a disputed fact at trial.

And even assuming the foundation for the records was inadequate, it was harmless error to admit them into evidence. "Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. In this case, the admission of the records was not "clearly capable of producing an unjust result" because the defendant's employment by two entities was not a disputed fact at trial. The defendant admitted to having two jobs and instead pursed a strategy of pleading ignorance of the rules and claiming that "he violated an employment policy" which is "not a crime." (2T 32:6-8). He now seeks to be rewarded for suffering this "error for tactical advantage" which he may not do. Singh, 245 N.J. at 13.

Point IV

The jury instructions in this case were fair and appropriate.

A. The "Claim of Right" Defense

There was insufficient evidence in the record to warrant a "claim of right" jury charge in this case.

The defendant asserts that he was entitled to a "claim of right" jury charge because he did not consciously take money from the Newark Police Department while working another job.

The defendant testified that he went on administrative sick leave but the policy "wasn't clear" and he "didn't have a clear understanding" of the policy. (3T 27:5-14). He then said he didn't have knowledge of the "revised policies." (3T 27:16-17). The defendant also testified over repeated objections and threat of sanctions that the policy prohibiting working another job while calling in sick to the Newark Police Department was "never enforced." (3T 32:15-19, 33:4-6).

Because the defendant did not request this charge and did not object to its omission, the omission is reviewed for plain error. State v. Alexander, 233 N.J. 132, 141-142 (2018). To warrant reversal, the unchallenged error must be clearly capable of producing an unjust result. Id. at 142. "The mere possibility of an unjust result is not enough." Id. (quoting State v. Funderburg,

225 N.J. 66, 79 (2016)). "[A] trial court's sua sponte obligation to instruct the jury in respect of any defense–whether affirmative or tailored to negate an element of the offense–is triggered only when the evidence clearly indicates or clearly warrants such a charge, and that the trial court is not called on to scour the record in detail to find such support." State v. Rivera, 205 N.J. 472, 490 (2011).

The "claim of right" jury instruction was not "clearly indicated" or "clearly warranted" in this case. The "claim of right" defense applies when the defendant honestly believes that he has a right to the property he is charged with stealing. At no point during his testimony did the defendant indicate that he was entitled to receive sick pay when he was working another job. Instead, he repeatedly tried to testify that the policy just wasn't enforced. He essentially tried to testify that others got away with it, so he should too.

Because there was no possibility of an unjust result from the omission of a "claim of right" jury charge, the jury charges were appropriate and the defendant's argument for reversal on this point fails.

B. The Model Jury Charge

The defendant asserts that the model jury charge should have been tailored to fit the facts of this case, but the model jury charge as it was read to the jury was completely appropriate.

The jury was properly instructed that "a person is guilty of theft if he **unlawfully** takes or exercises **unlawful** control over moveable property of another with the purpose to deprive him thereof." (3T 172:5-9) (emphasis added). The defendant alleges that the jury merely had to find that he "knowingly took" the money in order to find him guilty, but the instruction clearly required the jury to find that he unlawfully took the money.

The judge's use of the model jury charge ensured that a fair instruction was given to the jury. Model jury charges should be followed and read in their entirety to the jury. State v. R.B., 183 N.J. 308, 325 (2005). The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers. Id. In this case, the trial judge filled in every blank included in the model jury charge exactly as it was intended to be used and it was read in its entirety to the jury.

There was no need to embellish the charge to the jury. The facts of this case were not complicated and the jury understood the allegations.

When reviewing a claim of error related to jury charges, the "charge must be read as a whole in determining whether there was any error." State v. Torres, 183 N.J. 554, 564 (2005). If, like here, defense counsel did not object to the jury charge at trial, the plain error standard applies. Id. Reversal is

warranted only if the error was "clearly capable of producing an unjust result." Id. at 559 (quoting R. 2:10-2).

Because the defendant's attorney did not request a tailored jury instruction regarding theft and the jury was properly instructed using the model jury charge, the defendant's claim for a new trial on this point fails.

C. The Jury's Question

During deliberations, the jury asked, "Where in the evidence does it show that if you take a second job while on sick leave you are not entitled to your compensation from the police department?" (4T 5:18-21). The judge responded by reading the instruction on further deliberations, a response to which neither party objected. (4T 5:11-14). This was the proper response. The jury's question asked for "evidence," which would have been improper to provide to the jurors. It was the jurors' recollection of the evidence that controlled, as they had been instructed. (3T 165:4-13). Defendant fails to show any error that was plain; at worst, any error was harmless. R. 2:10-2.

Point V

The assistant prosecutor's closing statement was fair and appropriate.

"[P]rosecutors are afforded considerable leeway in their closing arguments" and are "expected to make vigorous and forceful closing arguments..." State v. Smith, 167 N.J. 158, 177 (2004). "On review, a court

must assess the prosecutor's comments in the context of the entire trial record." State v. Nelson, 173 N.J. 417, 472 (2002). "Even where a prosecutor's statements amount to misconduct, that misconduct will not be grounds for reversal 'unless it was so egregious as to work a deprivation of a defendant's right to a fair trial.'" Id. (quoting State v. Pennington, 199 N.J. 547, 575 (1990)).

A. The assistant prosecutor's comment regarding the defendant's alleged illness.

In closing, the assistant prosecutor called the defendant's credibility into question by suggesting that he did not have a back injury. This was appropriate commentary on the defendant's injury after the defendant testified extensively about his reasons for calling in sick to work.

The assistant prosecutor said that the defendant "didn't produce any evidence of [his back injury] other than his own statements." (3T 135:23-25). This was an appropriate attack on the defendant's credibility. Lt. Neves testified that the defendant had called out sick because of gout. (2T 42:8-14). The assistant prosecutor was entitled to call the defendant's credibility into account.

Even if it was error, it was a harmless error. Immediately after his comment, the assistant prosecutor said, "So I don't know – I don't know. I –

he may have been sick." (3T 136:6-8). In addition, there was ample, unrefuted evidence that the defendant called in sick to his job as a police officer and worked a second job as a security guard at the same time. The evidence that the defendant violated the sick leave policy by calling in sick and working another job was extremely strong. Thus, the assistant prosecutor's comments in closing, when assessed in the context of the entire trial, were not so egregious as to deprive the defendant of a fair trial.

B. The assistant prosecutor's comment regarding the egregious nature of this case was an appropriate response to the defendant's closing statement.

The defendant asserts that the assistant prosecutor erred by calling this case "egregious" in closing. The defendant did not object to this comment. This was an appropriate response to the defendant's closing statement.

It is reasonable for the prosecutor to respond to the statements of defense counsel in summation. State v. Perry, 65 N.J. 45, 48 (1974); see also State v. Timmendequas, 161 N.J. 515, 588 (1999) (wherein the prosecutor's comments on summation, while improper, were not grounds for reversal because they were largely in response to arguments made by defense counsel's summation).

In his closing, the defendant's attorney said, "And Nieves tells us that there's a good number of these cases, almost like it's a common practice along

city employees or police officers to continue to work their part-time jobs." (3T 108:25 to 109:3). He went on to say, "We also know... that people are disciplined for this. Some people are disciplined within the department. And we also know that sometimes, people are treated criminally." (3T 109:10-17). When discussing which cases are treated criminally, the defendant's attorney said, "I asked those officers how the decision is made and both of them could not tell you." (3T 110:7-9).

In response to the defendant's closing, the assistant prosecutor said, "So what's different about this case, you know, from other cases that we mentioned is that it's egregious." (3T 133:13-15). This was an appropriate response to the defendant's closing. The defendant suggested that there are plenty of other cases like this one that were not treated criminally, essentially arguing for jury nullification. The assistant prosecutor responded by saying that this case was appropriately treated as criminal because it was egregious. The assistant prosecutor's statement was therefore not improper.

Point VI

No evidence of prior bad acts was admitted at trial.

While questioning Lt. Nieves, the assistant prosecutor asked, "So in February 2018 your office -- did your office receive a criminal complaint or

criminal allegation against Officer Gibson?" (2T 39:6-8). This was obviously a reference to the indictment in the case and not evidence of any prior bad act.

