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THE APPROVAL OF THE COMMITTEE ON OPINIONS

**THE STATE OF NEW JERSEY**

**BERGEN COUNTY – LAW DIVISION**

v.

**INDICTMENT NO. 11-12-02152-I**

**MICHAEL SUMULIKOSKI and  
ARTUR SOPEL**

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**CRIMINAL ACTION**

**OPINION OF THE COURT**

Argued: June 5, 2012  
Decided: July 9, 2012

John L. Molinelli, Esq., Bergen County Prosecutor (Kenneth Ralph, Esq. appearing)  
Galantucci & Patuto, for defendant Michael Sumulikowski (Philip De Vences, Esq.  
appearing)  
Flood & Basile, for defendant Artur Sopol (Raymond F. Flood, Esq. appearing)

Guida, J.S.C.

**Introduction**

This is a motion to dismiss the indictment for the reason that the State of New Jersey lacks territorial jurisdiction to prosecute the matter.

On December 21, 2011, a Bergen County Grand Jury indicted Michael Sumulikowski (Sumulikowski) on three counts of sexual assault upon M.R. in violation of N.J.S.A. 2C:14-2c(3)(b) (Counts 2, 3 and 4) and three counts alleging endangering the welfare of M.R. and E.T. in violation of N.J.S.A. 2C:24-4a. (Counts 1, 5 and 6).

Artur Sopol (Sopol) was charged with nineteen counts in the indictment; including two counts alleging sexual assault upon E.T. (Counts 8 and 9); four counts of sexual assault upon M.R. (Counts 13, 14, 15 and 16); six counts of sexual assault upon C.P. (Counts 20, 21,

22, 23, 24 and 25); and five counts of endangering the welfare of M.R., E.T. and C.P. (Counts 7, 11, 12, 18 and 19).

In addition, the Grand Jury charged Sopel with two counts of witness tampering (Counts 10 and 17) between March 7, 2011 and March 10, 2011. The indictment alleges that the witness tampering occurred in Bergen County. As such, jurisdiction is not challenged on those counts.<sup>1</sup>

### **Statement of Facts**

At all times relevant to this matter, defendant Sumulikoski was employed as a permanent substitute teacher and an assistant basketball coach at Paramus Catholic High School. Sopel was an administrator at the school, holding the title “Vice President of Operations.” The alleged victims, M.R., E.T. and C.P., all age seventeen at the time, were students at the high school and residents of the State of New Jersey.

The allegations arise from a school-sponsored trip to Germany between February 17, 2011 and February 27, 2011.<sup>2</sup> Defendants were the only two chaperones assigned to the seventeen students who traveled from New Jersey to Germany. The allegations of sexual assault were not disclosed until a teacher notified the Division of Youth and Family Services (DYFS) on March 6, 2011, after discussing the incidents with one of the victims. Defendants deny any wrongdoing, and the State concedes that the alleged sexual conduct

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<sup>1</sup> Sumulikoski also argues that insufficient evidence was submitted to the Grand Jury pertaining to Counts 5 and 6 of the indictment, alleging violations of N.J.S.A. 2C:24-4a. This opinion does not address that issue.

<sup>2</sup> The facts are derived from the Transcript of the Grand Jury Hearing dated December 21, 2011. The trip was split into two groups of students traveling to France and Germany. The allegations in the indictment

occurred outside the geographical boundaries of the State of New Jersey. Specifically, it is alleged that defendants engaged in sexual conduct with M.R., E.T. and C.P. during the school-sponsored trip, in the municipality of Werl, in the Federal Republic of Germany.

The State contends that New Jersey has jurisdiction to prosecute because defendants had supervisory power over the victims. Defendants assert that supervisory power is neither conduct, nor a result of conduct, constituting an element of sexual assault and, therefore, the State does not have jurisdiction to prosecute.

This is a case of first impression, and the court must now determine whether the State of New Jersey has jurisdiction under these specific facts to prosecute sexual conduct that allegedly occurred outside its territorial borders.

