

STATE OF NEW JERSEY

Plaintiff

Vs.

JOHN DOE, SR., JOHN DOE, JR.,
JANE DOE, and RICHARD ROE,

Defendants.

SUPERIOR COURT OF NEW
JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO. XX-XX-XXXXX

CRIMINAL ACTION

**BRIEF IN SUPPORT OF DEFENDANT RICHARD ROE'S MOTION TO
DISMISS**

TABLE OF AUTHORITIES

CASES CITED

<u>Bank of Nova Scotia v. United States</u> , 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988)	... 22
<u>Cesare v. Cesare</u> , 302 N.J.Super. 57, 694 A.2d 603 (App. Div. 1997) <u>rev'd on other grounds</u> , 154 N.J. 394, 713 A.2d 390 (1998)	... 17, 18
<u>Costello v. United States</u> , 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397, <u>reh'g denied</u> , 351 U.S. 904, 76 S.Ct. 692, 100 L.Ed. 1440 (1956)	... 21
<u>State v. Bennett</u> , 194 N.J.Super. 231, 476 A.2d 833 (App. Div. 1984)	... 10
<u>State v. Brown</u> , 188 N.J.Super. 656, 458 A.2d 165 (Sup. Ct. Law Div. 1983)	...10
<u>State v. Chandler</u> , 98 N.J.Super. 241, 236 A.2d 632 (Law Div. 1967)	...10, 21, 24
<u>State v. Costa</u> , 109 N.J.Super. 243, 262 A.2d 917 (Law Div. 1970)	... 21
<u>State v. Dayton</u> , 23 N.J.L. 49 (1850)	... 10, 20
<u>State v. Del Fino</u> , 100 N.J. 154, 495 A.2d 60 (1985)	... 9
<u>State v. Dennis</u> , 43 N.J. 418, 204 A.2d 868 (1964)	... 11
<u>State v. Donovan</u> , 129 N.J.L. 478, 30 A.2d 421 (1943)	... 10, 20
<u>State v. Engel</u> , 249 N.J.Super. 336, 592 A.2d 572 (App. Div.), <u>cert. denied</u> , 130 N.J. 393, 614 A.2d 616 (1991)	... 21, 22
<u>State v. Epstein</u> , 175 N.J.Super. 93, 417 A.2d 1055 (Super. Ct. Resent. Div.), <u>aff'd</u> , 177 N.J.Super. 423, 426 A.2d 1066 (App. Div. 1980)	... 13, 21
<u>State v. Graziani</u> , 60 N.J.Super. 1, 158 A.2d 375(App. Div. 1959), <u>aff'd</u> , 31 N.J. 538, 158 A.2d 330, <u>cert. denied</u> , 363 U.S. 830, 80 S.Ct. 1601, 4 L.Ed.2d 1524 (1960)	... 24
<u>State v. Hogan</u> , 144 N.J. 216, 676 A.2d 533 (1996)	... 9
<u>State v. Kaufman</u> , 118 N.J.Super. 472, 288 A.2d 581 (App.Div.), <u>cert. denied</u> , 60 N.J. 467, 291 A.2d 17 (1972)	... 17, 18, 19
<u>State v. Laws</u> , 262 N.J.Super. 551, 621 A.2d 526 (App. Div.), <u>cert. denied</u> , 134 N.J. 475, 634 A.2d 523 (1993)	... 20
<u>State v. Laws</u> , 50 N.J. 159, 233 A.2d 633 (1967) , <u>on reargument</u> , 51 N.J. 494, 242 A.2d 333, <u>cert. denied</u> , <u>Laws v. New Jersey</u> , 393 U.S. 971, 89 S.Ct. 408, 21 L.Ed.2d 384 (1968).	... 21

<u>State v. Moretti</u> , 97 N.J.Super. 418, 235 A.2d 226 (App. Div. 1967), <u>aff'd</u> , 52 N.J. 182, 244 A.2d 499, <u>cert. denied</u> , <u>Moretti v. New Jersey</u> , 89 S.Ct. 376, 393 U.S. 952, 21 L.Ed.2d 363 (1968)	... 11, 15, 16
<u>State v. Murphy</u> , 110 N.J. 20, 538 A.2d 1235 (1988)	... 9
<u>State v. New Jersey Trade Waste Ass'n</u> , 96 N.J. 8, 472 A.2d 1050 (1984)	... 10, 23
<u>State v. Nolan</u> , 205 N.J.Super. 1, 500 A.2d 1 (App. Div. 1985)	... 8
<u>State v. Schamberg</u> , 146 N.J.Super. 559, 370 A.2d 482 (App. Div.), <u>cert. denied</u> , 75 N.J. 10, 379 A.2d 241 (1977)	... 20
<u>State v. Sivo</u> , 341 N.J.Super. 302, 775 A.2d 227, 2000 WL 33329469 (Sup. Ct. Law Div. 2000)	... 20, 21, 23
<u>State v. Tillem</u> , 127 N.J.Super. 421, 317 A.2d 738 (App. Div.), <u>cert. denied</u> , 65 N.J. 557, 325 A.2d 691, <u>and cert. denied</u> , <u>Tillem v. New Jersey</u> , 419 U.S. 900, 95 S.Ct. 183, 42 L.Ed.2d 146, <u>and cert. denied</u> , <u>State v. Tillem</u> , 66 N.J. 335, 331 A.2d 35 (1974)	... 16
<u>State v. Vanderhave</u> , 47 N.J.Super. 483, 136 A.2d 296 (App. Div.), <u>aff'd</u> , <u>State v. Giardina</u> , 27 N.J. 313, 142 A.2d 609 (1957)	... 11, 16, 21
<u>State v. Weleck</u> , 10 N.J. 355, 91 A.2d 751 (1952)	... 10
<u>State v. Morrissey</u> , 11 N.J.Super. 298, 78 A.2d 329 (Law Div. 1951)	... 13, 14
<u>United States v. Mechanik</u> , 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986)...	22