As part of the opening instructions to the jury, the trial court said that "the defendant stands before you charged of the indictment returned by the grandy jury charging him on or about February 2018 to November 2018 in the City of Newark in a jurisdiction of this court..." (2T 12:25 to 13:3). Later, during his opening statement, the assistant prosecutor read the indictment, which read that "on or about February 2018 to November 2018..." for both counts 1 and 2. (2T 20:7-22). During final instructions, the trial judge said that the defendant was charged with crimes that occurred "[o]n or about February 2018 to November 2018..." (3T 171:23 to 178:6).

When viewed in the context of the entire trial, the assistant prosecutor's question to Lt. Nieves was a minor error: Lt. Nieves did not receive a complaint about the defendant in February 2018. But when viewed from the perspective of a juror, it was clear that the assistant prosecutor was referring to the indictment in this case and not another event. This was merely a harmless error: there was no possibility that this minor error could have led to an unjust result in the trial. R. 2:10-2.

Point VII

There was no cumulative error that warranted a reversal.

The defendant's assertion that cumulative error requires reversal of his conviction is without merit. Any errors that occurred were minor at best.

A defendant is entitled to a fair trial, not a perfect one. Lutwak v. United States, 344 U.S. 604, 619 (1953); R.B., 183 N.J. at 334. Since criminal trials are vigorously contested, protracted, and sometimes involve subtle and difficult legal issues, it is virtually assured that in the course of the proceedings, some errors and imperfections may occur. State v. Marshall, 123 N.J. 1, 169 (1991). Trial judges, unlike appellate judges, make their rulings in the heat of trial, without the opportunity for deliberative review, and not even the most experienced and conscientious trial judges can be perfect. Id.

The right to a fair trial "does not mean that the incidental legal errors, which creep into the trial but do not prejudice the rights of the accused or make the proceedings unfair, may be invoked to upset an otherwise valid conviction[.]" State v. Orecchio, 16 N.J. 125, 129 (1954). To grant a new trial under such circumstances "would be grossly unjust to the State and its people . . ." Id. Only when the cumulative impact of errors prejudiced the fairness of defendant's trial and cast doubt on the propriety of the jury verdict, a new trial may be warranted. Id.

This is not such a case. There was no serious error in this trial, let alone so many that this Court must upset the jury's verdict. Here, "zero plus zero equals zero[,]" United States v. Powell, 444 Fed. App'x 517, 522 (3d Cir. 2011), cert. denied, 566 U.S. 940 (2012), and so defendant's claim of cumulative error fails.

Point VIII

The underlying charges should merge into the convictions for official misconduct.

The State agrees that a remand is warranted for merger.

On Ind. 19-06-2759, the defendant's conviction for theft should merge into his conviction for official misconduct. (Da 22-24).

On Ind. 22-01-99, the defendant's conviction for conspiracy should merge into his conviction for official misconduct. (Da 28-30).

Point IX

The defendant's sentence is fair and appropriate.

Because of the defendant's conviction for official misconduct, his mandatory minimum sentence is five years of incarceration without the possibility of parole. N.J.S.A. 2C: 43-6.5. After the sentencing judge considered the aggravating and mitigating factors, the defendant was sentenced to the mandatory minimum.

A sentence is reviewed on appeal for an abuse of discretion. State v. Miller, 237 N.J. 15, 28 (2019). Appellate courts are not to substitute their judgment for those of our sentencing courts. Id. An appellate court must affirm the sentence unless: (1) the sentencing guidelines were violated, (2) the aggravated and mitigating factors found by the sentencing court were not based on competent credible evidence in the record, or (3) the application of the guidelines to the facts of the case makes the sentence clearly unreasonable so as to shock the judicial conscience. Id.

None of those circumstances exist here. The sentencing judge in this case conducted a thorough, well-reasoned analysis of the aggravating and mitigating factors and arrived at a fair sentence. The sentence must be affirmed.

The sentencing judge properly declined to find mitigating factor 8: the defendant's conduct was the result of circumstances unlikely to recur. N.J.S.A. 2C:44-1(b)(8). While the defendant signed a consent order disqualifying him from future public employment, the essence of this case was a scheme of defrauding his employer that did not take place on one day, one week, or even one month. The theft took place over the course of a number of months and involved thousands of dollars. It was not simply a one-time event or a crime committed during a moment of weakness. There was insufficient

evidence in the record to show that the defendant was unlikely to engage in another scheme to defraud a future employer.

For the same reasons, the sentencing judge appropriately declined to find mitigating factor 9: The character and attitude of the defendant indicate that the defendant is unlikely to commit another offense. N.J.S.A. 2C:44-1(b)(9). This was not an isolated incident. The defendant committed a crime that carried on for months. His character is further impugned by the nature of his ongoing theft: he committed a crime while being paid for a job that required him to fight crime. His character and attitude indicate that he is very likely to engage in future crimes.

The sentencing judge also properly found aggravating factor 9: the need for deterring the defendant and others from violating the law. N.J.S.A. 2C:44-1(a)(9). Deterrence is one of the most important factors in sentencing. State v. L.V., 410 N.J. Super. 90, 92 (App. Div. 2009). Given the seriousness of the crimes for which the defendant was found guilty, it was appropriate to find this factor. In addition, the defendant's attorney conceded that factor 9 should apply. (6T 4:15-18).

The sentencing court found that the aggravating factors outweighed the mitigating factors but nonetheless sentenced the defendant to the statutory mandatory minimum sentence. (6T 14:1-8). The sentencing judge did not

abuse his discretion and the resulting sentence does not shock the judicial conscience.

Conclusion

Other than a remand for merger purposes, this Court should affirm the defendant's judgment of conviction in all respects. The defendant received a fair trial and sentence.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF-RESPONDENT

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Of Counsel and on the Brief

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0117-23

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from a Judgment of Conviction of the Superior Court
v.	:	of New Jersey, Law Division, Essex County
ANTHONY L. GIBSON A/K/A ANTHONY GIBSON,	:	Indictment Nos. 19-06-1759-I, 19-07-1907, 22-01-0099-I
Defendant-Appellant	:	Sat below:
		Hon. Patrick J. Arre, and a Jury

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[1] Da22-24 refers to counsel's brief.

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PROCEDURAL HISTORY

Defendant-Appellant shall rely upon the procedural history set forth in defense counsel's brief and appendix.

STATEMENT OF FACTS

Defendant-Appellant shall rely upon the statement of facts set forth in defense counsel's brief and appendix.

LEGAL ARGUMENT

POINT ONE

THE TRIAL COURT SHOULD HAVE GRANTED A JUDGMENT OF ACQUITTAL AS FOR THE CONVICTIONS FOR OFFICIAL MISCONDUCT AND/OR THEFT CHARGES BECAUSE STATE FAILED TO PRODUCE SUFFICIENT EVIDENCE AND MEET ITS BURDEN IN PROVING ALL ELEMENTS OF THE OFFENSES AS REQUIRED BY LAW

A Court shall grant a motion for a judgment of acquittal where"...viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could [not] find guilt of the charge beyond a reasonable doubt. See State v. Reyes, 50 N.J. 454, 458-459 (1967); In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970).