## **Discussion**

### **I. Standard of Review**

Jurisdiction is a legal issue that can be raised at any time except during trial. State v. Schumann 111 N.J. 470, 474-75 (1988); R. 3:10-2e (4). The Supreme Court, in State v. Denofa, 187 N.J. 24 (2006), established a procedural guide for determining issues of jurisdiction. In Denofa, defendant's murder conviction was overturned by the Appellate Division because the trial court failed to present the jurisdictional issue to the jury. Id. at 48. However, the Supreme Court reinstated defendant's conviction, holding that jurisdiction is a *non-material* offense element and must be decided by the jury, even without a request from the defendant, provided the record clearly indicates a factual dispute concerning where the

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pertain only to the group of students who traveled to Germany.

crime occurred. Id. at 29, 35, 48. To the contrary, the material elements of a crime (murder, for example, is charged as purposely or knowingly causing death or serious bodily injury resulting in death) must always be submitted to a jury and decided beyond a reasonable doubt, even without a request from counsel. Id. at 40.

The Court set forth the following procedure and standard of review for trial courts to determine the issue of jurisdiction:

If there are no facts in the record on which a rational trier of fact could conclude beyond a reasonable doubt that the crime was committed within the State, an appropriate motion may be filed. State v. McDowney, 49 N.J. 471, 475 (1967) ('A pre-trial motion to dismiss for lack of jurisdiction . . . should be granted only after very careful consideration. The moving party must carry the burden by showing that no inference could reasonably be drawn placing the site of the crime within the State.') If there are facts from which a rational factfinder could come to more than one conclusion concerning the crime's location and the defendant intends to dispute territorial jurisdiction, he should put both the State and the court on notice at the final pretrial conference. Because the validity of any conviction depends on sufficient proof of each element of the offense, lack of territorial jurisdiction may be raised in a motion for a judgment of acquittal notwithstanding a verdict of guilty. R. 3:18-2. [Id. at 43-44.]

Based upon the above standard of review, if this court determines there are no facts in the record from which an inference can reasonably be drawn placing the site of the crime within this State, the court must dismiss the complaint for lack of jurisdiction as a matter of law. On the other hand, where the record does not clearly indicate a jurisdictional dispute and contains sufficient evidence to support a finding that the crime occurred in this State, defendant's challenge to jurisdiction must be denied as a matter of law. Only where there are facts from which a rational fact-finder could come to more than one conclusion concerning the crime's location should the issue of jurisdiction be presented to the jury.

Denofa, supra, 187 N.J. 24, pertains to issues defining interstate territorial

jurisdiction, whereas the within case presents an issue of international extraterritorial jurisdiction. Accordingly, the court will also examine principles of international law to determine whether the State of New Jersey may prosecute defendants for sexual conduct which allegedly occurred in the sovereign nation of Germany.

## **II. Statutory Construction**

The primary goal in construing any statute is to divine the Legislature's intent, giving the "ordinary and commonsense meaning" to the actual words. State v. Gelman, 195 N.J. 475, 482 (2008) (citing DiProspero v. Penn., 183 N.J. 477, 492 (2005)). Only if the statutory language is susceptible "to more than one plausible interpretation" do courts turn to such extrinsic aids as legislative history for help in deciphering what the Legislature intended. DiProspero, 183 N.J. at 492-93.

Neither Chapter 14 (Sexual Offenses) nor Chapter 24 (Offenses Against the Family, Children and Incompetents) of the Criminal Code provide express authority for the State to exercise extraterritorial jurisdiction. Therefore, the court must explore the legislative history of N.J.S.A. 2C:1-3 and N.J.S.A. 2C:14-1 to divine the legislature's intent regarding extraterritorial jurisdiction in prosecutions of sex offenses.

### **A. N.J.S.A. 2C:1-3**

Under the common law's doctrine of strict territoriality, a state only had the power to prosecute and convict individuals for crimes committed within its territorial borders. See Model Penal Code and Commentaries § 1.03, at 36 (1980). Under this theory, the State would be precluded from prosecuting defendants in this case. However, courts and

legislatures have relaxed the common law’s strict territoriality requirement, allowing for the prosecution of individuals for crimes outside of the State’s borders.

