PHIL MURPHY
Governor

State of New Jersey
OFFICE OF THE PUBLIC DEFENDER
Monmouth Region
JOSHUA HOOD, DEPUTY PUBLIC DEFENDER
7 BROAD STREET
FREEHOLD, NEW JERSEY 07728
TEL :732- 308-4320
FAX: 732-761-3679
TheDefenders@OPD.NJ.GOV

JENNIFER N. SELLITTI
Public Defender

July 2, 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

Dear Judge Lemieux:

Please accept this letter brief, in lieu of a more formal brief, in support of the defense's Motion to Dismiss Counts 13 & 14 of the Indictment.

RELEVANT FACTS/ PROCEDURAL HISTORY

On February 11, 2019, the State presented the matter of State of New Jersey v. Paul Caneiro to a Monmouth County grand jury. Among the sixteen counts in the proposed indictment were one charge of second-degree theft of moveable property contrary to N.J.S.A. 2C:20-3a (Count 13), and one charge of fourth-degree misapplication of entrusted property contrary to N.J.S.A. 2C:21-15 (count 14).

After a brief synopsis of the case, the State called its only witness, Detective Patrick Petruzziello of the Monmouth County Prosecutor's Office. After detailing events which transpired on November 20, 2018, the State moved on to questioning Detective Petruzziello regarding the financial crimes outlined in counts thirteen and fourteen. Specifically, Detective Petruzziello testified about an irrevocable trust which was established for the benefit of Keith Caneiro in 1999. (T.1 P.88 L.16-23). The grand jurors were also told that this trust maintained a 3 million dollar life insurance policy which insured the life of Keith Caneiro, and that Paul Caneiro was appointed as trustee. In this role as trustee, Detective Petruzziello explained that Paul Caneiro was responsible for paying regular premiums on the insurance policy. (T.1 P.89 L.1 - P.90 L.23).

Despite this fiduciary responsibility, however, the grand jurors were told that on more than one occasion, Paul diverted funds earmarked for the payment of trust premiums, and transferred them into his or his wife's personal bank accounts. (T.1 P.92. L.1-23). The result of these monetary diversions, the grand jurors were told, was that the premiums owed on Keith's life insurance policy were not fully paid in the years 2017 and 2018.

Detective Petruzziello testified that in 2017, Paul paid $25,709 in insurance premiums, which constituted a $5,491 shortall versus the $31,200 that was due to be paid on the policy that year. The Detective informed the grand jurors that in the same year, Paul transferred $31,900 into a personal banking account, and $1,500 into a joint checking account with his wife. Id. The Detective testified that in 2018, Paul transferred $44,500 into his personal bank account, while only paying $8,500 towards insurance premiums. (T.1 P.93 L.1-14).

At the conclusion of Detective Petruzziello's testimony, the State read the charges being presented for the grand jury's consideration. As to count thirteen, (second-degree) theft of moveable property, the State explained:

> You have a count of theft which states, a person is guilty of theft if he unlawfully takes or exercises unlawful control of movable property of another with the purpose to deprive him thereof. And that's with respect to the trust fund.

(T.1 P.136 L.16-20). The State never read the degree or grading of the charge.

As to count fourteen, misapplication of entrusted property, the State recited the following:

> Count 14, misapplication of entrusted property. And that states, a person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary in a manner which he knows is unlawful and involves substantial risk of loss or a detriment to the owner of the property or to a person for whose benefit the property was entrusted, whether or not the actor has derived a pecuniary benefit. And fiduciary includes trustee in that definition.

(T.1 P.135 L.21 - P.136 L.5). Once again, the State never read the degree or grading of the charge.[1]

As a result of this presentation, an Indictment was returned charging (in relevant part) second-degree Theft (Count 13) and fourth-degree Misapplication of Funds (Count 14).

On December 9, 2024, a "Pretrial Memorandum" (Plea Cutoff Form) that was signed by all parties – the State, defense counsel, the Court, and the defendant – indicated, on page 1A that

[1] It is the defense's understanding that the State takes the position that it is 'not allowed' to present the degree or grading of these two theft-related offenses. However, this position is clearly contrary to law as well as to the State-wide practice where assistant prosecutors routinely present the charged degree and grading of theft-offenses to the grand jury. Moreover, it is contrary to the practice of the MCPO, where the degree and gradation of theft charges are likewise routinely presented to the grand jury. Upon request, the defense can provide examples of presentments that clearly demonstrate this well-established practice.

Mr. Caneiro was facing charges of 2nd degree Theft (Cout 13) punishable by "10 yrs NJSP" and 4th degree Misapplication of Entrusted Funds (Count 14) punishable by "18 months NJSP."