Defendant submits that the State failed to present sufficient evidence and meet its burden in proving all elements required to sustain the conviction(s) for theft and official misconduct. Thus, the trial court should have granted the motion for judgment of acquittal interest of justice and as a matter of fundamental fairness. (3T6-22 to 7-25). *R.* 3:18-1; c.f. State v. Reyes, 50 N.J. 454, 458-459 (1967); State v. Miller, 216 N.J. 40, 71 (2013) (quoting Oberhand v. Dir. Div. of Taxation, 193 N.J. 558, 578 (2008); State v. Yoskowitz, 116 N.J. 679, 712 (1989). State v. Pomianek, 429 N.J. Super 339 (App. Div. 2013); State v. Lodzinski, 246 N.J. 331, 339, 358-364, reconsid. granted on other grds. 248 N.J. 451, rev'd on other grounds. 249 N.J. 116 (2021); State v. Walsh, 360 N.J. Super 208 (App. Div. 2003); State v. Zeidell, 299 N.J. Super 613 (App. Div. 1997), rev'd on other grds. 154 N.J. 417 (1998); State v. Bain, 202 N.J. Super 233 (App. Div. 1985), certify. den. 102 N.J. 300 (1985);

(A) <u>There Was Insufficient Evidence To Support The Conviction For Theft</u>

Defendant submits that the State failed to present sufficient evidence that he knowingly received payment for sick time and/or purposely deprived Newark Police Department of payment thereof unlawfully in violation of the sick leave and/or outside employment policy. Thus, the State failed to meet its burden in proving all elements required to sustain a conviction for theft. ***N.J.S.A.*** 2C:2-2; ***N.J.S.A.*** 2C:20-3(a); **State v. Pomianek, supra**.

At some point in time during his twenty-five (25) year tenure with the Newark Police Department defendant sustained serious job related injuries. There came a point in time when he could no longer perform his daily duties as a fully operative police officer. (3T19-23 to 20--11; 3T75-10 to 76-1 to -8; 3T77-1 to -10). In March of 2018, defendant was approved and booked off for administrative leave. (3T25-18 to 26-1 to -2; 3T75-25 to 76-1). Since defendant was not placed on the medical certification list, he was excluded from the sick leave and injury leave policy, which states in pertinent part that when an officer is on the medical certification list he is not authorized to work a second job. (2T42-25 to 43-2; 2T79-21 to 80-1 to -4; 2T77-21 to 78-13; 2T80-5 to -7; 3T26-15 to -18; 3T31-24 to 32-1 to -3).

Consequently, defendant continued to work off and on at St. Michael's Hospital where his duties primarily consisted of sitting in a room and looking at a bank of screens that were bringing feeds from cameras around the hospital just to keep an eye on things. No physical labor at all for defendant on that job. (2T28-4 to -12; 2T42-25 to pg. 43-1 to -2;, 2T77-21 to 78-1 to -3; 2T79-21-25; 2T80-1 to -7; 3T26-15-18). Apparently at some point in time during the investigation it was discovered by investigator(s) that defendant had been working

intermittently at St. Michael's Hospital while simultaneously receiving payment for sick time from Newark Police Department. (2T41-4 to -20; 2T122-4 to -23). Defendant continued to receive payment for sick time in the interim with his last check dated and received on November 2, 2018, when he returned to work. (2T42-12 to -13; 2T: 2T148-16 to 149, lines 1-3).

According to State's witness John Neves, Executive Officer of Internal Affairs, Newark Police Department, his office received a criminal allegation/complaint against defendant in February of 2018 and after gathering all pertinent information his office made a referral to the Essex County Prosecutor's Office. (2T33-1 to-23; 2T35-14 to -22; 2T37-17 to 38-1 to -7, -24 to -25; 2T39-1 to -23). On March 6, 2018, defendant went out on administrative sick leave. (3T25-15 to 27-1 to -9; 3T32-15 to -17). At some point in time during the investigation Carlos Olmo of the Essex County Prosecutor's Office obtained records from the Newark Police Department regarding defendant's sick leave as well as records from St. Michael's Hospital. According to Inv. Olmo, after cross-referencing the records he discovered that defendant had been intermittently working at St. Michael's Hospital that overlapped on the days that defendant was assigned out as being sick with the Newark Police Department. (2T41-4 to -20; 2T122 -1 to -23; 2T152-3 to -8). According to Inv. Olmo, defendant violated Newark Police Department's outside employment policy. In charging defendant, including, but not limited to theft, Inv. Olmo clearly did not take into consideration that defendant was not precluded from working a second job while on sick leave as he was not placed on the medical certification list. (2T76-16 to 77-1 to -25; 2T78-1 to -7; 2T80-1 to pg. 78, lines 1-7).When asked on cross-examination if it was his view that the sick leave and injury leave policy, wasn't involved, Inv. Olmo conveniently

claimed that he was not sure what that policy reflects. (2T159-23 to 160-1).

Defendant was charged with theft as a consequence of presumably violating the outside employment policy, which read in pertinent part, "Personnel who are off for illness and/or injury and engage in outside employment may be committing a criminal act." (2T67-11 to 68-7 to -9; 2T158-20 to -22). Defendant submits that he did not knowingly receive payment for sick time unlawfully and/or purposely deprive Newark Police Department of said payment as the outside employment policy is facially vague wherein it states "may be" committing a criminal act." The theft offense is inextricably connected to the outside employment policy as it provided the basis for said criminal offense. However, that policy is vague as it does not plainly state and give defendant fair warning that by receiving payment from Newark Police Department for sick time while simultaneously working overlapping days on a second job would result in a criminal offense of theft.

Although the vagueness challenge here is one of policy, defendant believes that he should be afforded the same constitutional protection against vague laws, rules or otherwise - policy here - as a matter of due process, equal protection and fundamental fairness particularly given the inextricable connection between the purported policy and violation thereof and the theft offense. c.f. **State v. Saavedra**, 222 **N.J.** 39, 61, 67-68 (2015); **State v. Miller**, 216 **N.J.** 40, 71 (2013); **ADA Financial Service Corp. v. State**, 174 **N.J. Super** 337, 347-349 (App. Div. 1979); Vagueness is essentially a procedural due process concept grounded in notions of fair play. see **State v. Lee**, 96 **N.J.** 156 (1984) (quoting State v. Lashinsky, 81 N.J. 1, 17 (1979). Both Federal and State Constitution render vague laws unenforceable. See **U.S. Const.** Amend V, IXV;

N.J. Const., (1947), Art. I, Par 1. To avoid the pitfall of vagueness, the terms of a statue, rule or otherwise must enable a person of "common intelligence, in light of ordinary experience," to understand whether contemplated conduct is lawful. A statue or otherwise - policy here - that is challenged facially may be voided if it is "impermissibly vague in all its application," that is, there is no conduct that it proscribes with sufficient certainty. See **State v. Cameron**, 100 N.J. 586, 591 (1984) (citing Lashinsky, supra, 81 N.J. at 18; Village of Hoffman Esates v. Flipside, Hoffman Estates, 455 U.S. 498, 102 S.Ct. 1193, 71 L.Ed.2d 362, 371 (1982); c.f. **Saavdera**, supra, at 61, (A public servant must know that such act is unauthorized because it is declared to be such by statue.....rule or otherwise).

According to defendant he was not familiar with the outside employment policy prior to being charged with a criminal offense for theft. Defendant never signed a receipt acknowledging that he received policies. In fact, when he became detective he was assigned to a specialized unit where there was no roll call. (3T21-2 to 22-4 to -22). Furthermore, new policies would be announced through a software system known as PowerDMS, (i.e., Document Management System), that was fully implemented in 2018 and officers had thirty days (30) days to virtually sign for the policy. According to Executive Officer Neves, defendant never had the opportunity to sign the acknowledgment form to use PowerDMS so he never actually accessed that program or was trained on it. (2T48-21 to 49-1 to -19). Prior to PowerDMS, policies were usually disseminated during roll call and at that time officers were required to sign the roster sheet next to their name acknowledging the receipt of that policy. (2T49-20 to 50-1 to -9). According to Lt. Neves there is not even one sheet of paper that indicates that defendant ever

signed for receiving the outside employment policy. (2T76-16 to 77-1 to -6). In fact, Captain Antonio Dominguez, testified that from his knowledge, while at Internal Affairs up until he retired, there is no single piece of paper that indicates that defendant signed for a policy. (3T98-16 to 99-1 to -4).

