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July 6, 2025

The Honorable Marc C. Lemieux, A.J.S.C.
Monmouth County Superior Courthouse
71 Monument Park
Freehold, NJ 07728

Re: **State v. Paul Caneiro**
Case No. 18-004915 / Indictment No. 19-02-283-I

Motion to Dismiss Counts 13 & 14 of the Indictment – Defense Reply

Dear Judge Lemieux:

Please accept this supplemental filing in reply to the State's response to the defense's Motion to Dismiss Counts 13 & 14 of the Indictment.

In its response, the State argues that it satisfied its responsibility to charge the grand jury with the gradation of these two offenses (Counts 13 & 14) because it did so 3 months prior, on November 5, 2018 during the Grand Jury Orientation. However, as expressed in State v. Triestman, 416 N.J. Super. 195, 207 (App. Div. 1990), this time lag is problematic. In Triestman, the Appellate Court considered an instruction given at grand jury orientation 2 months prior to the presentment that did not precisely reference the statute of sexual assault. The Appellate Court then held:

> The misleading effect of this charge **was compounded by the passage of more than two months before the prosecutor presented this case**. In the interim, the grand jury had considered a variety of sexual and other crimes. The average grand juror could not possibly be expected to recall and apply the elements of any crime, including criminal sexual contact, after such a hiatus.

Id. at 207. Here, the grand jury was charged as to the gradation 3 months prior to the presentment in this case. As such, 'the average grand juror' could not be expected to remember the gradation as to these offenses. Moreover, as this Court is likely aware, grand jury presentments are routinely preceded with a reading of the statutes and elements of the offense, which did not occur here. Further, even when the prosecutor has already presented the grand jury with a familiar offense, the prosecutor typically inquires of the grand jury whether they need to be refreshed on the charge. Here, this did not occur: the grand jurors were not offered a refresher on the gradation. As such, the grand jurors were neither read the gradation within a reasonable time frame nor were they offered the opportunity to have it read to them, so that either their memories could be refreshed or the record could clearly indicate no such refresher was needed.

Further, as was the case in Triestman, supra, the **statute** of these two offenses – Counts 13 and 14 – were not specifically identified to the grand jury. That is, during the 2/11/19 presentment, the State merely read the name of the offenses "theft" and "misapplication of entrusted property" without identifying the relevant 2C statute. As Triestman makes clear, this is extremely problematic because the grand jurors cannot be expected to assume that the statute associated with these two offenses are the same statutes read to them 3 months prior. Indeed there are many variances of the theft statute. As the Triestman Court explained:

> Needless to say, even had the prosecutor presented the case against defendant on September 23, 2008, [the date of orientation] the grand jury could not have applied

> the law to the facts. First, the prosecutor in the above-quoted passage should have referenced "Section 2C:14–2c(1) through (4)", not "Section 2C:14–2c through (4)." **Second, the prosecutor never indicated that she was charging the jury on N.J.S.A. 2C:14–2c at all; she merely informed the jury that she was charging them on "sexual assault." Thus, although the jury knew it had been charged on offenses under N.J.S.A. 2C:14–2, it had no idea which portion of that charge contained the circumstances that would establish criminal sexual contact under N.J.S.A. 2C:14–3.**

Triestman, 416 N.J. Super. at 206-07. Here, similarly, the prosecutor "never indicated that she was charging the jury on N.J.S.A. [2C:20-3a or 2C:21-15] at all; she merely informed the grand jury that she was charging them on "[theft and misapplication of funds]." See ibid.

Second, the State argues that despite the State not indicating during the presentment that the total amount of alleged theft was $78,180, the grand jurors were expected to perform the math of the various amounts transferred and agree upon same. However, there is no clarity in the record with respect to whether the grand jurors in fact agreed that the amount was $78,180 or any amount less or more based on the various alleged transfer amounts presented. In fact, the amounts presented to the grand jury amount to $79,180 – not $78,180 as alleged in the Indictment. ($31,900 + $1,500 + $280 + 44,500 + $1,000 = $79,180). (T:92-1 to 93-5).

Additionally, because alleged theft and alleged misapplication of funds occurred by way of numerous transactions over a 23-month period, the grand jury needed to decide whether this was an aggregated theft, and same was not explained to them. "The amount involved in a theft is not simply a sentencing factor, but is an element of the crime that must be determined by the grand jury and the finder of fact at trial." State v. Childs, 242 N.J. Super. 121, 131 (App. Div. 1990) (citing State v. Vasky, 218 N.J. Super. 487, 491 (App. Div. 1987)). "Where it applies, the statute

permits a grand jury to charge a single second-degree theft by aggregating the amounts involved in separate lesser thefts." Ibid. However, "Before aggregating the amount involved in two or more thefts, the finder of fact must first determine whether the thefts are constituent parts of a single scheme or course of conduct. This threshold determination is an element of an aggregated theft crime." Ibid. Here, the grand jurors were never told that this was allegation of aggravated theft with respect to Counts 13 and 14 of the Indictment, and thus the requisite findings with respect to this element were never presented to, nor found by, the grand jury.

For these additional reasons, the defense respectfully submits that these Counts of the instant Indictment must be dismissed.

Respectfully,

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cc: AP Christopher Decker; AP Nicole Wallace