STATUTES AND OTHER AUTHORITIES CITED

Lord Ellenborough, 102 Eng.Reprint K.B., 1235	... 14
N.J. Const. art. I, § 8	... 11, 12
N.J.S.A. § 2C:12-3b	... 16, 17, 18, 19
N.J.S.A. § 2C:20-5	... 11, 12
N.J.S.A. § 2C:21-19	... 14, 15, 16
N.J.S.A. § 2C:5-2	... 11, 12
U.S. Const. amend. V	9

STATEMENT OF FACTS

On September 25, 2002, the State made a presentation to a Middlesex County grand jury in the matter that is now captioned State of New Jersey vs. John Doe, Sr., John Doe, Jr., Jane Doe, and Richard Roe. As a result of that presentation the grand jury returned Indictment No. XX-XX-XXXXXX. Richard Roe was not charged in the case at the time of the presentation, however, the prosecutor noted that the grand jury could charge him, which they did. (Tr. ¶ 7, lines 14-19; Tr. ¶ 36, lines 23-25, 37, lines 1-2.) The indictment charged Mr. Roe with second degree conspiracy to commit theft by extortion (Count 2), second degree conspiracy to commit business usury (Count 4) and third degree terroristic threats (Count 5). Richard Roe now moves for dismissal of the indictment on the grounds of lack of evidence and prosecutorial misconduct.

CHARGES

The grand jury was never read the entire statute relevant to theft by extortion.

The first charge for your consideration is theft by extortion. It's a second degree offense regardless of the amount. Theft by extortion, 2C:20-5. A person is guilty of theft by extortion if he purposely and unlawfully obtains property of another by extortion. A person extorts if he purposely threatens to: (A) inflict bodily injury on or physically confine or restrain anyone or commit any other criminal offense. Now there's also Sections B, C., D, E, F, and G, but they don't apply here. So A is what applies here, and that is that the person extorts if he inflicts bodily injury on or physically confines or restrains anyone or commits any other criminal offense. So that is theft by extortion. (Tr. ¶ 3, line 2 to 4, line 12.)

Theft by extortion. A person is guilty of theft by extortion if he purposely and unlawfully obtains property of another by extortion. A person extorts if he purposely threatens to inflict bodily injury on or physically confine or physically restrain anyone or commit any other criminal offense. (Tr. ¶ 34, line 21 to 35, line 1.)

The grand jury was also never read the entire statute relevant to criminal usury.

Okay. Criminal usury, which is under 2C:21-19, another new one, under the heading of wrongful credit practices and related offenses. Criminal usury, a person is guilty of criminal usury when not being authorized or permitted by law to do so, he loans or agrees to loan, directly or indirectly, any money or other property at a rate exceeding the maximum rate permitted by law; or (2) takes or agrees to take, or receive money or other property as interest on the loan or on the forbearance of any money or other interest in excess of the maximum rate permitted by law. And B, which is the section of the statute 21-19 under which Mr. Doe has been charged, the business of criminal usury. Any person who knowingly engages in the business of making loans or forbearances in violation of subsection A, which is just what I read to you, loans or agrees to loan any money at a rate exceeding the maximum or takes or agrees to take, or receives any money as property as interest on the loan other than interest exceeding the maximum rate permitted by law. So I will go back to B. Any person who knowingly engages in the business of making loans or forbearances in violation of Subsection A, which I just read, is guilty of a crime of the second degree and then it goes on and just talks about the sentencing provisions. So you don't need to know that. You just need to know that if you're engaging in making loans or forbearances in violation of the first part of the section it is a second degree. (Tr. ¶ 4 line 13 to 5, line 16.)

Criminal usury. A person is guilty of criminal usury when not being authorized or permitted by law to do so, he loans or agrees to loan, directly or indirectly, any money or other property at a rate exceeding the maximum rate permitted by law; or (2) takes, or agrees to take, or receives any money or other property as interest on the loan or on the forbearance of any money or other interest in excess of the maximum rate permitted by law. And B, 19B, which is what we're considering 21-19B, is business criminal usury. A person who knowingly engages in the business of making loans or forbearances in violation of Subsection A, which I just read, of this section is guilty of a crime of the second degree, and then it goes on to talk about sentencing provisions. (TR. ¶ 35, lines 4-20.)

