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VIA eCOURTS FILING

Hon. Bernard E. DeLury, Jr., P.J.Cr.
 Cape May County Courthouse
 9 North Main Street, 2nd Floor
 Cape May Court House, NJ 08210

RE: State v. Ernest V. Troiano
Case Number: CPM-22-000535

Dear Judge DeLury:

Please accept this letter in lieu of a more formal brief addressing the issues raised by Your Honor at our last appearance on May 19, 2023. As explained further below, there is more than adequate case law to find that the grand jury process relating to “qualification” of absent grand jurors in this matter was defective, requiring a dismissal of the indictment.

The New Jersey “Standard Grand Jury Charge” explicitly requires that “Jurors who vote in a case must have been present and have heard all of the evidence presented.” NJ Directives Dir. 12-06. This requirement is based on the clear case law in our State that the absence of *even a single voting grand juror* from any portion of the State’s presentation is fatal to the process. “Where only 11 of the necessary 12 grand jurors required to return an indictment were present to hear the entire presentation of the evidence presented to the grand jury, the indictment must fail.” State v. Reynolds, 166 N.J. Super. 570, 575 (Law. Div. 1979), aff’d sub nom. State v. Reldan, 185 N.J. Super. 494 (App. Div. 1982). “In such a case the function of the grand jury as ‘standing between the accused and the accuser,’ has been irremediably compromised.” Ibid. (internal citation omitted). Stated more simply, the function of the grand jury “cannot be faithfully performed where the required minimum number of grand jurors voting the indictment is composed of individuals absent during substantial portions of the presentation of the State’s case.” Ibid. Where this type of error occurs, the only appropriate outcome is dismissal of the flawed indictment.

In this matter, the error in attempting to “qualify” jurors by having them subsequently read a transcript is magnified by the State’s representation that there were credibility issues with the testimony of ██████████ in her February 17, 2023, grand jury appearance. It is well settled that “credibility findings. . . are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record.” State v. Mordente, 444 N.J. Super. 393, 397 (App. Div. 2016). Such “observations” simply “cannot be transmitted by a dry record.” State v. Swint, 328 N.J. Super. 236, 254 (App. Div. 2000) (referencing State v. Locurto, 157 N.J. 463 (1999)).

Hon. Bernard E. DeLury, Jr., P.J.Cr.

June 1, 2023

Page 2

This is the same logic that requires an appellate court to defer to the credibility findings of a lower court, because “where the evidence is so conflicting that the finding has to turn on credibility, ‘. . . the conclusion of the one who saw and heard the witnesses should be given controlling regard.’” State v. Contursi, 44 N.J. 422, 428 n.2 (1965)(punctuation in original). Therefore, even if our Courts were to allow for the subsequent “qualification” of absent grand jurors, such a process certainly could not be accomplished where credibility of a witness was directly at issue.

I would finally note that the State’s reliance on State v. Del Fino in this regard is insufficient for two key reasons. First, the question of “qualifying” absent jurors was not before the Court in that matter. In fact, the only issue raised to the Court “was that the grand jury clerk failed to tally the individual votes of the grand jurors.” State v. Del Fino, 100 N.J. 154, 163 (1985). Second, while the Court engages in a general discussion regarding “the necessity for insuring that the grand jury be informed of all the evidence. . .,” it notes that there has not been a uniform response in state and federal courts on the issue. Ibid. Notably, there is only one New Jersey decision that the Court acknowledges as to the requirement that all grand jurors be present to hear the entire presentation, and that is State v. Reynolds, which is discussed above. Ibid.

For all of these reasons, the additional certification submitted from the State Grand Jury Clerk in this matter is insufficient to cure the deficiency that existed in the first place. The proper outcome, based upon the clear and relevant case law, is dismissal of the indictment.

I thank the Court in advance for its consideration of these issues.

Respectfully,



Brian A. Pelloni, Esq.

cc: Brian Uzdavinis, DAG (via eCourts notification)