Twenty-nine states have modeled their jurisdictional statutes after the Model Penal Code (M.P.C.) provisions, which set forth broad standards.<sup>3</sup> The drafters of the M.P.C. rejected the common law’s strict territoriality doctrine because they believed “it [wa]s particularly desirable in a federated state to increase jurisdictional options” over any individuals who engaged in conduct against a state's interests, as long as their exercise of jurisdiction did not result in unfairness to the defendant. *Id.* at 34-35. They further recognized that “there may be special cases where there is a legislative purpose to declare the [defendant’s] conduct criminal regardless of the place of the result.” *Id.* at 44.

New Jersey is among the states that have adopted the M.P.C.’s approach. N.J.S.A. 2C:1-3 expanded pre-code law (Title 2C), which generally required “the completed act” to occur in this State in order to permit prosecution here. Final Report of the New Jersey Criminal Law Revision Commission, commentary to §2C:1-3 (1971).

The Legislature extended New Jersey’s jurisdiction even further, in 2003, when it included the prosecution of individuals for offenses where the result occurred within the state, “even if the conduct occur[ed] wholly outside this State and any property that was

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<sup>3</sup> See Model Penal Code and Commentaries, *supra*, § 1.03, at 40. See, e.g., Ariz. Rev. Stat. Ann. § 13-108 (LexisNexis 1978); N.H. Rev. Stat. Ann. § 625:4 (2012); 18 Pa. Cons. Stat. Ann. § 102 (West 1997); Tex. Penal Code Ann. § 1.04 (West 1994); N.Y. Crim. Proc. Law § 20.30 (McKinney 1970); Me. Rev. Stat. Ann. tit. 17 § 7 (2007); Haw. Rev. Stat. § 701-106 (West 1972); Ind. Code Ann. 35-41-1-1 (West 2009); Ga. Code Ann. § 17-2-1 (2012); 11 Del. Laws § 204 (1995); Colo. Rev. Stat. Ann. § 18-1-201 (West 2012); Iowa Code Ann. § 803.1 (West 2000); Fla. Stat. Ann. § 910.005 (West 1997); Mont. Code Ann. § 46-2-101 (2009); Ohio Rev. Code Ann. § 2901.11 (West 2005); Or. Rev. Stat. Ann. § 131.215 (West 1972); Ky. Rev. Stat. Ann. § 500.060 (West 2011); 720 Ill. Comp. Stat. Ann. 5/1-5 (West 1999); Utah Code Ann. § 76-1-201 (West 2004); Tenn.

affected by the offense was located outside this State.” N.J.S.A. 2C:1-3a (1)(g). Thus, both the M.P.C. commentary and the New Jersey Legislature intended that jurisdiction should be interpreted broadly to apply beyond its borders in certain situations.

The State argues that the pertinent provisions of the M.P.C., codified in N.J.S.A. 2C:1-3, which grant New Jersey territorial jurisdiction are:

- (1) “either the conduct which is an element of the offense or the result which is such an element occurs within this State” [N.J.S.A. 2C:1-3a(1)]; or
- (2) “[t]he offense consists of the omission to perform a legal duty imposed by the law of this State with respect to domicile, residence or a relationship to a person, thing or transaction in the State” [N.J.S.A. 2C:1-3a(5)]; or
- (3) “[w]hen the result which is an element of an offense consists of inflicting a harm upon a resident of this State . . . occurs within this State, even if the conduct occurs wholly outside this State . . .” [N.J.S.A. 2C:1-3g].

The court agrees with defendant’s analysis that neither N.J.S.A. 2C:1-3a(5) nor N.J.S.A. 2C:1-3g confer extraterritorial jurisdiction to the facts of this case.