On June 29, 2025, the State submitted a Trial Memorandum in anticipation of the trial presently scheduled for September 8, 2025. Therein, the State – for the first time – requested that Count 14 be amended from a 4th degree to a 2nd degree. In response, and after further review of the grand jury transcript, the defense submits the instant Motion to Dismiss these two counts.

LEGAL ARGUMENT

The New Jersey Constitution guarantees the right to have a grand jury consider all crimes before the return of an indictment. N.J. Const. art. I, 8. "It is the duty of the grand jury to bring to trial individuals who are probably guilty and to clear the innocent of baseless charges." State v. Triestman, 416 N.J. Super. 195, 204 (App. Div. 2010). "The grand jury stands between the defendant and the power of the State protecting the defendant from unfounded prosecutions." Ibid. (citations and internal punctuation omitted). "The grand jury is a judicial, investigative body, serving a judicial function; it is an arm of the court, not a law enforcement agency or an alter ego of the prosecutor's office." Bell, 241 N.J. 552, 559 (2020) (quoting In re Grand Jury Appearance Request by Loigman, 183 N.J. 133, 141 (2005)). "Grand jury proceedings are largely controlled by prosecutors." Id. at 205.

A court should dismiss an indictment when it is manifestly deficient or palpably defective. State v. Twiggs, 233 N.J. 513, 544-45 (2018). "[T]he presence of the right to indictment in [our] State Constitution indicates that the grand jury was intended to be more than a rubber stamp of the prosecutor's office." State v. Tucker, 473 N.J. Super. 329, 342 (App. Div. 2022) (quoting State v. Hogan, 144 N.J. 216, 236 (1996)), leave to appeal denied, 252 N.J. 481 (2023). Courts act to ensure

the fairness and integrity of grand jury proceedings and to ensure that a defendant's right to a fundamentally fair grand jury presentation has not been violated." Id. at 343 (quoting State v. Shaw, 241 N.J. 223, 229-30 (2020) (internal punctuation omitted)). "Scrutiny of grand jury proceedings is particularly probing when a motion to dismiss an indictment claims that a deficiency in the proceedings affected the grand jurors' ability to make an informed decision whether to indict." State v. Bell, 241 N.J. 552, 560 (2020) (internal punctuation and citation omitted).

"The grand jury must be presented with sufficient evidence to justify the issuance of an indictment[,]" and "[t]he absence of any evidence to support the charges [] render[s] the indictment 'palpably defective' and subject to dismissal." State v. Morrison, 188 N.J. 2, 12 (2006). The prosecutor not only serves as the presenter of fact but also as the legal advisor to the grand jury. "[A] Prosecutor's advice to the lay jury on the applicable law helps make the grand jury more effective." State v. Laws, 262 N.J. Super. 551, 562 (App. Div.), certif. denied, 134 N.J. 475 (1993). "A prosecutor is obligated to charge the grand jury as to the elements of specific offenses and specific exculpatory defenses." Triestman, 416 N.J. Super. at 205 (citation omitted). Accord Bell, supra. "[N]othing in the New Jersey Constitution demands a verbatim reading of applicable statutes or a recitation of all legal elements of each charge." State v. Hogan, 336 N.J. Super. 319, 340 (App. Div. 2001), certif. denied, 167 N.J. 635 (2000). However, the prosecutor must read the statutory definitions of each element of the charged offenses, State v. Ball, 268 N.J. Super. 72, 118 (App. Div. 1993), affirmed, 141 N.J. 142 (1995), cert. denied, 516 U.S. 1075, 116 S.Ct. 779 (1996), or rely upon a modified Model Jury charge. Where the evidence possessed by the State presents a statutory exemption negating guilt, the State is mandated to instruct the jury as to the exemption. Saavedra, 222 N.J. at 65.

POINT I

COUNTS 13 AND 14 OF THE INDICTMENT ISSUED AGAINST PAUL CANEIRO MUST BE DISMISSED BECAUSE, BY FAILING TO PRESENT THE ELEMENT OF VALUE AS TO EITHER CHARGE, THE STATE OMITTED A CRITICAL ELEMENT OF THE OFFENSES.

Facts which aggravate the crime for which a defendant is accused and enhance the punishment to which he will be subject are considered an "element" of the offense and must therefore be charged in an indictment. State v. Ingram, 98 N.J. 489, 488 (1985), *quoting* State v. Hock, 54 N.J. 526, 536 (1969). As such, the value of stolen property must be alleged in a theft indictment because the value determines the degree of the offense. If the "indictment fails to allege the value of the property stolen, then, absent a waiver, the defendant can be convicted only of the lowest indictable theft offense." State v. Rodriguez, 234 N.J. Super. 298, 305 (1989).