The prosecutor never clearly explained the difference between subsections A and B; nor did she explain what interest was allowable under the law. Id.

The grand jury was never read any portion of the statute for terroristic threats or even cited the relevant statute.

Terroristic threats, we know. We've had and so I don't have to read that one. (Tr. ¶ 5, lines 17-18.)

The third charge is terroristic threats. (Tr. ¶ 35, line 21.)

Even if the grand jury had been previously explained the charge of terroristic threats, the prosecutor should have explained it to them. As will be discussed infra the grand jury clearly misunderstood the nature of the crime of terroristic threats.

It is also clear from the transcript that the grand jury was confused about the level of culpability of people who were “working on behalf of the operation even though they — I don’t know — weren’t always present on each individual incident.” (Tr. ¶42, lines 6-8.) The prosecutor goes on to give a long and complicated explanation that obviously did not explain things clearly to the grand jury because at the end of her explanation a juror states, “Probably it should be conspiracy for the other people outside the senior.” (Tr. ¶ 44, lines 8-9; see Tr. ¶¶ 42-44.)¹ This colloquy also illustrates that the grand jury misunderstood the definition of a criminal conspiracy. Moreover, the prosecutor never read the statutory definition of conspiracy and the only explanation the grand jury was given regarding conspiracy was a long explanation that a single individual can be charged with committing a conspiracy. (Tr.¶ 37-38.)

EVIDENCE

The only witness who testified at the proceeding was Lt. John Smith. David Jones, the person allegedly threatened and extorted did not testify. The evidence against Richard Roe falls into two categories: evidence against the defendant himself and evidence against an individual known as “Big Bear,” whom Smith testified he discovered

¹ As the prosecutor went off the record at this point the defendant has no means of knowing whether the grand jury ever understood the nature of the meaning of conspiracy or the other charges. When they went back on the record the presentation turned immediately to the issue of assault. Id.

was the defendant. Smith never testified exactly how he came to discover that Roe was Big Bear merely that he discovered it “through investigative means.” (Tr. ¶ 19, line 14.)

The evidence against Big Bear includes the following, as testified by Smith: 1. During a telephone conversation John Doe, Sr. stated that Big Bear was going to “break [Jones] in half” if he didn’t pay his debts. (Tr. ¶14.) 2. Big Bear contacted Jones and stated that he would take over collecting Jones’s payments while Doe, Sr. was in the hospital and he would pick up money on Saturday evenings. (Tr. ¶ 19.) Smith’s testimony about this incident conflates Roe and Big Bear. Smith, however, testified that on March 8, 2002 at 5:30 p.m. that he saw Jane Doe go to pick up the money and that she returned and did pick up the money on March 9, 2002, in the morning. (Tr. ¶20.) Jones was making payments to “Big Bear, Jane, or Jim.” (Tr. ¶ 22.) All of the evidence presented against Big Bear was through the testimony of Smith, the only witness.

The evidence against Mr. Roe includes the following as testified by Smith: 1. On July 25, 2002, Jones had a conversation with Roe and Doe at a taxi stand. “They showed up one day and stated that — because he was starting to fall back on his payments again. They showed up out of the blue and told him we’re making new arrangements. From now on, payments are going to be on Monday, you’re not going to be late. There will be problems if it is and they walked out. So Jones relayed that to me.” (Tr. ¶ 25, lines 2-8.) 2. On July 29, 2002,² Jones contacted Smith and stated that Doe, Sr. called him [Jones], who told Doe that he would be late with a payment. Jones told him, “A few seconds later

² It is a bit unclear from Smith’s testimony whether conversations took place on July 29th, 30th or both. His testimony refers to a conversation on July 29th about a meeting tomorrow, however, the meeting appears to have taken place on July 31, 2002.

Big Bear or Roe called and said Jim and I are going to be down tomorrow.” (Tr. ¶ 25.) 3.

On July 31, 2002 Smith set up surveillance on the taxi stand where Jones was to meet Doe. Roe and Doe had a short conversation and then entered the taxi stand. “Within about a minute or so, those two emerged out and so did Jones and a very animated conversation took place. Roe was spitting on the ground and Doe was waving his arms; and at that point we thought that it could escalate to a point where Jones might get cracked around, so we came in and effected the arrest [of Doe].” (Tr. ¶ 28.) 4. At that time Roe was not arrested, but he was in possession of “several thousand” dollars of bundled money. (Tr. ¶ 29.) It should be noted that the police report states that Roe was in possession of “three bundles” of money, but does not state or estimate the amount. 5.

“Roe stated that Jones had borrowed money from him and that he was there to pick up his payment.” (Tr. ¶ 30, lines 4-5.) All of the evidence presented against Roe was through the testimony of Smith, the only witness. Although Smith did not testify regarding the fact, the police report notes that Roe allowed the police to search his home without a warrant and that nothing was seized as a result of that search.