N.J.S.A. 2C:1-3a(5) extends jurisdiction over those persons who do not dwell in the State but nevertheless bear an obligation to a person or entity within the State. Accordingly, extraterritorial jurisdiction has been affirmed to enforce child support and alimony obligations, and reach absent taxpayers, landlords or other entities who may transact business in the State. Model Penal Code and Commentaries, § 1.03, at 53. The duty imposed by law under this section is inherently financial or ministerial and does not imply conduct as alleged in the indictment. See State of Oregon v. McGill, 836 P. 2d 1371 (Or. Ct. App. 1992) (confirming jurisdiction in state court over resident of an Indian Reservation for failure to

return property to a store located in the State); [State of Wisconsin v. Gantt, 548 N.W. 2d 134 (Wis. Ct. App.1996) (requiring non-resident to pay child support); State of Rhode Island v. Kane, 625 A. 2d 1361 (R.I. 1993) (holding Rhode Island retained jurisdiction over custody violations occurring outside the State).

N.J.S.A. 2C:1-3g also does not confer extraterritorial jurisdiction to the acts alleged in this case. That provision of the statute was enacted as part of L. 2003, c. 184 to “expand the reach of prosecutions for theft of identity to include an actor’s conduct which is outside the State when the victim suffers the harm in or resides in New Jersey.” Senate Judiciary. Comm. Statement to Assembly Committee Substitute for Assembly Nos. 3226 and 329, at 1 (2003).

Thus, the court narrows its focus to the applicability of N.J.S.A. 2C:1-3a(1), particularly as it pertains to the prosecution of sexual offenses.

**B. N.J.S.A. 2C:14-1**

The Senate Judiciary Committee revised sex offense treatment in 1979 by redefining rape as sexual assault, omitting spousal immunity, and changing the resistance element into a force requirement. Leigh Bienen, Rape III National Developments in Rape Reform Legislation, 6 Women’s Rts. L.R. 170, 181 (1980). The Legislature’s purpose in reforming the statute was to “bring that area of law in line with the expectation of privacy and bodily control” and to shift the focus onto the actor’s violation of those expectations. In re M.T.S., 129 N.J. 444-46 (1992).

The Senate Statement from the original revision details factors the State should use in



deciding which sexual offense the defendant's act falls under. These include:

the actual sexual acts committed;

the amount of force and physical injury involved in the offense;

the age of [the] victim and sometimes the age of the accused (i.e., consensual intercourse between a boy of 15 and a girl of 14 would not be an offense; consensual intercourse between a man of 20 and a girl of 14 would be an offense);

the mental state of [the] victim (i.e., was the victim "physically helpless," "mentally defective" or "mentally incapacitated"); and

*the relationship of the accused vis-a-vis the victim (Did the accused have supervisory or disciplinary power over the victim? i.e., a prison guard and an inmate).*

[Senate Judiciary Comm., Statement to S. 738, at 56 (1978) (emphasis added).]

In addition, N.J.S.A. 2C:14-2c(3)(b) was revised in 2001 to include the phrase "of any nature or in any capacity" in order "to clarify that in addition to parents, teachers, law enforcement officers, etc., this provision is intended to cover individuals with supervisory or disciplinary power in volunteer organizations." N.J.S.A. 2C:14-2c(3)(b) Senate, No. 84--L.2001, c. 60.

The history suggests that the legislature was concerned with both the status and the conduct of the defendant in sexual assault cases, and not necessarily focused on the location where the sexual assault occurred. Accordingly, the history implies that criminal sexual acts which occur beyond the State's territorial borders may be prosecuted if one of the material elements to establish the criminal activity occurs in this State.

**C. Application of N.J.S.A. 2C:1-3 to N.J.S.A. 2C:14 and 2C:24**

N.J.S.A. 2C:14-2c(3)(b) provides in pertinent part that "an actor is guilty of sexual

assault if he commits an act of sexual penetration with another person . . . . [where] the victim is at least 16 but less than 18 years old and the actor has supervisory or disciplinary power of any nature or in any capacity over the victim.”