To the extent that defendant was made aware of the sick leave and injury policy and the outside employment policy, he was not familiar with and did not have a clear understanding of those policies. (3T21-2 to -5; 3T27-5 to -20; 2T64-21 to 65-1 to -4; 3T78-13 to -19). Defendant further testified that he was not given any training by his superior officer with regard to how that policy might be enforced against him or tell him under what circumstances he would be charged with a crime. (3T27-5 to -20; 3T78-13 to -19). According to Lt. Neves, there is nothing in the policy book that tells an officer when a violation of the sick leave policy would be considered a crime. Given the plain meaning to "may be committing" a crime that I do, you may or you may not be committing a criminal act. (2T74-17 to 75-1 to -7). Lt. Neves further testified that he has had experiences where a policy violation is treated as a crime and where its not treated as a crime and does not know why one is one way one is the other way. (2T91-16 to 92-6 to -14). Retired Captain Antonio Dominguez also testified that there is no policy that tells an officer when a policy violation as here is gonna be handled as a criminal offense as opposed to a disciplinary offense. (3T99-15 to -18). Given the inconsistent application and vagueness of Newark Police Department's sick leave and outside employment policy, defendant submits that he did not knowingly commit theft and/or purposely deprive the police

department of payment for sick time unlawfully. Consequently, the State failed to meet its burden and prove all of the elements required to sustain a conviction for theft. Thus, the trial court should have granted a judgment of acquittal.

B. There Was Insufficient Evidence To Support The Conviction for Official Misconduct

As set for above, defendant charged with official misconduct as a consequence of receiving payment for sick time from the Newark Police Department while simultaneously working for and receiving payment from Saint Michael's Medical Center, presumably in violation of the Newark Police Department's outside employment policy. (2T20-7 to -18; 2T63-7 to -18; 2T63-11 to -19; 2T66-1 to -13; 3T74-17 to 75-1 to -7; 3T145-23 to -25; 3T149-3 to -5).

To establish a prima facie case with respect to the offense of official misconduct, the State was required to present evidence that: (1) defendant was a "public servant," (2) who, with purpose to obtain a benefit or deprive another of a benefit, (3) committed an act relating to but constituting an unauthorized exercise of his office, (4) knowing that such act was unauthorized or that he was committing such act in an unauthorized manner. See **State v. Saavedra**, 222 **N.J.** 39, 58-62 (2015); **State v. Thompson**, 402 **N.J. Super** 177, 191-182 (App. Div. 2008).

However, defendant submits that when he went out on sick leave it was not for the purpose of or his intent to obtain the benefit of payment for sick time and pay from working a second job. Nor was it his purpose or intent to deprive the City of Newark of the benefit of performing his duties and/or money otherwise as a consequence of going out on sick leave and working a second job intermittently during that time.

As set forth above, defendant sustained serious job related I injuries during his twenty-five tenure with NPD. With his progressive injuries there came a point in time when he could no longer perform his daily duties as a fully operative police officer. (3T19-23 to 20-1 to -11; 3T75-10 to 76-1 to -8; 3T77-1 to -10). In March of 2018, after being seen by his primary doctor, a specialist and having an MRI, defendant was approved and booked off for administrative leave. (3T25-18 to 26-1 to -2; 3T75-25 to 76-1). Given that defendant was not placed on the medical certification list, he continued to work off and on at the St. Michael's Hospital where his duties primarily consisted of sitting in a room and looking at a bank of screens. No physical labor for defendant on that job. (2T28-4 to -12; 2T42-25 to 43-2; 2T77-21 to 78-3; 2T79-21 to 80-7; 3T26-15 to -18).

According to State's witness John Neves, Executive Officer of Internal Affairs, Newark Police Department, his office received a criminal allegation/complaint against defendant in February 2018. After gathering all pertinent information his office made a referral to the Essex County Prosecutor's Office. (2T33-1 to -23; 2T35-14 to -22; 2T37-17 to 38-7, 24-25; 2T39-1 to -23). As set forth above, defendant went out on administrative sick leave on March 6, 2023. At some point in time during the investigation, Carlos Olmo of the Essex County Prosecutor's Office obtained records from the Newark Police Department regarding defendant's sick leave as well as records from St. Michael's Hospital. According to Inv. Olmo, after cross-referencing the records, he discovered that defendant had been intermittently working at St. Michael's Hospital that overlapped on the days that defendant was assigned out as being sick with the Newark Police Department. (2T41-4 to -20; 2T122-1 to -23; 2T152-3 to -8). According to Inv. Olmo,

defendant violated Newark Police Department's outside employment policy. When asked on cross-examination if it was his view that policy 94-4, sick leave and injury leave policy, wasn't involved, Inv. Olmo conveniently claimed that he was not sure what that policy reflects. (2T159-23 t0 160-1). In charging defendant, including but not limited to official misconduct, Inv. Olmo clearly did not take into consideration that defendant was not precluded from working a second job while on sick leave as he was not placed on the medical certification list. (2T76-16 to 77-25; 2T77-25; 2T78-1 to -7; 2T80-1 to -7). In the interim, defendant continued to receive payment for sick time with his last check dated and received on November 2, 2018, when he returned to work. (2T42-12 to -13; 2T48-16 to 149-1 to -3).

Defendant submits that he legitimately went out on sick leave because he could no longer perform his daily duties as a fully operative officer a consequence of his work related injuries after being approved for administrative sick leave as set forth above. Thus, defendant did not go out on sick leave for the purpose to obtain the benefit of receiving payment for sick leave as if it was additional money that he would not have earned otherwise. Nor did defendant go out on sick leave for the purpose to work a second job and obtain the benefit of pay as he had been simultaneously working at the Newark Police Department and St. Michael's Hospital from 1997 until in or about November 2018. During the period of March 2011for working a second job during that same time. (3T45-21 to -24). Circularly, defendant submits that he did not go out on sick leave for the purpose to deprive the City of Newark of the benefit of performing his duties or otherwise, but rather due to his inability to perform his daily duties as a fully operative officer as supported by the approval of being placed administrative sick leave after being seen

by an MRI as set forth above. Thus, Defendant submits that there is insufficient to support the conviction for official misconduct under the second element of subsection (a) of **N.J.S.A.** 2C:30-2.

Defendant further submits that a conviction for official misconduct under the third element of **N.J.S.A.** 2C:30-2, subsection (a), required the State to prove that he committed "an act relating to his office.' The crime is not proven by showing misconduct committed by a person who happens to be a public officer; that is, the misconduct must be connected to that persons official duties. see **State v. Thompson**, 402 **N.J. Super** 177, 191-192 (App. Div. 2008)(citing State v. Weleck, 10 N.J. 365 (1952)).

In an effort to prove that defendant committed "an act relating to his office," the prosecutor presented evidence that he received payment for sick time and while out on sick leave, he was working at St. Michael's Hospital that overlapped on the days that he was assigned out as being on sick with the Newark Police Department. (2T41-4 to -20; 2T41-4 to -20; 2T122-1 to -23; 2T152-3 to -8). During closing arguments, the prosecutor argued, "defendant's failure to show up and perform his duties as a public servant while simultaneously working for his own personal gain clearly touches upon and relates to his office." (3T150-5 to -13). In arguing defendant failed to show up and perform his duties, the prosecutor in effect argued that defendant knowingly failed to show up and thus, refrained from performing his duties imposed upon by law, which is an element of official misconduct under **N.J.S.A.** 2C:30-2, subsection (b). However, defendant submits that he was not required to show up and perform his duties as he was out legitimately on administrative sick leave.

Defendant submits that he was charged with official misconduct as a consequence of presumably violating NPD's outside employment policy and not for committing a criminal offense in of itself that relates to the public servant's office as required by **N.J.S.A.** 2C:30-2. Assuming defendant violated the outside employment policy it is an administrative matter in nature and not a criminal act in of itself that is related to the official duties imposed upon him by law. see **State v. Hinds**, 143 **N.J.** 540, 549 (1996)(The proposition that it is an inherent duty of every police officer to obey the law, and therefore, police officers are strictly liable under **N.J.S.A.** 2C:30-2 for the commission of any crime is forestalled by precedent. "[N}ot every offense committed by a public official involves official misconduct.")). There is nothing contained in **N.J.S.A.** 2C:30-2 that specifically states that receiving payment for sick time while simultaneously working a second job constitutes official misconduct. c.f. **Thompson**, **supra**., (citing State v. Gregorio, 186 N.J. Super 138, 146 (Law Div. 1982)). Nor is there any other statutory law that says when a public official or otherwise receives payment for sick time while working second job constitutes a crime. In fact, many officers abuse sick time, but the matters are handled administratively without criminal charges ever being filed. (2T91-16 to 92-14; 3T99-15 to -18). Given the circumstances in the case sub judice, the language of the misconduct in office statute simply cannot be stretched to cover the action. c.f. **State v. Pomianek**, 429 **N.J. Super** 339, 363, 365 (App. Div. 2013); **State v. Kueny**, 411 **N.J. Super** 392, 407 (App. Div. 2010).

