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October 11, 2024

VIA E-COURTS
The Honorable Peter E. Warshaw, Jr., P.J. Cr.
Mercer County Criminal Courthouse
400 S. Warren Street
Trenton, New Jersey 08608

Re: State v. George E. Norcross III et al. (24-06-0111-S)

Dear Judge Warshaw:

We write on behalf of all Defendants, in advance of the status conference scheduled for this coming Wednesday, October 16, 2024.

On September 24, 2024, all Defendants filed a joint motion to dismiss the Indictment. The brief in support of that motion does not refer—not even once—to facts outside the Indictment, including the evidence presented to the grand jury. Neither do the supplemental briefs filed on behalf of any Defendant other than Defendant Tambussi.[1] Instead, those six briefs—the brief in support of the joint motion and those in support of the other five Defendants' motions—argue that, accepting the Indictment's factual allegations as true and assuming that each of those allegations was supported by evidence before the grand jury, those allegations simply do not amount to a crime as a matter of law. Those briefs also argue that the applicable statutes of limitations bar all charges on the face of the Indictment; Defendant O'Donnell's supplemental brief further explains why the charges are time-barred on their face. The Court can and should adjudicate those two purely legal arguments, and can and should do so without looking beyond the four corners of the indictment. That is exactly what the motions attacking the Indictment on its face request, and exactly what defense counsel represented to Your Honor they would request during the conference on September 10, 2024.

In its letter of October 8, 2024, the State does not, as it could not, contend that Defendants' joint brief or the supplemental briefs addressed to the face of the Indictment ever refer to any facts

[1] Defendant Tambussi's individual brief attacks the State's grand jury presentation. For that reason, his individual motion should be litigated on a separate track from the motions addressed to the facial sufficiency of the Indictment.

outside the indictment. Neither do they point to grand jury evidence. Instead, those briefs carefully argue that the Indictment, assuming all of its facts are true, does not set forth an offense, strictly as a matter of law, and that—again, strictly as a matter of law—its allegations run afoul of the statute of limitations, an argument the State fails to even mention in its October 8 letter.

To be clear, it is true that a defendant *may* seek to dismiss an indictment based on the State's failure to present the grand jury with evidence sufficient to support an indictment's allegations. And it is also true that a defendant may seek, under *State v. Hogan*, 144 N.J. 216 (1996), and its progeny, to dismiss charges based upon the State's failure to present exculpatory evidence to the grand jury, or other such misconduct. But a defendant may also seek dismissal: (1) as the State acknowledges, if an indictment fails to allege each and every element of an offense, *State v. Algor*, 26 N.J. Super 527, 531 (App. Div. 1953) (dismissing indictment because, "[h]owever progressively liberal has become the legislative and judicial attitude toward the literal composition of indictments . . . and the discretionary disinclination to quash them unless palpably defective, . . . yet it is basically imperative that an indictment allege every essential element of the crime sought to be charged."); (2) if, although all the elements of a crime are pled, an indictment does not set forth a sufficient factual basis to support those elements, *see, e.g., State v. Dorn*, 223 N.J. 81, 93 (2018) (An "indictment must allege all the essential facts of the crime"); or (3) as here, because the allegations of the Indictment—***even if accepted as true***—simply do not state an offense as a matter of New Jersey law. *See, e.g., State v. Perry*, 439 N.J. Super. 514, 532 (App. Div.) (affirming dismissals of indictments charging driving-while-suspended offenses where the facts alleged in the indictments established that "[n]one of these offenses occurred during the relevant court-imposed period of suspension"), *certif. den.*, 222 N.J. 306 (2015); *State v. Thompson*, 402 N.J. Super. 177, 204 (App. Div. 2008) (affirming dismissal of official misconduct charges where the facts alleged in the indictment established only an "unreasonable appearance of impropriety"); *State v. Mason*, 355 N.J. Super. 296, 299 (App. Div. 2002) ("Indeed, where the indictment is factually unsupported either on its face *or* in the grand jury proceedings, the dismissal is appropriate." (emphasis added)); *State v. Riley*, 412 N.J. Super 162, 169 (Law Div. 2009) (dismissing indictment where facts alleged did not "fall within the statute invoked").[2] For these sorts of challenges, Courts do not look beyond the four corners of the Indictment and evaluate the evidence before the grand jury.

In a clear effort to avoid having the Court actually assess whether the Indictment states a crime, the State points the Court to the grand jury record here. But the State cites no authority (because there is none) for the proposition that trial courts must review grand jury materials when

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[2] Federal law similarly allows such challenges to the sufficiency of an indictment's allegations as a matter of law. S*ee, e.g., United States v. Stock*, 728 F.3d 287, 291 (3d Cir. 2013) ("the sufficiency of [an] indictment[] on the basis that the specific facts alleged therein fall outside the scope of the relevant criminal statute . . . is a legal question."); *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002) ("We are thus constrained to reject the government's contention that an indictment or information charges an offense, for purposes of [a motion to dismiss] as long as it recites in general terms the essential elements of the offense, even if the specific facts alleged in the charging instrument fail to satisfy those elements" and "a charging document fails to state an offense if the specific facts alleged . . . fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.").

presented with a motion challenging the legal sufficiency of the Indictment as drafted by the State. Nor is it correct, as the State asserts, that it suffices for an indictment to make "statutory allegations"—that is, simply to mouth the statutory elements of the offenses charged. *See State v. Jeannotte-Rodriguez*, 469 N.J. Super. 69, 103 (App. Div. 2021) ("[a] valid indictment may not simply allege the 'essential elements of the offense'"). Indeed, that is not the theory animating Defendants' facial challenge to the Indictment. To defeat Defendants' motions in this case, the State must show that the Indictment, as written, sets forth the crimes alleged and was filed within the applicable statute of limitations. If the State cannot do that (and it cannot), the Court must dismiss the indictment as a matter of law.

In short, Defendants' motions do exactly what they said it would do: expose that the Indictment, taken as true, both fails to allege facts constituting the crimes charged and is time-barred. If the State cannot "appropriately oppose" those two purely legal arguments, then those motions should be granted, without the Court to examining "the entirety of the grand jury presentment," a process that would be not only non-responsive and improper at this stage, but also an enormous waste of time and resources. Nothing that happened in the grand jury has any relevance to whether the Indictment, on its face, alleges conduct that does not constitute a crime. The State drafted the Indictment. Now the State must defend it. It should be ordered to do just that, on the schedule to which all parties agreed.

Respectfully submitted,

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