Although no culpable mental state is expressed in N.J.S.A. 2C:2-14c(3)(b), defendant must act “knowingly” to be culpable of offenses under Title 14. N.J.S.A. 2C:2-2c(3); S.D. v. M.J.R., 415 N.J. Super. 417, 432 (App. Div. 2010).

N.J.S.A. 2C:2-2c(1) provides “when the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.” (emphasis added). Therefore, if a person must act knowingly to be guilty of the offenses proscribed in N.J.S.A. 2C:14-2c(3)(b) and N.J.S.A. 2C:24-4a, his knowledge must extend to every aspect of his activities, their results, and the attendant circumstances, as all are material elements of the offense. Cannel, Criminal Code Annotated, Comment N.J.S. 2C:1-14[2]. (Gann 2012). See State v. Parsons, 270 N.J. Super. 213 (App. Div. 1994) (for an assault on police officer defendant must be found reckless both as to causing the injury and to the fact that the victim was an officer); State v. Worthy, 329 N.J. Super. 109, 114-116 (App. Div. 2000) (required mental state of “knowingly” applies not only to restraint, but to the fact that it was unlawful and that it exposed the victim to the risk of serious bodily injury); and State v. Sherman, 367 N.J. Super. 324, 355-56 (App. Div.), certif. den. 180 N.J. 356 (2004) (culpability for crime of first degree kidnapping requires that defendant knowingly failed to release victim unharmed

notwithstanding that the statute does not specify “knowingly” as the state of mind for the element of failure to release the victim).

The State must prove all of the following material elements beyond a reasonable doubt to find defendant guilty of a violation of N.J.S.A. 2C:14-2c(3)(b):

- (1) the defendant committed an act of sexual penetration with the victim;
- (2) that at the time of the penetration, the victim was at least 16 years old but less than 18 years old;
- (3) that defendant had supervisory or disciplinary power of any nature or in any capacity over the victim; and
- (4) that defendant acted knowingly.

[Model Criminal Jury Charges, rev. 6/27/2011.]

Moreover, N.J.S.A. 2C:24-4a provides that:

“[A]ny person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child, or who causes the child harm that would make the child an abused or neglected child . . . is guilty of a crime of the second degree.”

The State must prove the following material elements beyond a reasonable doubt to obtain a conviction under this statute:

- (1) that the victim was a child;
- (2) that defendant knowingly engaged in sexual conduct, or that defendant knowingly caused the child harm that would make the child abused or neglected;
- (3) that defendant knew that such conduct would impair or debauch the morals of the child, or that defendant knew that such conduct would cause the child harm that would make the child abused or neglected; and

(4) that defendant had a legal duty for the care of the child<sup>4</sup> or had assumed responsibility for the care of the child.

Whether or not New Jersey can exercise territorial jurisdiction over the above offenses in this case turns on whether the “supervisory or disciplinary power” requirement under N.J.S.A. 2C:14-2c(3)(b) and the “assumption of responsibility” requirement under N.J.S.A. 2C:24-4a are considered “conduct” which are material elements of those respective offenses as set forth in N.J.S.A. 2C:1-3(a)(1).

A “[m]aterial element of an offense means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (1) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (2) the existence of a justification or excuse for such conduct.” Denofa, supra, 187 N.J. at 40, (citing N.J.S.A. 2C:1-14i).

The New Jersey Criminal Code defines “conduct” as “an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions.” N.J.S.A. 2C:1-14d. That is, conduct may be either an act, or the failure to act when a person is under an obligation to act.

Although there is no definition of “status” within the Code, *Black’s Law Dictionary* defines “status” as:

1. A person’s legal condition, whether personal or proprietary; the sum total of a person’s legal rights, duties, liabilities, and other legal relations, or any particular

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<sup>4</sup> It is unlikely that the defendants can be “charged with the care or custody of a child” as defined in the statute since that language has been strictly construed to apply only to persons who have been assigned responsibility for a child’s care or custody by a court or public agency under Title 30. State v. McAllister, 394 N.J. Super. 571, 576 (App. Div. 2007).

group of them separately considered <the status of a landowner>. **2.** A person's legal condition regarding personal rights but excluding proprietary relations <the status of a father> <the status of a wife>. **3.** A person's capacities and incapacities, as opposed to other elements of personal status <the status of minors>. **4.** A person's legal condition insofar as it is imposed by the law without the person's consent, as opposed to a condition that the person has acquired by agreement <the status of a slave>. [Black's Law Dictionary (9<sup>th</sup> ed. 2009).]