Misconduct in office or official misconduct has been defined as "unlawful behavior in relation to official duties by an officer entrusted with the administration of justice or who is in breach of a duty of public concern in a public office." **State v. Mason,** 355 **N.J. Super** 296,

301 (App. Div. 2002)(citing State v. Winne, 12 N.J. 152, 176 (1953)). The defendant's oath as a police officer to defend and obey the laws of New Jersey, in of itself, does not make him strictly liable for official misconduct for all crimes he may commit. The Supreme Court has stated that, although the oath of office "is a necessary condition to assumption of office, of itself creates no particular duty, transgression of which" would be indictable. see **State v. Silverstein**, 41 **N.J.** 203, 205 (1963). In New Jersey "the fundamental duty of a policeman. . . .is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them." **Kueny, supra**, 411 **N.J. Super** at 203; **State v. Corso,** 355 **N.J. Super** 518, 526 (App. Div. 2002)(off duty officer has a duty to arrest persons committing a crime in the officer's presence).

To be guilty of a violation of **N.J.S.A.** 2C:30-2, the defendant must be shown to have committed misconduct that is "sufficiently related to the officer's status." Id. at 546. 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. see **State v. Kueny**, 411 **N.J. Super** 392, 407 (App. Div. 2010)(citing State v. Corso, 355 **N.J. Super** 518, 526 (App. Div. 2002).

In the case sub judice, defendant's conduct in receiving payment for sick time to which he was not otherwise entitled to as a consequence of simultaneously working a second job is not an act relating to his office or official duties imposed upon him by law, but rather a matter of departmental policy. It is undisputed that an act relates to a public servants office for purposes of official misconduct when they rely their status to gain a benefit or deprive another. The State

failed to present any evidence that defendant committed an act relating to his office or official duties as a police officer such as would constitute official misconduct as required under N.J.S.A. 2C:30-2(a). In other words, the State presented no evidence that defendant relied on his status to gain a benefit or deprive another by offering gifts, monetary or otherwise, and/or persuade the City of Newark's primary doctor that he be placed on medical leave or same to officials approving him for administrative sick leave. Nor did the State present any evidence that defendant relied on his status to influence, persuade and/or offer any gifts, monetary or otherwise, to payroll personnel to issue him checks for payment of sick time while he simultaneously worked a second job. Thus, defendant submits that the State failed to prove that he committed an act relating to his office or official duties so as required to constitute official misconduct and therefore, the conviction for official misconduct must be vacated as a matter of law, equal protection and principles of fundamental fairness. c.f State v. Saavedra, 222 N.J. 39, 61, 67-68 (2015); State v. Miller, 216 N.J. 40, 71 (2013); ADA Financial Service Corp. v. State, 174 N.J. Super 337, 347-349 (App. Div. 1979); State v. Pomianek, 429 N.J. Super 339 (App. Div. 2013)(citing State v. Kueny, 411 N.J. Super 392, 407 (App. Div. 2010))

Moreover, defendant submits that he did not knowingly receive payment for sick time unlawfully and/or purposely deprive NDP of said payment as the outside employment policy is facially vague wherein it states "may be" committing a criminal act"; that policy is vague as it does not plainly state and give defendant fair warning that by receiving payment from NPD for sick time while simultaneously working overlapping days on a second job would result in a criminal offense of official misconduct or otherwise. Although the vagueness challenge here is

one of policy, defendant believes that he should be afforded the same constitutional protection against vague laws, rules or otherwise - policy here - as a matter of due process, equal protection and fundamental fairness particularly given the inextricable connection between the purported policy and violation thereof and the theft offense. c.f. **State v. Saavedra**, 222 **N.J.** 39, 61, 67-68 (2015); **State v. Miller**, 216 **N.J.** 40, 71 (2013); **ADA Financial Service Corp. v. State**, 174 **N.J. Super** 337, 347-349 (App. Div. 1979); Vagueness is essentially a procedural due process concept grounded in notions of fair play. see **State v. Lee**, 96 **N.J.** 156 (1984) (quoting State v. Lashinsky, 81 N.J. 1, 17 (1979). Both Federal and State Constitution render vague laws unenforceable. See **U.S. Const.** Amend V, IXV; **N.J. Const.**, (1947), Art. I, Par 1. To avoid the pitfall of vagueness, the terms of a statue, rule or otherwise must enable a person of "common intelligence, in light of ordinary experience," to understand whether contemplated conduct is lawful. A statue or otherwise - policy here - that is challenged facially may be voided if it is "impermissibly vague in all its application," that is, there is no conduct that it proscribes with sufficient certainty. See **State v. Cameron**, 100 **N.J.** 586, 591 (1984) (citing Lashinsky, supra, 81 N.J. at 18; Village of Hoffman Esates v. Flipside, Hoffman Estates, 455 U.S. 498, 102 S.Ct. 1193, 71 L.Ed.2d 362, 371 (1982); c.f. **Saavdera**, **supra**, at 61, (A public servant must know that such act is unauthorized because it is declared to be such by statue.....rule or otherwise).

According to defendant he was not familiar with the outside employment policy prior to being charged with official misconduct or otherwise. Defendant never signed a receipt acknowledging that he received policies. In fact, when he became detective he was assigned to a specialized unit where there was no roll call. (3T21-2 to 22-4 to -22). Furthermore, new

policies would be announced through a software system known as PowerDMS, (i.e., Document Management System), that was fully implemented in 2018 and officers had thirty days (30) days to virtually sign for the policy. According to Executive Officer Neves, defendant never had the opportunity to sign the acknowledgment form to use PowerDMS so he never actually accessed that program or was trained on it. (2T48-21 to 49-1 to -19). Prior to PowerDMS, policies were usually disseminated during roll call and at that time officers were required to sign the roster sheet next to their name acknowledging the receipt of that policy. (2T49-20 to 50-1 to -9). According to Lt. Neves there is not even one sheet of paper that indicates that defendant ever signed for receiving the outside employment policy. (2T76-16 to 77-1 to -6). In fact, Captain Antonio Dominguez, testified that from his knowledge, while at Internal Affairs up until he retired, there is no single piece of paper that indicates that defendant signed for a policy. (3T98-16 to 99-1 to -4).

To the extent that defendant was made aware of the sick leave and injury policy and the outside employment policy, he was not familiar with and did not have a clear understanding of those policies. (3T21-2 to -5; 3T27-5 to ,-20; 3T64-21 to 65-1 to -4; 3T78-13 to -19). Defendant further testified that he was not given any training by his superior officer with regard to how that policy might be enforced against him or tell him under what circumstances he would be charged with a crime. (3T27-5 to -20; 3T78-13 to -19).

According to Lt. Neves, there is nothing in the policy book that tells an officer when a violation of the sick leave policy would be considered a crime.. Given the plain meaning to "may be committing" a crime that I do, you may or you may not be committing a criminal act. (2T74-

17 to 75-1 to -7). Lt. Neves further testified that he has had experiences where a policy violation is treated as a crime and where its not treated as a crime and does not know why one is one way one is the other way. (2T91-16 to 92-6 to -14). Retired Captain Antonio Dominguez also testified that there is no policy that tells an officer when a policy violation as here is gonna be handled as a criminal offense as opposed to a disciplinary offense. (3T99-15 to 8).