As held in State v. D'Amato, 218 N.J. Super. 595, 606-07 (App.Div. 1987), the amount of a theft "constitutes an element of the offense to be proven by proof beyond a reasonable doubt and that, as an element of the offense, the amount must be alleged in the indictment." In D'Amato, the court ultimately upheld defendant's conviction for third-degree theft, but did so because defendant failed to raise a pretrial objection to the grand jury presentation, and because defendant testified at his own trial to being aware that the value of the stolen property was in excess of $2,000. D'Amato, 218 N.J. Super. at 607-08.

In the present matter, Paul Caneiro has raised this Motion to Dismiss prior to trial, and has made no concessions regarding the value of the allegedly stolen/misapplied monies mentioned in the indictment against him. Therefore, unlike in D'Amato, Mr. Caneiro's application to dismiss counts thirteen and fourteen are neither untimely nor waived by notice.

As to count thirteen of the present indictment, the grand jurors were told only that they needed to consider whether Paul Caneiro took control over the property of another with the intent to deprive the owner thereof. The grand jurors were not told that the value of the property taken was in any way significant, nor that the value of the property constituted a necessary element of the offense. Likewise, as to count fourteen, the grand jurors were again told about all of the elements related to misapplication of entrusted property except for the element relating to the value of that property.[2] Whether facts were presented during the grand jury testimony relating to value is not the point. The grand jurors were never told that a specific value threshold is a necessary element of both offenses.

The grand jurors, therefore, could have rejected the testimony, either in part or in full, regarding the value of the trust property and yet still returned an indictment against Paul Caneiro on these charges because they were never informed that value was a critical element. As a result, it is unknown whether the grand jurors found that amount – if any – misapplied was less than $1,000 (a 4th degree); more than $1,000 but less than $75,000 (a 3rd degree); or $75,000 or more (a 2nd degree). Without the jury making this specific finding, it is unknown what amount, and therefore what degree of charge, the grand jurors found to be misapplied. Indeed, the grand jurors could have been under the impression that *any* amount of misapplication was the same degree charge. Likewise, they could have assumed the same with the theft offense. These uninformed/ misinformed decisions are precisely the kind that the grand jury process seeks to avoid.

Making no mention whatsoever regarding the element of value as to either count 13 or 14 very clearly demonstrates the State's omission of critical elements regarding both offenses.

[2] Pursuant to N.J.S.A. 2C:21-15, the "benefit derived" from a violation of this statute must amount to $75,000 or more in order for the offense to be charged as a second-degree crime.

D'Amato, *supra*. This omission of a critical element regarding both charges deprived the grand jurors of the ability to make an "informed decision whether to indict" Paul Caneiro on counts 13 and 14. State v. Bell, 241 N.J. at 560. Without being informed of these elements, it cannot be said that the grand jurors were charged on every element of counts 13 and 14. *See* Ball, *supra.*

By depriving the grand jurors of a correct charge on the law and thereby preventing the grand jurors from exercising their essential function, the State's inadequate presentation creates the possibility that this grand jury voted to indict on counts 13 and 14 because they were armed with less than all information on the elements necessary for the offenses to be complete. Without recitation of the essential element of value, it is unclear whether this grand jury may have rejected Detective Petruzziello's testimony regarding the specified monetary amounts diverted, and yet still voted to return an indictment on these counts because they were simply misinformed on the critical element of value as to each.

POINT II

AT THE VERY LEAST, THE PROSECUTOR SHOULD NOT BE PERMITTED TO AMEND THE INDICTMENT FROM A FOURTH DEGREE TO A SECOND DEGREE ON THE EVE OF TRIAL.

In State v. Dorn, the defendant was charged in a multi-count indictment with, among other things, third-degree possession with intent to distribute marijuana within 500 feet of public housing, and third-degree possession of more than one ounce of marijuana. Dorn, 233 N.J. 81, 87-88 (2018). Prior to trial, the prosecution realized that the indictment contained an error related to the first of these charges. Specifically, because defendant was charged with possessing more than an ounce of marijuana, the charge of being within 500 feet of public housing should have been a second-degree offense, as opposed to the third-degree offense charged in the indictment. Id. at 88.

On the eve of trial, the State moved to amend this count of the indictment, raising the degree of the charge from a third-degree to a second-degree offense. Id. The State's contention in this application was that the change was one of form and not substance, and that testimony relating to the quantity of marijuana possessed was elicited during the grand jury presentation. Id. The trial court agreed that the error in the indictment was merely "typographical," and that it was, "clear that the grand jury had information that they believed to be credible, so that they returned count [five] which specifically indicates the quantity of over one ounce." Id.