LEGAL ARGUMENT

POINT I THE ELEMENTS OF THE CHARGES HAVE NOT BEEN SUFFICIENTLY ALLEGED

New Jersey's State Constitution guarantees that the grand jury plays a central role in the enforcement of the criminal law of this State.

No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger. N.J. Const. art. I, § 8. See also U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...”).

“The grand jury has always occupied a high place as an instrument of justice in our system of criminal law....” State v. Del Fino, 100 N.J. 154, 165, 495 A.2d 60, 65 (1985). A “grand jury **must** determine whether the State has established a *prima facie* case that a crime has been committed and that the accused has committed it.” State v. Hogan, 144 N.J. 216, 227, 676 A.2d 533, 538 (1996) (citation omitted) (emphases added). A grand jury, in addition to bringing the guilty to trial, has an equal “responsibility to protect the innocent from unfounded prosecution.” Id. quoting State v. Murphy, 110 N.J. 20, 29, 538 A.2d 1235, 1239 (1988). The prosecutor did not satisfy her burden to present a *prima facie* case against defendant. The only reason that defendant was charged with the crimes mentioned in the indictment was because the prosecutor did not adequately explain the elements of the alleged crimes (as will be discussed in Point II). Because the prosecutor did not present a *prima facie* case against the defendant the indictment should be dismissed.

A grand jury must be presented evidence to support the charges brought against a defendant.

But we do not understand that it is within the proper function of a grand jury indifferently and openly to present charges against an individual without having some evidence to support those charges. State v. Donovan, 129 N.J.L. 478, 483 30 A.2d 421, 424 (1943).

For a grand jury to indict without evidence of the crime is considered misconduct. State v. Chandler, 98 N.J.Super. 241, 250, 236 A.2d 632, 638 (Law Div. 1967) citing Donovan, supra. It is also an abdication of the role as a grand jury. Id. at 251, 236 A.2d at 639.

“Whether an indictment should be dismissed or quashed lies within the discretion of the trial court. Such discretion should not be exercised except on ‘the clearest and plainest ground’ and an indictment should stand ‘unless it is palpably defective.’” State v. New Jersey Trade Waste Ass’n, 96 N.J. 8, 18-19, 472 A.2d 1050, 1056 (1984) quoting State v. Weleck, 10 N.J. 355, 364, 91 A.2d 751 (1952) (other citations omitted).

A defendant, however, has a right to move to dismiss an indictment on the basis of insufficient evidence. State v. Brown, 188 N.J.Super. 656, 671, 458 A.2d 165, 174 (Sup. Ct. Law Div. 1983), citing State v. Dayton, 23 N.J.L. 49 (1850). “Even if an indictment appears sufficient on its face, it cannot stand if the State fails to present the grand jury with at least ‘some evidence’ as to **each element** of a prima facie case.” State v. Bennett, 194 N.J.Super. 231, 234, 476 A.2d 833, 834-35 (App. Div. 1984), citing Dayton (emphasis added). The charges made against Richard Roe in Count 2, Count 4, and Count 5 of the indictment are not supported by evidence and therefor should be dismissed.

Count 2: Conspiracy to Commit Theft by Extortion N.J.S.A. §§ 2C:20-5; 2C:5-2

The New Jersey extortion statute reads, in pertinent part, as follows:

A person is guilty of theft by extortion if he purposely and unlawfully obtains property of another by extortion. A person extorts if he purposely threatens to:

a. Inflict bodily injury on or physically confine or restrain anyone or commit any other criminal offense... N.J.S.A. § 2C:20-5.

Conspiracy is defined by statute as follows:

a. Definition of conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:

(1) Agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) Agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

b. Scope of conspiratorial relationship. If a person guilty of conspiracy, as defined by subsection a. of this section, knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.

c. Conspiracy with multiple objectives. If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship. It shall not be a defense to a charge under this section that one or more of the objectives of the conspiracy was not criminal; provided that one or more of its objectives or the means of promoting or facilitating an objective of the conspiracy is criminal. N.J.S.A. § 2C:5-2.³

There is no evidence that Richard Roe agreed to engage in conduct to purposely and unlawfully obtain the property of David Jones by threatening to inflict bodily injury or

³ Sections d-g of N.J.S.A. § 2C-5-2 respectively involve the definitions of an overt act for the purposes of narcotics conspiracy, renunciation of purpose, duration of conspiracy, and leader of organized crime, and are not relevant here.

physically confine or restrain him or commit any other offense. See N.J.S.A. §§ 2C:20-5; 2C:5-2.

The elements of the statutory crime of conspiracy are a criminal agreement and an overt act in furtherance thereof. State v. Moretti, 97 N.J.Super. 418, 421, 235 A.2d 226, 227 (App. Div. 1967), (App. Div. 1967), aff'd, 52 N.J. 182, 244 A.2d 499, cert. denied, Moretti v. New Jersey, 89 S.Ct. 376, 393 U.S. 952, 21 L.Ed.2d 363 (1968), citing State v. Dennis, 43 N.J. 418, 204 A.2d 868 (1964).