In this case, defendant's "status" alone as a teacher or chaperone is not sufficient to establish criminal culpability. The State must prove beyond a reasonable doubt that defendants (1) knowingly engaged in sexual penetration with the alleged victims; (2) knowingly engaged in "conduct" either as a teacher or chaperone within the State of New Jersey, establishing supervisory power over the alleged victims, or providing care for them; and (3) that such conduct continued during the class-sponsored trip in Germany.

In State v. Buscham, 360 N.J. Super. 346 (App. Div 2003), a jury convicted a summer-term gymnastics teacher of aggravated sexual assault upon one of his students. On appeal, defendant challenged the sufficiency of the evidence to support the conviction. The State's theory was that defendant served as the victim's gymnastic coach and that he held "supervisory or disciplinary power" over the victim as a consequence of that "occupational status," sufficient to make his conduct a crime under N.J.S.A. 2C:14-2a(2)(b). Id. at 360.

The court stated "we have no quarrel with the general proposition that a coach can, indeed, be in a position to possess significant psychological or emotional power over a team member and that, in appropriate circumstances, a coach can be found to have supervisory or disciplinary power." Id. at 361. However, because the evidence was ambiguous in that it could support a finding in either direction, the Appellate Division remanded the matter for

the jury to consider various factors to determine whether or not the defendant exercised supervisory or disciplinary power. Id. at 362. The Appellate Division further stated that

“[t]he statute, in our view, speaks to the nature of the relationship which exists between an accused defendant and an alleged victim. . . . [T]he jury may consider whether there was a significant disparity in ages and/or maturity level between the two; the role that the athletic activity plays in the life of the alleged victim; the extent, if any, to which the coach has offered guidance and advice to the alleged victim on questions and issues outside the athletic arena; and the power or ability of the coach to affect future athletic participation or success. We list these factors by way of example only, with no intent to exhaust the field. Counsel and the trial court may well be able to identify additional items. *The jury should examine the entire context of the relationship.*”

[Id. at 362. (emphasis added)].

Defendants argue that the facts in this case are similar to those presented in State v. Ishaque, 312 N.J. Super. 207 (App. Div 1997) where the court held that New Jersey had no jurisdiction to prosecute a bigamy offense since the conduct constituting the offense took place in Pakistan. Specifically, defendant’s marital “status” in Ishaque, supra, 312 N.J. 207 did not constitute “conduct” in order to establish jurisdiction, and the only conduct that constituted the offense of bigamy was the subsequent marriage, which occurred outside the territorial limits of New Jersey. Id. at 211. Similarly, defendants assert that their positions as teachers or chaperones are not elemental “conduct” but merely establish their “status” *vis a vis* the alleged victims.

The status of a married person in Ishaque, supra, 312 N.J. Super. 207 is distinguishable from the status of a teacher. School authorities, teachers and coaches are obligated to take reasonable precautions for the safety and well-being of the children they oversee. Jackson v. Hankinson, 51 N.J. 230, 235 (1968). Therefore, the status of a teacher

presupposes conduct.

Based upon the aforesaid definitions and case law, it is clear that “supervisory or disciplinary power” over an individual or “assuming the responsibility for the care of a child” is “conduct,” which is a material element of the offenses charged in the indictment. That conduct is not unconnected with, but is the exact type of conduct that the legislature sought to prevent by the law defining the offenses. N.J.S.A. 2C:1-1h; N.J.S.A. 2C:14-2c(3)(b); N.J.S.A. 2C:24-4a.