Given the inconsistent application and vagueness of Newark Police Department's sick leave and outside employment policy, defendant submits that he did not knowingly commit official misconduct or otherwise and/or purposely deprive the police department of payment for sick time unlawfully. Thus, defendant submits that the State failed to present sufficient evidence to sustain the official misconduct conviction and therefore, a judgment of acquittal should have been granted.

POINT TWO

THE SENTENCE IMPOSED ON THE DEFENDANT WAS EXCESSIVE

The sentencing court imposed a five year prison sentence for defendant's conviction for theft by unlawful taking-movable property and a concurrent term of five years with five years parole ineligibility for the conviction for official misconduct. While the five year parole disqualifier was "mandatory", N.J.S.A. 2C:46-6.5(a)(b)(17), defendant contends that the sentencing court erred and/or abused its discretion including, but not limited to not finding applicable statutory and non-statutory mitigating factors and consider.

The court found as aggravating factors that a lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of public trust under chapters 27 and 30 of this title, or in the defendant took advantage of a position of trust or confidence to commit the offense, N.J.S.A. 2C:44-1(a)(4); the need for deterring the defendant and others from violating the law, N.J.S.A. 2C:44-1(a)(9); and the offense involved fraudulent or deceptive practices committed against any department or division of State government, N.J.S.A. 2C:44-1(a)(10). The court found one single mitigating factor that the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense, N.J.S.A. 2C:44-1(b)(7).

To the extent that the sentencing court engaged in any analysis at all of the finding and weighing of the aggravating factors that analysis is flawed. In determining the applicable aggravating factors the court simply stated

> This court does find aggravating factors four, nine and ten.

(6T14-1 to -2). In part, the sentencing court erred in failing to provide adequate reasons for the sentences it imposed and circularly, failed to provide the factual basis supporting his finding of particular aggravating and mitigating factors affecting sentence as required by Rule 3:21-4(e). The only reference to the reasons for the sentences by the trial court here was a cursory indication that defendant was found guilty. (6T13-14 to -25). A sentencing court must state on the record its reasons for the sentence that it imposes and, a blanket application of the aggravating factors found in defendant's case without providing a statement of the specific reasons supporting those findings is error. Generally see **State v. Jarbeth**, 114 **N.J.** 394 (1989).

The sentencing court further erred when it implicitly found that the aggravating factors taken together clearly outweighs the mitigating factors.[1] (6T14-5 to -7). When determining the sentence to be imposed it cannot be based upon a quantitative analysis of the number of factors to be balanced. The factors are not interchangeable on a one-to-one. The proper weight to be given to each is a function of its gravity in relation to severity of the offense. **State v. Roth**, 95 **N.J.** 334, 368 (1984). For example, the need to deter in a case involving a murder offense would weigh greatly in comparison for the crime for which defendant here was convicted. Thus, defendant submits that the sentencing court erred in its implicit finding that that the aggravating factors quantitatively outweighed the mitigating factor rather than engaging in an analysis balancing and determining the weight to be given each applicable aggravating and mitigating factor.

[1] Without providing reasons the sentencing court changed its findings on the judgment of conviction to the aggravating preponderant over the mitigating factors.

In addition, aggravating factor (4) provides two acts; (i) A lesser sentence will depreciate the seriousness of defendant's offense because it involved a breach of the public trust under chapters 27 and 30 of this title, or (ii) the defendant took advantage of a position of trust or confidence to commit the offense. This aggravating factor uses the word "or", not "and/or" and the court failed to specify which act applies. To the extent that the former applies, the sentencing court failed to define and provide reasons as to the classification of defendant's offense as to its seriousness and/or why a lesser sentence would depreciate the seriousness thereof. It determining the seriousness of defendant's offense, it should be noted that the "victim" is the City of Newark, not a person. Defendant submits that the related offense for which he was convicted is not serious as contemplated by law and that a lesser sentence would not have depreciated the "seriousness" of the offense particularly given the facts and circumstances therein. Further support for defendant's argument can be found in N.J.S.A. 2C:44-1(f)(2) and/or N.J.S.A. 2C:43-6.5(c)(2), which provides for a lesser sentence involving the offense for which he was convicted.

The trial court further court erred and/or abused its discretion in double-counting aggravating factor (4), which provides in relevant part, "....defendant's offense because it involves a breach of public trust under chapter 30...." and aggravating factor (10), which provides, "the offense involved fraudulent or deceptive practices committed against any department or division of State government." (6T6-1 to -3; 6T7-11 to -14; 6T9-17-21; 6T10-1 to -23). The defendant's conduct here was an element of the offense of official misconduct. N.J.S.A. 2C: 30-2. (3T178-7 to -25; 3T179-1 to -24). Thus, finding aggravating factor (4) and (10)

in effect constitutes the evidence thereof being counted twice, once in determining the degree of culpability of the crime and, again, as an aggravating factor. Such double-counting is unfair and not permitted. Generally see **State v. Jarbeth**, supra, 114 **N.J.** at 404, citing **State v. Gardner**, 113 N.J. 510, 519 (1989); **State v. Miller**, 108 **N.J.** 112, 122 (1987); **State v. Yarbough**, 100 **N.J.** 627, 633 (1985), cert. den., 475 U.S. 1014, 106 S.Ct. 1193, 89 L.Ed.2d 308 (1986); c.f. **State v. Martini**, 139 N.J. 3, 74 (1994).

Further, the trial; court erred and/or abused its discretion in finding aggravating factor (4). Although the court found the need to deter, he did not specify whether he was considering deterrence of this individual defendant, deterrence of others or both. (6T14-1 to -20). Personal and general deterrence are interrelated but distinguishable concepts; a sentence can have a general deterrent on the public in addition to its personal deterrent effect on the defendant. see **State v. Jarbeth**, 114 **N.J.** 394, 405 (1989), citing **State in the of C.A.H. & B.A.R.**, 89 **N.J.** 326, 334-35 (1982). Nevertheless, the absence of any personal deterrent effect greatly undermines the efficacy of a sentence as a general deterrent. **Id.** at 405. In **State v. Gardner**, 113 **N.J.** 510, 520 (1989), the New Jersey Supreme Court recognized That general deterrence unrelated to specific deterrence has relatively insignificant penal value. Personal and general deterrence is , of course a very weak factor, it at all, particularly where a mandatory prison term is provided by statute as here and, it is submitted can never clearly outweigh the mitigating factors under such circumstances. **State v. Jarbeth**, supra,, c.f. **State v. Rice**, 425 **N.J. Super** 375, 383 (2012. Moreover, defendant submits that general deterrence is very weak because it has little effect, if any at all, on the public given that the offense is limited

individuals who hold an official position rather than the general public. Thus, the record is uninformative as to exactly what weight the court assigned to deterrence of the defendant, and why, contrary to the courts obligation to make explicit findings. State v. Kruse, 105 N.J. 354, 360-361, 363 (1987). Defendant further submits that aggravating factor (4) is not supported by evidence sufficient to constituting this aggravating factor.

As for mitigating factors, the Court found mitigating factor (7), "the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense." Given defendant's background and the exemplary life he lived prior to the commission of the present offenses for which he was unfortunately convicted, he believes that this mitigating factor should be given great weight. (6T4-17 to -24; 6T11-8 to -25; 6T12-1 to -20). However, the Court erred when it failed to determine the amount of weight to be given to this mitigating factor. see **State v. Roth**, 95 **N.J.** 334, 368 (1994). The court also erred and/or abused its discretion in not finding mitigating factor (8), "the defendant's conduct was the result of circumstances unlikely to recur and, for its failure in not providing any reasons supporting its decision thereof. (6T4-15 to -25; 6T5-1 to -3). Defendant submits that mitigating factor (8) applies given the relevancy and that it carries great weight. The court not only erred in not finding this mitigating factor, but it also violates the doctrine of fundamental fairness and principles of due process and equal protection. State v. Rice, supra, 425 **N.J. Super** 375, 383 (2012); c.f. **ADA Financial Service Corp. v. State**, 174 **N.J. Super** 337, 347-349 (App. Div. 1979).