The gist of the offense of conspiracy consists in the unlawful confederation and not in the overt acts designed to carry it into effect; a conspiracy to commit an offense is a separate and distinct offense from the substantive crime planned and consummated. State v. Vanderhave, 47 N.J.Super. 483, 486-487, 136 A.2d 296, 298 (App. Div.), aff'd, State v. Giardina, 27 N.J. 313, 142 A.2d 609 (1957) (citations omitted).

The evidence against Roe falls into two categories, evidence against Roe and evidence against “Big Bear.” Although Smith identified Roe as Big Bear he never stated how he discovered that Roe was Big Bear other than that it was done through “investigative means.” (Tr. ¶ 19.) Moreover, Smith testified that Big Bear was to pick up a payment on March 8, 2002, whereas Jane Doe actually picked up the payment. (Tr. ¶ 20.)⁴ Additionally, when Smith testified that after the July 29, 2002 conversation between Jones and Doe, Jones called and said, “A few seconds later Big Bear or Roe called and said Jim and I are going to be down tomorrow.” (Tr. ¶ 25) (emphasis added). Despite these inconsistencies, Smith and the prosecutor on several occasions stated that Roe was Big Bear. (See, e.g., Tr. ¶ 7.)

⁴ Mrs. Doe went to see Jones on March 8, 2002 to pick up the payment. When Jones did not have the payment, Mrs. Doe returned the following day, March 9, 2002 to pick up the payment Id.

There is no evidence that Roe or Big Bear made a criminal agreement to threaten Jones with bodily injury. “The essence of conspiracy is the illegal agreement.” State v. Epstein, 175 N.J.Super. 93, 98, 417 A.2d 1055, 1058 (Super. Ct. Resent. Div.), *aff’d*, 177 N.J.Super. 423, 426 A.2d 1066 (App. Div. 1980).

The only evidence that Roe “conspired” with Doe is that Smith testified that Roe and Doe spoke before meeting Jones and that they both spoke with Jones on July 31, 2002. (Tr. ¶¶ 27-30.) This is not *prima facie* evidence that there was an agreement to commit a criminal act.

Moreover, there is no evidence that Jones was extorted on that date. Smith did not testify as to the contents of the conversation. Id. Jones did not testify before the grand jury. A conspiracy charge only requires the planning and agreement to commit a crime. However, it is logical that Roe and Doe did not conspire to extort money from Jones during their conversation. Their conversation with Jones took place only minutes after they spoke. Smith’s testimony was that there was an animated conversation. (Tr. ¶ 28.) This is no other evidence that Jones was threatened or extorted on July 31, 2002. Smith did not testify regarding Jones’s account of the conversation and Jones did not testify before the grand jury. Lastly, there is no evidence presented that Roe or Big Bear was aware of any previous threats that Doe allegedly made to Jones.

Regarding an “over act,” none of the statements made by Roe or Big Bear constitute a threat against Jones. Stating that if he missed a payment “there will be problems” is not a threat of bodily injury. State v. Morrissey, 11 N.J.Super. 298, 301-02, 78 A.2d 329, 330-31 (Law Div. 1951).

The test of indictability in a given case applies to the nature of the threat, whether in itself or as affected by attendant circumstances it is

such as may reasonably be regarded as capable of moving an ordinarily 'firm and prudent' person to comply with the offender's extorsive demand. Upon the question presented by the application, within the indictment's scope, of the test thus stated, this motion was argued.

'To obtain money under a threat of any kind, or to attempt to do it is no doubt an immoral action; but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man'; or, as otherwise stated, the threat must be 'one that may overcome the ordinary free-will of a firm man and induce him to part with his money.' (Lord Ellenborough, 102 Eng.Reprint K.B., 1235, at 1240, 1241). It was also judicially declared in the latter case, respecting the degree of coercion carried by the threat, that 'one man cannot be indicted because another has been a fool.' (supra, 1241).
Id.

Stating that "there will be problems" if a loan payment is not made is clearly not a threat, which the statute considers extortion.

The evidence presented at the grand jury does not support a charge that Roe conspired to extort money from Jones, therefor Count 2 of the Indictment against defendant Richard Roe should be dismissed.

Count 4: Conspiracy to Commit Business by Criminal Usury N.J.S.A. §§ 2C:21-19b; 2C:5-2

New Jersey defines business criminal usury as follows:

a. Criminal usury. A person is guilty of criminal usury when not being authorized or permitted by law to do so, he:

(1) Loans or agrees to loan, directly or indirectly, any money or other property at a rate exceeding the maximum rate permitted by law; or

(2) Takes, agrees to take, or receives any money or other property as interest on the loan or on the forbearance of any money or other interest in excess of the maximum rate permitted by law.

For the purposes of this section and notwithstanding any law of this State which permits as a maximum interest rate a rate or rates agreed to by the parties of the transaction, any loan or forbearance with an interest rate which exceeds 30% per annum shall not be a rate

authorized or permitted by law, except if the loan or forbearance is made to a corporation, limited liability company or limited liability partnership any rate not in excess of 50% per annum shall be a rate authorized or permitted by law.