The court is satisfied, based upon the facts alleged in the indictment, that a rational fact-finder could conclude that the location of the crime occurred in this State. State v. Reyes, 50 N.J. 454 (1967). Thus, whether or not such “conduct” occurred within the State to establish a material element of a criminal offense is a question of fact for the jury to determine.

As in Buscham, supra, 360 N.J. Super. 362, the jury may consider among other factors: the disparity in ages and/or maturity level between them, the relationship of the individual defendants to the victims here in New Jersey during the school year; the duties and responsibilities with which defendants were charged as chaperones on the school-sponsored trip; the extent to which defendants exercised physical control over the victims here in New Jersey at the commencement of the school-sponsored trip and abroad; and their responsibilities to the victims while in transit, at the hotels, and during the excursion in Europe. Also, as a required material element of the offenses, the jury should consider to what extent defendants assumed the responsibility for the care of the victims and/or

exercised control over the victims with respect to time, location and personal contacts. In other words, the entire context of the relationship should be presented to the jury to determine if defendants engaged in “supervisory or disciplinary conduct” which constitutes a material element of the crime of sexual assault, or if defendants undertook a “duty of care” for the victims constituting a material element of the crime of endangering the welfare of a child.

### **III. Principles of International Law**

Neither the Legislature nor the courts (Federal or State) are bound to the dictates of international law when enacting or interpreting statutes with extraterritorial application.<sup>5</sup> Nevertheless, international law supports rather than dictates decisions in the area of the overseas application of American law.

“To what extent does international law permit a nation to exercise extraterritorial criminal jurisdiction? The question is essentially one of national interests. What national interest is served by extraterritorial application and what interests of other nations suffer by an extraterritorial application?” Charles Doyle, Cong. Research Serv., RS22497, Extraterritorial Application of American Criminal Law, Congressional Research Service Report for Congress, 11 (2012).

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<sup>5</sup> “Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.” United States v. Yunis, 924 F. 2d 1086, 1091 (D.C.Cir. 1991); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) (citations omitted) (“In determining whether Congress intended a federal statute to apply to overseas conduct, ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.’ Nonetheless, in fashioning the reach of our criminal law, ‘Congress is not bound by international law.’ ‘If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law.’”); United States v. Felix-Gutierrez, 940 F. 2d 1200, 1204-06 (9th Cir. 1991).



The most common classification of these interests dates to a 1935 Harvard Law School study, which divided them into five categories or principles corresponding to the circumstances under which the nations of the world had declared their criminal laws applicable:

- (1) the territorial principle which involves crimes occurring or having an impact within the territory of a country;
- (2) the nationality principle which involves crimes committed by its nationals;
- (3) the passive personality principle which involves crimes committed against its nationals;
- (4) the protection principle which involves the crimes which have an impact on its interests as a nation; and
- (5) the universal principle which involves crimes which are universally condemned.

[Id. at 11 (citing Harvard Research in International Law, Jurisdiction with Respect to Crime, 29 Am. J. Int'l. L. 435, 445 (Supp. 1935).]

The American Law Institute's Restatement (Third) of the Foreign Relations Law of the United States (1987) Restatement contains perhaps the most comprehensive, contemporary statement of international law in the area. It indicates that reasonableness defines the latitude that international law affords a country to enact, try, and punish violations of its law extraterritorially; its assessment of reasonableness mirrors a balancing of the interests represented in the Harvard study principles. Id.

Section 403 of the Restatement provides:

“Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

- (a) the link of the activity to the territory of the regulated state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.”

[Restatement (Third) of The Foreign Relations Law of the United States, supra, § 403.]

An analysis of the Harvard factors and the Restatement supports the prosecution of defendants in New Jersey under the specific facts of the indictment herein. Both the actor and the victims are New Jersey residents. The State of New Jersey has a substantial interest in regulating the conduct of supervisory personnel to ensure the safety and protection of its children. Likewise, parents entrusting their children to such supervisory personnel justifiably expect that their children will be cared for as if they were in their own homes.

It is unlikely that Germany would prosecute the matter since the allegations of sexual conduct were not disclosed until the victims returned to New Jersey. Moreover, the criminal statute in that jurisdiction requires a person in the position of power to *abuse that power* in the furtherance of the sexual conduct to negate consent of a seventeen-year-old child. Strafgesetzbuch [StGB][Penal Code], Nov. 13, 1998, Bundesgesetzblatt, Teil I [BGBl. I] 945-3322, as amended, §174 (Ger.). Thus, even if defendants engaged in conduct that established “disciplinary or supervisory power,” the prosecution must prove the additional element of “abuse of authority” to establish criminal liability for the acts alleged in the indictment under the German Code.

However, even if defendants were subject to prosecution in Germany, the State of New Jersey would not be precluded from prosecuting defendants. See Ex parte Davis, 54 F. 2d 723, 727 (9<sup>th</sup> Cir. 1931) (allowing defendant to be expedited to Mexico for stabbing that occurred in Mexico, but death in California, “notwithstanding the possibility that he might also be tried for murder in California.”)

Federal and State courts have also extended territorial jurisdiction beyond the State’s borders where the victim is a resident of the State and where the State has a substantial interest to protect its residents. See Skiriotes v. State of Florida, 313 U.S. 69, 74,(1941) (“[A] criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect.”); State of Alaska v. Jack, 125 P. 3d 311, 322 (2005)

(holding Alaska had jurisdiction to prosecute an act of sexual assault on a ferry traveling to Washington, even though there was no controlling statute prohibiting the offense beyond Alaska's borders because Alaska had a substantial interest in protecting people on the ferry and in protecting against the harmful effects on tourism and Alaska's economy if the crime was not prosecuted); State of California v. Burt, 288 P. 2d 503, 506 (1955) (California had jurisdiction to prosecute the defendant for solicitation of a woman to commit extortion in Mexico because "[s]uch solicitation [wa]s inimical to the public welfare and to the safety and morals of the inhabitants of th[e] state").

The court rejects defendants' argument that extending territorial jurisdiction to the facts of this case would result in an expansion of the State's power "without territorial limit." Defendants correctly assert that a person located in the State of California who assaults a New Jersey resident while on vacation in California cannot be prosecuted in New Jersey. Nor should persons traveling outside the geographical boundaries of this State be concerned that they could be prosecuted for acts which might be deemed criminal in this State, but are legal in the place where they travel. For example, a New Jersey resident vacationing in Amsterdam who possesses marijuana in that country, is not subject to criminal prosecution in New Jersey for possession of a Controlled Dangerous Substance (CDS) while in Amsterdam since none of the material elements of the offense occurred here in New Jersey.

Rather, a person who exercises supervisory or disciplinary power in this State, or who assumes the responsibility for the care of a child in this State, shall, by continuing to exercise such conduct beyond the geographical borders of this State, be subject to criminal

prosecution for sexual offenses committed against those children outside the geographical jurisdiction of this State, whether or not the intent to engage in such sexual conduct was formed in New Jersey or in another jurisdiction.

Therefore, under the narrow facts of this case, the court finds that “conduct” in New Jersey constitutes an anchor, to which jurisdiction to this State is tethered. If the State is able to prove beyond a reasonable doubt that such conduct commenced in New Jersey and continued overseas, defendants may be held criminally responsible for the consequences of such conduct under New Jersey law, notwithstanding where the sexual acts occurred.

**Conclusion.**

For the above reasons, the court finds that the “supervisory or disciplinary power” requirement under N.J.S.A. 2C:14-2c(3)(b) and the “assumption of responsibility” requirement under N.J.S.A. 2C:24-4a are deemed “conduct” which are material elements of those respective offenses as set forth in N.J.S.A. 2C:1-3a(1) and N.J.S.A. 2C:1-14i. Moreover, the prosecution of defendants in this State for the crimes alleged in the indictment does not offend traditional principles of international law.

Accordingly, defendant’s motion to dismiss the indictment for lack of territorial jurisdiction is DENIED.