In reversing this trial court ruling, the Supreme Court found that this amendment to the indictment amounted to more than a scrivener's error, and that the degree of an offense charged in an indictment is an essential element of that crime. Id. at 97, ("Rather, the degree determination is analogous to the requirement that the State enumerate the value of stolen goods in a theft charge, a fact that impacts the extent of a defendant's exposure and is, therefore, an element of the crime." *citing* D'Amato, 218 N.J. Super. at 605–07).

Likewise the Supreme Court refuted the argument that the facts elicited during the grand jury presentation as to the weight of the contraband somehow placed the defendant on notice that the public housing charge was more appropriately one of the second-degree. To quote the Court on this point:

> To be sure, the State submitted evidence of defendant's possession of more than one ounce of marijuana to the grand jury. However, the indictment makes no mention of the weight of the marijuana in count two. Thus, even though the grand jury heard evidence and returned an indictment to that effect in count five, there is nothing in the record demonstrating that the grand jury intended to charge defendant with possession of more than one ounce of marijuana in count two or for

> the defendant to face the heightened criminal liability associated with the higher-degree charge.

Dorn, 233 N.J. at 97-98.

Regarding count fourteen of the indictment returned against Paul Caneiro, the State now seeks an amendment of the charge, raising it from a fourth-degree to a second-degree offense, but it is abundantly clear from the holding in Dorn that this is impermissible. Not only is the elevation in the degree of the crime a "substantive" change to the offense. Id. at 98. Beyond that, and regardless of the factual presentation to the grand jury, it elevates the offense to one which, "there is nothing in the record demonstrating that the grand jury intended to charge." Id. Here, (as discussed in Point I, supra), where the State neglected to charge the jury on the grading of this offense, there is a clear void in the record as to what degree the grand jurors "intended to charge." To amend the charge now – without a clearer record before the grand jury – would be unfair, unjust, and violation of due process.

The implication is that whether or not the State presented evidence during the testimony of Detective Petruzziello regarding value, there was nothing in the State's charge on the elements which tied this testimony to the value of property allegedly misapplied. The grand jurors were never asked to make a determination on the value of the property in reference to whether all elements of the offense were established. For this reason, "there is nothing in the record demonstrating that the grand jury intended to charge" Paul Caneiro, with a second-degree misapplication of entrusted property charge. Id. The State cannot now upwardly amend count fourteen of the indictment. The change is prejudicial in the sense that it increases Paul Caneiro's carceral exposure, is a substantive change to the indictment, and would reflect a change that was never countenanced by the grand jury who indicted the matter. Id.

POINT III

STATE V. MURPHY REQUIRES DISMISSAL OF THE INDICTMENT DUE TO THE PROSECUTOR'S FAILURE TO INQUIRE AS TO POTENTIAL GRAND JUROR BIAS

The New Jersey Supreme Court has held that our State's constitutional right to indictment contemplates indictment by an unbiased grand jury. State v. Murphy, 110 N.J. 20, 30 (1988). In Murphy, the Court established the procedures to be followed to secure impartial grand jurors: "as an officer of the court, the prosecuting attorney has a responsibility to bring to the attention of the presiding judge any evidence of partiality or bias that could affect the impartial deliberations of a grand juror." Id. at 33. Upon such a disclosure, the presiding judge must determine whether partiality or bias exists and whether it justifies excusal of the grand juror from the particular case being considered or from the panel. Ibid.

In Murphy, the grand jury presentation involved a conspiracy to defraud various insurance companies. Two of the victim insurance companies were Allstate and State Farm. One grand juror disclosed she was currently employed by Allstate, another disclosed she was currently involved in litigation with Allstate, and a third disclosed he was currently employed by State Farm. 110 N.J. at 24-25. Our Supreme Court held the jurors had disclosed a sufficient basis for a finding of potential bias to require the prosecutor to refer them to the assignment judge. Id. at 35-36. Instead, the prosecutor excused the one employee and the next week instructed the grand jury foreman to speak to the second juror employee off the record to investigate his potential bias. Id. at 25-26. After speaking with the juror in the presence of the other jurors, the foreman informed the prosecutor that the other jurors had voted to keep the second employee on the jury. The grand jury returned an indictment. The defendant's motion to dismiss the indictment was denied. The

Appellate Division affirmed, holding that the defendant had failed to demonstrate actual prejudice. Id. at 26. The Supreme Court upheld the decision as to this particular defendant but warned that future deviations from the appropriate procedure to determine bias would result in dismissal of the indictment. Id. at 36.