Criminal usury is a crime of the second degree if the rate of interest on any loan made to any person exceeds 50% per annum or the equivalent rate for a longer or shorter period. It is a crime of the third degree if the interest rate on any loan made to any person except a corporation, limited liability company or limited liability partnership does not exceed 50% per annum but the amount of the loan or forbearance exceeds \$1,000.00. Otherwise, making a loan to any person in violation of subsections a.(1) and a.(2) of this section is a disorderly persons offense.

b. Business of criminal usury. Any person who knowingly engages in the business of making loans or forbearances in violation of subsection a. of this section is guilty of a crime of the second degree and, notwithstanding the provisions of N.J.S. 2C:43-3, shall be subject to a fine of not more than \$250,000.00 and any other appropriate disposition authorized by N.J.S. 2C:43-2b. N.J.S.A. § 2C:21-19.

The definition of conspiracy can be found in the discussion of Count 2. There is no evidence that Richard Roe agreed or planned to engage in conduct that would constitute the business of making loans or receiving any money or other property as interest on the loan or on the forbearance of any money or other interest in excess of the maximum rate permitted by law. See Id.

The elements of the statutory crime of conspiracy are a criminal agreement and an overt act in furtherance thereof. Moretti, 97 N.J.Super. at 421, 235 A.2d at 227. As is discussed by John Doe, Sr.'s Brief in Support of Motion to Dismiss, Smith's testimony regarding loans made to Jones "was inaccurate and misleading." Brief at 3. It is unclear from the discovery and testimony whether an exact accounting of the loans to Jones and others, penalties, and payments made by Jones that the interest would exceed the statutory amount. Id. at 3-4, 11-12.

Even if the interest exceeded the statutory amount, there is no evidence that Roe was aware that amounts collected exceeded the statutory maximum amount of interest. Moreover, as this is a charge of business criminal usury, there was no evidence presented before the grand jury that Roe was aware that the loan to Jones was part of a business enterprise.

Giving the statutory words their common, ordinary, common-sense construction, they can be defined as meaning one who carries on an enterprise, a business or a profession for profit or improvement over a period of time, as distinguished from one who commits or occasionally participates in a single act or transaction. State v. Tillem, 127 N.J.Super. 421, 425, 317 A.2d 738, 741 (App. Div.), cert. denied, 65 N.J. 557, 325 A.2d 691, and cert. denied, Tillem v. New Jersey, 419 U.S. 900, 95 S.Ct. 183, 42 L.Ed.2d 146, and cert. denied, State v. Tillem, 66 N.J. 335, 331 A.2d 35 (1974) (citations omitted).

One who commits a single transgression or occasionally participates in illegal loans is not chargeable under N.J.S.A. § 2C:21-19b. Id. Similarly one who engages in a conspiracy to commit business usury must have some knowledge that the crime is going being committed; one must have knowledge of the crime in order to agree to agree to engage in the crime or aid in the planning or commission of the crime. See N.J.S.A. § 2C:5-2; see also, Moretti, supra; Vanderhave, supra.

Lastly, much of the evidence regarding collecting payments is against Big Bear. As is discussed in the section regarding Count 2, there was conflicting evidence presented whether Roe was Big Bear, which the prosecutor and Smith ignored.

The evidence does not support a *prima facie* case that defendant Richard Roe conspired to commit the business of criminal usury and therefor Count 4 of the indictment against Richard Roe should be dismissed.

Count 5: Terroristic Threats N.J.S.A. § 2C12-3b

The prosecutor never read the grand jury the statute relevant to terroristic threats, N.J.S.A. § 2C:12-3b; she never even explained to the jury the elements of a terroristic threats charge. (See Tr. ¶¶ 5, 35). Therefore, it is very difficult for the defendant to guess what evidence the grand jury considered when charging him under 2C:12-3b.

The statute regarding terroristic threats, which was never read to the grand jury, is as follows:

A person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out. N.J.S.A. § 2C:12-3b.

The elements of N.J.S.A. § 2C:12b include threatening someone so he is in “**imminent fear** of death under the circumstances **reasonably** causing the victim to believe the immediacy of the threat and **the likelihood that it will be carried out.**” Cesare v. Cesare, 302 N.J.Super. 57, 64, 694 A.2d 603, 607 (App. Div. 1997) rev’d on other grounds 154 N.J. 394, 713 A.2d 390 (1998) (citing N.J.S.A. § 2C:12b) (emphasis in original). In order to make a *prima facie* case the state must present some evidence that the defendant threatened someone (in this case Jones), that Jones reasonably feared that defendant would carry out the threat, and reasonably believed that the threat would be carried out immediately. Moreover, the “gravamen of the offense involves the communication of a threat to kill in such terms as would in the attendant circumstances convey to an ordinary individual that the language **seriously threatened death.**” State v. Kaufman, 118 N.J.Super. 472, 474, 288 A.2d 581 (App.Div.), cert. denied, 60 N.J. 467, 291 A.2d 17 (1972) (emphasis added).