Defendant further submits that the court erred and/or abused its discretion in not

considering relevant mitigating factors that, "The defendants conduct neither caused nor threatened serious harm," **N.J.S.A.** 2C:44-1(b)(1); "The defendant did not contemplate that the defendants conduct would cause or threaten serious harm," **N.J.S.A.** 2C:44-1(b)(2); "The character and attitude of the defendant indicate that the defendant is unlikely to commit another offense," **N.J.S.A.** 2C:44-1(b)(9); "The defendant is particularly likely to respond affirmatively to probationary treatment and," and; "The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents." **N.J.S.A.** 2C:44-1(b)(11).

Although our sentencing statute lists only thirteen mitigating factors, the Superior Court of New Jersey, Appellate Division, has recognized the court's ability to use non-statutory mitigating factors in imposing a sentence. **State v. Rice**, 335 **N.J. Super** 375, 381-82 (2012), citing **State v. Ross**, 335 **N.J. Super** 536, 543, 763 A.2d 281 (App. Div. 2000), certif. denied, 167 N.J. 637, 772 A.2d 939 (2001). In Rice, the Appellate Division presumed that the sentencing Judge was referencing statements he made at the time of sentencing regarding defendant's character and the high regard in which he was held by the community and his co-workers, as evidenced by numerous letters sent to the court. Id. at 425 N.J. Super 381-83.

At sentencing, counsel for defendant stated

> He worked for some 25 years as a law enforcement officer. He had a stellar career until this happened. 2017, 2018 things went wrong for him and he did something that really seems to be out of character given the history of his employment...I've had a number of talks with him since the verdict judge. And, I think he's truly remorseful.
>
> He realizes that -- he realizes that things did go wrong for him and that He didn't handle them the way that he should have or could have. His

> wife and sister are here. And he knows he's let them both down. And, he feels particularly badly about how this has all affected his family. He's got a mother and father in Georgia who I've spoken to who are Just heartbroken. And -- you know -- he -- he carries the pain for having done that to them. That -- that's clear to me. (6T4-19 to -23; 6T5-5 to -16).

Speaking on her brother's behalf, defendant's sister stated

> My brother has always been a good person. He's never been in any trouble. Yeah, he did a -- a bad mistake -- bad move and I know he's very remorseful. My parents -- its just me, him and my sister. And he's -- he's always been a good person not just to me but to community. We used to go out and just have cook outs and do things to give back.
>
> And this has -- has been very dramatic on my family. And, I just wish that you take in consideration that I know this will never happen again. And -- you -- he has a daughter that's in college. So, I just wish I -- you know -- was there to guide him better. And, I came in this morning. So -- but he -- he's not a bad person. (6T6-3 to -16).

Speaking on his own behalf, defendant stated

> Judge, I stand before the Court and I would like to apologize. First and foremost just let me give a little history about myself. I -- just give me a second -- I come from -- we'll I grew up in one of the worst projects in the city of Newark....projects. Because of that, that made me want to push myself and become someone. I was always that kid that ran through the back alleys to get home to avoid all of the other stuff.
>
> I graduated from my -- I did that from -- from elementary school to high school. I applied to college and put myself through college as an individual. During my college years I ended up seeking law enforcement instead of going to Setan Law -- law school. And during that tenure I took great deal of pride in protecting not only the citizens but also the residents of the city of Newark Judge.
>
> I contributed what I would like to believe a great deal to this -- to the public safety of the city of Newark in regards to -- I don't want to use this word but putting away shooters just as well individuals who committed homicides your Honor. I protected a great deal of the dignitaries throughout the city and just as -- well, to reiterate what Mr. Ianetti said,

> I made a bad decision during the year 2017.
>
> And, I am extremely sorrowful for that Judge. And I do -- and I've been Thinking. I have accepted the fact that that one mistake destroys the past 25 years that I contributed unselfish service to the city Newark. I -- I'm extremely remorseful, very. And I did cause a great deal of pain to my family to the point where it separated and destroyed. I'm very apologetic for that. But I'm not the person that the State has pictured me to be Judge. I'm not that person. (6T11-8 to -25; 6T12-1 to -20).

Before the court imposed the sentence the judge stated

> So the court has the pre sentence report in this matter.....I reviewed it and familiarized myself with this defendant's background which as he says was prior to this offense one of service and dedication to the city of Newark -- which I appreciate, which makes this all the more tragic in the Court's view and -- and sad. (6T12-22 to -25; 6T13-1 to -3).

Although the court acknowledged the non-statutory mitigating circumstances/factors, he did not consider them in determining the appropriate sentence, nor did he provide any reason supporting his decision for not considering the relevancy thereof. Defendant submits that the court erred and/or abused its discretion in its finding and weighing of aggravating and mitigating factors in determining the appropriate sentence to be imposed. State v. Jarbeth, 114 N.J. 394 (1989).

For the above reasons, defendant asserts that he has made a clear showing of abuse by the sentencing court of its discretion and that his sentence, while legal is excessive. State v. Velasquez, 54 N.J. 493 (1969).

CONCLUSION

For the reasons set for above, defendant's convictions and/or denial of motion for judgment of acquittal should be reversed, in part if not full, and/or remanded for resentencing.

Respectfully Submitted,

Anthony L. Gibson
Defendant-Appellant

Dated:

PHIL MURPHY
Governor

TAHESHA WAY
Lt. Governor

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August 2, 2024

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REPLY LETTER-BRIEF ON BEHALF OF DEFENDANT-APPELLANT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0117-23
INDICTMENT NOS. 19-06-1759-I,
19-07-1907-I, 22-01-0099-I

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Respondent,	:	On Appeal from an Order of the Superior Court of New Jersey,
v.	:	Law Division, Essex County.
ANTHONY L. GIBSON A/K/A ANTHONY GIBSON,	:	Sat Below:
Defendant-Appellant.	:	Hon. Patrick J. Arre, J.S.C.,
	:	and a Jury.

Your Honors:

This letter is submitted in lieu of a formal brief pursuant to R. 2:6-2(b).

DEFENDANT IS CONFINED

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendant-appellant Anthony Gibson relies on the procedural history and statement of facts from his initial brief. (Db 2-11)[1]

[1] This brief uses the same abbreviations as Mr. Gibson's initial brief. In addition, Db refers to Mr. Gibson's initial brief, Sb refers to the State's brief, and Dsa refers to Mr. Gibson's supplemental appendix.

LEGAL ARGUMENT

Mr. Gibson relies on the legal arguments from his initial brief and adds the following:

POINT I

THE STATE'S ATTEMPTS TO CHARACTERIZE DEFENDANT'S CONDUCT AS AN "UNAUTHORIZED EXERCISE OF HIS OFFICIAL FUNCTIONS" LACK SUPPORT IN CASE LAW AND ELSEWHERE.

In his initial brief, Mr. Gibson argued that he should have been acquitted of official misconduct because working a second job while on sick leave does not amount to "an unauthorized exercise of his official functions" as a police officer. See N.J.S.A. 2C:30-2a (emphasis added). (Db 11-18) As he explained, a defendant commits an unauthorized exercise of his official functions when he breaches "some prescribed duty of the public servant's office" that is either "imposed upon him by law (such as statute, municipal charter or ordinance) or clearly inherent in the nature of his[] office." Model Jury Charges (Criminal), "Official Misconduct (N.J.S.A. 2C:30-2)" (rev. Sep. 11, 2006). See State v. Maioranna, 225 N.J. Super. 365, 371 (Law. Div. 1988), aff'd and remanded, 240 N.J. Super. 352 (App. Div. 1990). The duty to abide by the NPD's sick leave and outside employment policies is neither a duty imposed by law (those policies

are internal agency regulations, not law) nor is it so fundamental to the role of a police officer that it is clearly inherent in the nature of the office.

In response, the State asserts that the duty to abide by the sick leave and outside employment policies is imposed by law, but the State fails to provide any support for this assertion. (Sb 2-3) The fact that these policies were read into the record and moved into evidence does not somehow render them "law."