Rule 3:6-3(a) was promulgated in response to the Murphy decision. Comment 2 to R. 3:6-3. That provision states, in full:

> When appropriate, the Assignment Judge shall inquire of potential grand jurors about such aspects of their backgrounds as may reveal possible bias or interest in a matter to come before the grand jury. The Assignment Judge shall instruct the grand jury that without the Assignment Judge's approval **no grand juror shall participate in any matter in which that juror has a bias** or a financial, proprietary, or personal interest; and if that juror wishes to participate, the juror shall forthwith so inform the prosecutor. The prosecutor shall forthwith inform the Assignment Judge, who shall determine, in camera, whether such bias or interest exists and whether it justifies excusal.

R. 3:6-3(a) (emphasis added).

In State v. Brown, 289 N.J. Super. 285 (App. Div. 1996), the appellate court elaborated on the prosecutor's duty under Murphy to determine whether a grand juror's disclosures warrant referral to the assignment judge. In this regard, the Brown Court instructed:

> We have no doubt that when a potential for bias or interest arises, the prosecutor may make a threshold finding to determine if the facts as presented by the grand juror have the potential for bias or interest. Once a grand juror makes known a basis for questioning his or her ability to proceed due to bias, financial, proprietary or personal interest, the prosecutor must explore whether the situation has the potential for warranting excusal and determine the juror's position on the issue. If the circumstances appear sufficient to raise a reasonable inference of bias or interest, that minimal threshold is met and the prosecutor must refer the matter to the Assignment Judge for a determination.

Id. at 291 (emphasis added). Accord State v. Murphy, 213 N.J. Super. 404, 411-12 (App. Div. 1986) (holding that prosecutor's duty to make referral to assignment judge exists only where "there is a legitimate and colorable issue as to the propriety of a grand juror remaining on the panel because of possible prejudice"), aff'd, 110 N.J. 20 (1990); Hogan, supra, 336 N.J. Super. at 350 (prosecutorial duty of referral exists "where a prosecutor obtains information which supports a legitimate and colorable basis for believing that a grand juror lacks impartiality").

The weight of authority in this state indicates that a colorable basis for finding potential bias exists where a grand juror has a present connection either to the matter he or she will be considering, or with the actors or litigants involved. The Grand Jury Manual recommends informing the grand jury that "if a juror has **personal knowledge of the facts of a case** or is acquainted with a witness, victim or defendant, the juror should call that fact to the attention of the foreperson or prosecutor." New Jersey Grand Jury Manual 11 (Aug. 1993) (emphasis added). The Standard Grand Jury Charge likewise instructs:

> **It sometimes occurs that a grand juror has formed an opinion about a case before hearing evidence** or may be influenced by a financial or personal relationship to a case, such as being acquainted with a victim, witness, law enforcement officer, a target for possible indictment or anyone else involved in the matter. Because every case must be decided on its own merits, it is inappropriate for your deliberations to be affected by your familiarity with such matters. In such a case you should decide whether or not you should disqualify yourself. If you are not certain whether you should excuse yourself from a case, you are required to inform the prosecutor, and a judge will decide whether you should hear that case.

Standard Grand Jury Charge, promulgated by Directive #6-06 (Apr. 25, 2006) (emphasis added).

Here, where the instant matter is one of the most well-known, widely publicized, high profile cases in the State, let alone in Monmouth County, the prosecutor should have made every effort to ensure that the grand jurors were not biased. To start, the prosecutor should have, at the very least, questioned the jurors to find out (1) whether they had any knowledge about the case, and (2) whether based on that knowledge they had formed any opinions about the case. Instead, however, the prosecutor simply told the grand jurors that "this case is newsworthy" and stated that she assumed "many of [the grand jurors] probably heard news accounts or read news stories about this or have seen or heard things on social media." That is, rather than discretely or objectively inquire whether anyone had knowledge about the case, the prosecutor directed the grand jurors' attention to the high-profile nature of the case and underscored that the case was 'newsworthy.' While the prosecutor did note that such news accounts "aren't always necessarily accurate," this does not cure the fact that the State failed to critically inquire whether the jurors had knowledge and as a result, had formed an opinion or harbored any bias. As a result, the indictment should be dismissed.

Respectfully,

/s/ Monika Mastellone
Monika Mastellone, Esq.
Attorney ID No. 122942014

/s/ Andy Murray
Andy Murray, Esq.
Attorney ID No. 007752008

cc: AP Christopher Decker; AP Nicole Wallace