The only person who testified before the grand jury was Lt. Smith. Jones, the person allegedly threatened, did not testify. Moreover, Smith never even testified regarding Jones's version of what occurred on July 31, 2002. (See Tr. ¶¶ 27-30.) Assuming arguendo that the grand jury had reason to believe that Big Bear and Roe are the same person, none of the interactions between Jones and Roe satisfy the elements of a terroristic threats charge.

According to Smith's testimony, Jones's only interactions with Big Bear and Roe include Big Bear's statement that he would pick up the payments for Doe; the interaction between Roe, Doe, and Jones on July 25, 2002, and the interaction between those three on July 31, 2002. (See Tr. ¶¶ 19, 25-30.) There is no evidence that Holci threatened Jones on any of these occasions. (See *Id.*) The testimony regarding Big Bear's taking over the collecting of Jones's debt to Doe does not contain any evidence of a threat against Jones. (See Tr. ¶ 19.) The testimony regarding the conversation that took place on July 25, 2002 only contains one possible statement that could possibly be considered a threat, that there "will be problems" if Jones's payments were late. (See Tr. ¶ 25.) Even if this was considered a threat, this cannot be considered an imminent threat, as it was concerning future payments. See *Cesare*, 302 N.J.Super. at 64, 694 A.2d at 607 (citing N.J.S.A. § 2C:12b); *Kaufman*, *supra*. Moreover, it was unclear from the testimony who made that statement. (See Tr. ¶ 25.) Thus the grand jury may have attributed Doe's alleged statement to Roe.

The incident that Smith testified that occurred on July 31, 2002 also does not contain any evidence that would constitute a terroristic threat under N.J.S.A. § 2C:12b. Moreover, there was no testimony that Jones felt his life was threatened on July 25, 2002

or July 31, 2002. (See Tr. ¶¶ 25-30.) Although a charge of terroristic threats does not require that the victim feel threatened, but rather that a reasonable person would be threatened that his life was in danger, there is no evidence that a reasonable person would have considered Jones life in danger. See State v. Nolan, 205 N.J.Super. 1, 500 A.2d 1 (App. Div. 1985). Smith’s testimony was that he thought that Jones would be injured, not that his life was in danger.

Within about a minute or so, those two emerged out and so did Jones and a very animated conversation took place. Roe was spitting on the ground and Doe was waving his arms; and at that point we thought that it could escalate to a point where Jones might get **cracked around**, so we came in and effected the arrest [of Doe]. (Tr. ¶ 28) (emphases added).

Moreover, there was no testimony that Roe threatened Jones at that time. The only “threatening” Roe allegedly did was spit on the ground. Id. This would not “convey to an ordinary individual that the language seriously threatened death.” Kaufman, 118 N.J.Super. at 474. The only reason Roe was charged with terroristic threats was because the grand jury, because of the prosecutor’s misconduct by her failure to explain the charge, misunderstood the nature of the charge.

None of the evidence presented supports a *prima facie* case that Roe “threaten[ed] to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out.” N.J.S.A. § 2C:12-3b. Because the prosecutor has not made a *prima facie* case against him, Count Five of the Indictment should be dismissed against defendant Richard Roe.

**POINT II PROSECUTORIAL MISCONDUCT WARRANTS A DISMISSAL OF
ALL CHARGES**

A court may in its discretion dismiss an indictment on the grounds of prosecutorial misconduct. State v. Donovan, *supra*, 129 N.J.L. at 483, 30 A.2d at 424, citing Dayton, *supra*. A court may dismiss an indictment when the prosecutor's misconduct has affected the grand jury's "fair and impartial decision-making process." State v. Sivo, 341 N.J.Super. 302, 318, 775 A.2d 227, 237, 2000 WL 33329469, at *7 (Sup. Ct. Law Div. 2000), citing State v. Laws, 262 N.J.Super. 551, 621 A.2d 526 (App. Div. 1993), cert. denied, 134 N.J. 475, 634 A.2d 523 (1993); see also State v. Schamberg, 146 N.J.Super. 559, 370 A.2d 482 (App. Div.), cert. denied, 75 N.J. 10, 379 A.2d 241 (1977).

The prosecutor committed misconduct at the grand jury hearing in several ways. First, the prosecutor made mistakes and omissions when presenting the statutes to the jury. Second, the prosecutor never made the definition of conspiracy clear to the grand jury. Third, the prosecutor only presented one witness, when other better witnesses were readily available.

The prosecutor incorrectly presented the statutes regarding extortion and the business of criminal usury, and did not read the statute regarding terroristic threats. (Tr. ¶¶ 3-5.) The grand jury would not have charged Roe with terroristic threats if they understood the nature of the charge since Smith testified that he thought Jones would be hurt, not that he thought he would be killed. See discussion in Point I *supra*; Tr. ¶ 28.

Additionally, the prosecutor never explained to the grand jury what constitutes conspiracy, despite the fact that the grand jury was clearly confused about the subject.