In addition, the State contends that the duty to abide by these policies is clearly inherent in the nature of Mr. Gibson's office because "unlike most jobs, Newark Police officers get unlimited sick time." (Sb 3) This argument misinterprets the meaning of the phrase "clearly inherent or implicit in the nature of the office." See Maioranna, 225 N.J. Super. at 371.

As explained in Mr. Gibson's initial brief, case law demonstrates that the duties inherent in a public office are those that are essential to carrying out its public functions. (Db 15-18) See State v. Brady, 452 N.J. Super. 143, 172-73 (App. Div. 2017) (discussing the inherent duties of a Superior Court judge); Maioranna, 225 N.J. Super. at 372-73 (discussing the inherent duties of the executive director of a county community development office). See also People v. Ridge, 25 Misc. 3d 432, 439, 887 N.Y.S.2d 811 (Dist. Ct. 2009) ("A duty which is 'clearly inherent in the nature of the office' encompasses those unspecified duties that are so essential to the accomplishment of the purposes

for which the office was created that they are clearly inherent in the nature of the office.") (Citation omitted.) For a police officer, then, such duties are those that are closely tied to the law enforcement and public safety functions of the office. See State v. Kueny, 411 N.J. Super. 392, 405-06 (App. Div. 2010) (cleaned up) ("In New Jersey the fundamental duty of a policeman is to be on the lookout for infractions of the law and to use due diligence in discovering and reporting them.")

While the State might be right that unlimited sick time is a unique employment perk, that is all it is: a perk. It is not a fundamental feature of the role of a police officer. Indeed, while Newark chooses to give its police officers unlimited sick time, other police departments in New Jersey do not. See Agreement Between City of Asbury Park And The Police Benevolent Association, available at: https://www.perc.state.nj.us/publicsectorcontracts.nsf (detailing injury leave and sick leave allowances for Asbury Park police officers). (Dsa 16-18) It follows that unlimited sick time is in no way essential to carrying out the law enforcement and public safety functions of the police. Taking advantage of this employment benefit is therefore not akin to breaching a duty "clearly inherent in the nature" of the office.

Published case law in New York supports Mr. Gibson's position. In People v. Ridge, the defendant was a corrections officer who allegedly submitted

fraudulent documents in order to obtain sick leave benefits. 886 N.Y.S.2d at 434, 440. Under the relevant sick leave provision, the defendant was required to obtain treatment from a doctor to be eligible for the leave benefits. Id. at 440. The government charged him with official misconduct on the ground that he refrained from performing a duty "clearly inherent in the nature of [his] office" by seeking leave benefits despite failing to go to the doctor. Id. at 439.[2]

The court disagreed with the government and granted the defendant's motion to dismiss the indictment. Ibid. According to the court, the inherent duties of a corrections officer "include such things as patrolling the correctional center buildings, supervising inmates, inspecting for contraband, inmate head counts, escorting inmates, searching inmates, supervising visitors, and other related law enforcement activity." Id. at 439-440. Abiding by the sick leave provision, on the other hand, is not "essential to the fundamental duties of a correction officer"; it is an "administrative requirement, the violation of which may result in the loss of sick days, vacation days, personal days and/or salary." Ibid. This reasoning is equally applicable in Mr. Gibson's case and compels a conclusion that abiding by the NPD's sick leave and outside employment policies is not an inherent duty of a police officer.

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[2] New Jersey's official misconduct statute was based on New York's official misconduct statute and is nearly identical to it. See N.Y. Penal Law § 195.00; State v. Hinds, 143 N.J. 540, 548 (1996).

In sum, the State failed to prove at trial that Mr. Gibson committed official misconduct. Even if the State succeeded in proving that he violated the sick leave and outside employment policies, doing so did not constitute an "unauthorized exercise of his official functions." See N.J.S.A. 2C:30-2a. A judgment of acquittal must be entered on the official misconduct charge.

POINT II

A CLAIM OF RIGHT INSTRUCTION WAS CLEARLY WARRANTED IN THIS CASE BASED ON DEFENDANT'S TESTIMONY AND DEFENSE COUNSEL'S ARGUMENT.

In his initial brief, Mr. Gibson argued that the theft conviction must be reversed due to the trial court's failure to give an instruction on the affirmative defense of claim of right. (Db 30-33) See N.J.S.A. 2C:20-2c(2). In response, the State argues that a claim of right instruction was not "clearly warranted" because "at no point in his testimony did the defendant indicate that he was entitled to receive sick pay when he was working another job" and "[i]nstead, he repeatedly tried to testify that the policy just wasn't enforced." (Sb 9) This argument is flawed for two reasons.

First, the defense theory was not that Mr. Gibson was, in fact, entitled to his sick pay while working a second job. Rather, the defense theory centered on Mr. Gibson's intent. The State had to prove that Mr. Gibson knew that he was violating NPD policies by continuing to work a second job while on sick leave and that therefore he was not entitled to his sick pay. Both Mr. Gibson's testimony and defense counsel's argument poked holes in the State's case in this regard.

When asked on direct if he knew that NPD policies prohibit working a second job while on sick leave, Mr. Gibson responded, "Now I do." (3T 32-8 to

14) His testimony made clear, however, that at the time he went on sick leave, he did not understand the policies and how they applied to him. (3T 27-5 to 17) Moreover, the evidence showed that when Mr. Gibson started at the NPD in 1993, working a second job while on sick leave was not prohibited. (2T 61-20 to 62-21; 3T 84-7 to 17) Mr. Gibson testified that he never received the updated policies nor was he trained on them, and thus he did not know that he was violating them by continuing to work his second job while on leave. (3T 27-5 to 17, 32-8 to 34-3)

Defense counsel summarized this evidence in his closing argument, stating:

> Now there's a bunch of discussion about how these policies are disseminated to officers and should Detective Gibson have been aware of the policy. He should have been aware of the policy. There's no question. Officers are -- should be aware of what's required of them and what rules they're supposed to follow. He should have been aware of the policy.
>
> When he started, he was given a policy book. And that policy book doesn't say anything about sick time and outside -- outside employment. Detective Gibson told you it wasn't there. Captain Dominguez came in and he told you about some things that were in that book. And if it said in that book, you can't work your outside job, he would have told you that too. But it's not there. And then he talked about how the policies are disseminated. Right? And we know that at roll call, you're supposed to get the policy and you're supposed to sign for it. And we know that once you're a detective, you don't have to go to roll call but your supervisors are still supposed

> to disseminate the policies to you. Detective Gibson says he didn't get the policies. And Captain Dominguez says, well, you're supposed to get the policies but sometimes, supervising officers are disciplined because they don't give you the policies. It happens. (3T 112-16 to 113-17)

Thus, both Mr. Gibson's testimony and defense counsel's argument focused on Mr. Gibson's state of mind and whether he knew that he was not entitled to his sick pay, making a claim of right instruction clearly warranted.

Second, Mr. Gibson's testimony that the policies were not enforced does not nullify his claim of right defense. Contrary to the State's assertions, Mr. Gibson was not trying to testify "that others got away with it, so he should to." (Sb 9) Instead, evidence that he was not aware of any instances of enforcement bolsters his position that he did not know that working a second job while on sick leave was prohibited.

At bottom, Mr. Gibson's intent to steal from the NPD was central to this case. He was therefore entitled to an instruction on the affirmative defense of claim of right, and such an instruction was made even more essential by the State's improper suggestion via its rebuttal witness that his intent to steal was irrelevant. (Db 32-33) Accordingly, the omission of a claim of right instruction was plain error and requires reversal of the theft conviction. See State v. Ippolito, 287 N.J. Super. 375, 381-85 (App. Div. 1996).

CONCLUSION

For the reasons set forth here and in Mr. Gibson's initial brief, this Court should reverse his convictions, order the entry of a judgment of acquittal on the official misconduct charge, and permit Mr. Gibson to withdraw from his subsequent guilty pleas in Indictment Nos. 19-7-1907 and 22-1-99. In addition, the Court should remand the matter for resentencing due to errors in the application of statutory aggravating and mitigating factors and due to the failure to merge several offenses, as conceded by the State. (Sb 17)

Respectfully submitted,

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Dated: August 2, 2024