(See Tr. 37-38.) The grand jury’s misunderstanding of the definition of conspiracy is illustrated by the statement of one juror: “Probably it should be conspiracy for the other people outside the senior.” (Tr. ¶ 44; see Tr. ¶¶ 42-44.) The grand jury also clearly misunderstood the nature of the charge of terroristic threats as Smith’s own testimony was that he believed Jones would be hurt, not killed. See Tr. ¶ 28; see also discussion in Point I supra. As a result of the prosecutor’s misconduct, none of the charges against Richard Roe were clearly presented to the grand jury. The prosecutor should have read the entire statutes to the jury and then accurately explained the elements of each charge. The prosecutor’s misconduct in her presentation of the statutes and elements of the crimes interfered with the ability of the grand jury to make a fair and impartial decision. See Sivo, supra.

The misunderstanding of the nature of a conspiracy charge by the grand jury is evinced by the charges that the grand jury brought. With the exception of the terroristic threats charge, the grand jury only charged the “other people outside the senior” with conspiracy. Conspiracy is not a lesser charge than a crime. It is a different charge than the crime. Vanderhave, 47 N.J.Super. at 486-487, 136 A.2d at 298 (“a conspiracy to commit an offense is a separate and distinct offense from the substantive crime planned and consummated”); see also Epstein, supra. The grand jury’s failure to understand the meaning of conspiracy was a direct result of the prosecutor’s misconduct and therefore interfered with the ability of the grand jury to make a fair and impartial decision. See Sivo, supra.

Lastly, the prosecutor only presented one witness at the grand jury hearing. The use of hearsay evidence is not enough to invalidate an indictment. Costello v. United

States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397, reh'g denied, 351 U.S. 904, 76 S.Ct. 692, 100 L.Ed. 1440 (1956). However, New Jersey courts have held an indictment invalid when the only witness was a detective presenting the prosecutor's file. See, e.g., Chandler, supra; State v. Costa, 109 N.J.Super. 243, 246, 262 A.2d 917, 919 (Law Div. 1970), citing State v. Laws, 50 N.J. 159, 182, 233 A.2d 633 (1967), on reargument, 51 N.J. 494, 242 A.2d 333, cert. denied, Laws v. New Jersey, 393 U.S. 971, 89 S.Ct. 408, 21 L.Ed.2d 384 (1968). Although Chandler is factually distinct from the instant case, Costa is remarkably similar. The only testimony in Costa, was from one of the investigating officers. The court in Costa noted that such misconduct is not misconduct of the grand jury, but of the prosecutor. Id. at 247, 262 A.2d at 920. The court also noted that the witnesses were all local and there was no reason for the prosecutor to rely entirely on hearsay. Id. at 248, 262 A.2d at 920. Similarly, the prosecutor could have called David Jones to testify. He would not be in any danger from testifying as Smith used his name during his testimony and according to Smith's testimony defendants already clearly knew where Jones lived and worked. Moreover, the prosecutor had Smith testify as to what Jones told Patrolman McSweeney concerning an assault on Jones. (Tr. ¶ 16.) Such testimony was double hearsay. There was no reason for the prosecutor not to call Jones or McSweeney.

In State v. Engel, 249 N.J.Super. 336, 592 A.2d 572 (App. Div.), cert. denied, 130 N.J. 393, 614 A.2d 616 (1991) the court noted,

[I]t has been said that dismissal of an indictment "is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict,'" or if there is "grave doubt" that the determination ultimately reached was arrived at fairly and impartially. Id. at 360, 592 A.2d at 583, quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 256, 108 S.Ct. 2369, 2374, 101 L.Ed.2d 228, 238

(1988), quoting United States v. Mechanik, 475 U.S. 66, 78, 106 S.Ct. 938, 945, 89 L.Ed.2d 50, 61 (1986).

The prosecutor's errors and omissions when reading the statutes, failure to adequately explain conspiracy, and decision to call a single witness substantially influenced the grand jury's decision to indict and creates great doubt that the decision was reached fairly and impartially.

The prosecutor's misconduct included her mistakes and omissions when presenting the statutes to the jury, her failure to adequately clearly explain the definition of conspiracy to the grand jury, and her presentation of only one witness. As a direct result of that misconduct the jury was unable to maintain a "fair and impartial decision-making process." Sivo, supra. This resulted in a "palpably defective" indictment. See New Jersey Trade Waste Ass'n, supra. Therefore the charges against Richard Roe in Count 2, Count 4, and Count 5 of the Indictment should be dismissed.

CONCLUSION

“A defendant with substantial grounds for having an indictment dismissed should not be compelled to go to trial to prove the insufficiency.” State v. Graziani, 60 N.J.Super. 1, 22, 158 A.2d 375, 386 (App. Div. 1959), aff’d, 31 N.J. 538, 158 A.2d 330, cert. denied, 363 U.S. 830, 80 S.Ct. 1601, 4 L.Ed.2d 1524 (1960), quoted in, Chandler, 98 N.J.Super. at 250-51, 236 A.2d 632, 637-38.

For all of the reasons stated above defendant Richard Roe respectfully submits that the charges against him in Count 2, Count 4, and Count 5 of Indictment No. 01-10-01206 be dismissed.

Respectfully Submitted

By: _____

, Esq.

Attorney for Defendant Richard Roe

Dated: