State of New Jersey,

Plaintiff,

vs.

George E. Norcross, III, Philip A. Norcross, William M. Tambussi, Dana L. Redd, Sidney R. Brown, and John J. O'Donnell,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION
MERCER COUNTY
INDICTMENT NO. 24-06-00111-S
DOCKET NO. MER-24-001988

REPLY BRIEF IN SUPPORT OF DEFENDANT WILLIAM M. TAMBUSSI, ESQ.'S, MOTION TO DISMISS INDICTMENT

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Defendant William M. Tambussi, Esq. joins the reply brief in support of the omnibus motion to dismiss the indictment filed by all Defendants. This reply brief addresses the legal arguments unique to him, as raised in his motion to dismiss.

PRELIMINARY STATEMENT

The Attorney General's ("AG's") response to Tambussi's motion to dismiss can be distilled to a single line from the opposition papers: "Tambussi is not being prosecuted for providing any bona fide legal services; he is charged with, among other crimes, conspiring to participate in a racketeering enterprise, to commit theft by extortion, and to commit criminal coercion." (Opp'n at 106, n.21.) In other words, because Tambussi was indicted for those crimes, the indictment must be valid. That is the AG's argument.

That argument, of course, ignores that an indictment requires at least some allegations that establish each element of each crime charged so that a *prima facie* case is made. Otherwise, the indictment is invalid. It also ignores that the AG's only allegations establishing the elements of the crimes charged against Tambussi involve his routine practice of law. The only allegation in the indictment that Tambussi "agree[d] to coopt a public entity to advance the Enterprise's private, illicit purposes," (id. at 99), was the declaratory judgment research he and his law firm completed for the Camden Redevelopment Agency ("CRA"). The only allegation in the indictment that Tambussi "coordinat[ed] [with] the Enterprise's associates to conceal evidence and suppress awareness of their conspiratorial activities," (id. at 101), was the motion *in limine* he and his law firm filed and argued for the City of Camden and the CRA.

The question for this Court then is whether an indictment charging a lawyer with thirteen first- and second-degree crimes is legally sufficient where the only allegations of the lawyer's criminality was his routine practice of law. And not just the routine practice of law. The routine

practice of law for clients, the City and CRA, who were not co-conspirators and never complained about Tambussi's work or claimed it was unauthorized or improper. The answer is clearly no.

Our Supreme Court has considered when a lawyer can be sued civilly based on his legal work. In every case, the Court has extended special protections to lawyers, not because lawyers are themselves special, but because our adversary system is. If lawyers can be easily sued based on their legal advice, loyalties become divided, and our system suffers. That is why the Appellate Division in Mayo held that before an attorney can be a civil RICO co-conspirator, his legal work must first be found to be "so egregiously wrong." Mayo, Lynch & Assocs., Inc. v. Pollack, 351 N.J. Super. 486, 497 (App. Div. 2002). It is why federal courts have held that an attorney cannot conspire with his client when he acts within the attorney-client relationship. And it is why Congress has said that if an attorney has an objectively bona fide reason for acting on behalf of his client, he cannot be prosecuted, even where the government suspects his motives are "corrupt."

No lesser standard should apply here. If our adversary system suffers when lawyers can be sued civilly for their legal advice, it suffers even more when they can be prosecuted criminally for that advice. If a New Jersey lawyer cannot be a civil RICO co-conspirator unless his legal advice is "so egregiously wrong," then he cannot be a criminal RICO co-conspirator without a showing that his advice was wrong at all.

The AG's prosecution of Tambussi could not be brought in a New Jersey civil court. Or a federal civil court. Or a federal criminal court. It should not be permitted to live only in a New Jersey criminal court. The indictment should be dismissed in full as to Tambussi.

RELEVANT FACTS

According to the AG, Tambussi is charged with conduct "that went beyond zealous legal advocacy, and instead constituted criminal activity." (Opp'n at 98.) But a careful reading of the

indictment shows that every paragraph that discusses Tambussi discusses his work as an attorney. No paragraph alleges that Tambussi "assist[ed] in crime," (id. at 104), or agreed that "crimes should occur through the non-lawyering activity of co-conspirators," (id. at 99). The AG all but admits this, anticipating a challenge to the sufficiency of the evidence if the Court denies this first motion to dismiss. (See, e.g., id. at 99, 101.)[1]

The few times Tambussi is mentioned in the indictment, he is mentioned as a lawyer, representing clients, and engaged in routine lawyering, (see Vartan Cert. dated 9/26/24, Ex. A):

- ¶11 states that Tambussi "is an attorney" and "served as outside counsel to the City of Camden, the Camden Redevelopment Agency, Cooper Health, and [Conner Strong & Buckelew]." ¶11 also states that Tambussi represented George Norcross.

- ¶89 recounts an August 2016 voluntary interview of George Norcross by the FBI. Tambussi represented Norcross at the interview.

- ¶91(c) alleges that George Norcross was interviewed by a reporter in May 2022, with Tambussi present as his attorney. ¶91(c) also alleges that Tambussi made statements during the interview "to conceal the Enterprise's conduct." Whatever Tambussi told the reporter, he learned while representing his clients, Cooper Health and George Norcross.

- ¶127 alleges that Tambussi "agreed to cause the CRA to bring [a] court action against [Dranoff Properties, Inc.] with the purpose of creating additional pressure on [Dranoff] to sell his rights." The CRA was Tambussi's client.

- ¶128 acknowledges that the CRA was a client of Tambussi and Brown & Connery. Philip Norcross represented Liberty Property Trust. ¶128 alleges that Tambussi, Philip Norcross, "and members of their respective law firms" "coordinated to devise a plan" to condemn Dranoff's view easement. Whatever "plan" was "devise[d]" was done by

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[1] The AG does not have to guess at such a motion. Tambussi already filed it. It is being held in abeyance until this motion is argued. Tambussi's Hogan motion shows, among other things, that Tambussi did not "coopt a public entity to advance the Enterprise's private, illicit purposes." (Id. at 99.) Rather, the CRA (the "public entity") directed Tambussi's law firm, Brown & Connery, and Tambussi's legal strategy and associated research. (See Tambussi Br. at 10-16.) Tambussi was engaged in the routine practice of law, the AG knows that, but persists in telling this Court the opposite because "at this stage," the AG can without contradiction, (Opp'n at 99); the grand jury transcripts and discovery are not before the Court.

two law firms representing clients with a common interest: to develop the Camden waterfront.

- ¶¶132-134 describe the coordinated legal strategy between Philip Norcross and "other personnel at [his] law firm," Parker McCay, on behalf of their client, Liberty Property Trust, and Tambussi and "Lawyer-2" on behalf of their client, the CRA. The AG did not charge any other attorney at Parker McCay or Brown & Connery who worked on the contemplated declaratory judgment action.

- ¶135 describes billing records from Brown & Connery to the CRA showing that multiple Brown & Connery attorneys worked on the file and spent hours communicating with the CRA. Again, no other Brown & Connery attorney was charged for their routine legal work.

- ¶¶139-140 recount discussions between George Norcross and Philip Norcross about Tambussi. Tambussi was not a party to those conversations.

- ¶¶142-149 describe an October 2016 conversation among certain of the Defendants, including George Norcross. Tambussi was on the call as Norcross's attorney and explained the CRA's legal strategy to the group.

- ¶155 recounts the 2018 lawsuit filed by Dranoff against the City of Camden and the CRA. The City and CRA hired Tambussi to represent them.

- ¶156 describes a motion *in limine* that Tambussi filed on behalf of his clients a few weeks prior to trial. That motion sought to preclude mention of George Norcross and Philip Norcross, neither of whom were parties to the action or were on the parties' witness lists. The AG ends the paragraph by oddly chiding Judge Polansky for not immediately ruling on the motion.

- ¶157 recounts Tambussi's argument around that motion *in limine*, during which he appropriately (and accurately) argued that "George Norcross and Phil Norcross were not parties" to the view easement agreement. Because of Tambussi's efforts, Dranoff settled with the City and CRA and paid them millions of dollars.

- ¶175 describes a conversation between Anthony Perno and Susan Bass Levin where Bass Levin recounts legal advice that Tambussi allegedly gave her about Perno's employment contract. Bass Levin was an employee of Cooper Health, Tambussi's client.

- ¶193 recounts how during the lawsuit brought by Dranoff against the City and CRA, Philip Norcross provided Tambussi with talking points related to Dranoff and the litigation.

That is it. There is no other mention of Tambussi in the indictment. Everywhere Tambussi is discussed, he is discussed as a lawyer. Representing George Norcross, (see, e.g., ¶89, ¶91(c)); representing Cooper Health (see, e.g., ¶11); representing the CRA, (see, e.g., ¶¶132-35); and representing the City and CRA, (see, e.g., ¶¶155-57). The closest the AG comes to alleging anything other than the routine practice of law is: (1) the implicit allegation that Tambussi directed the CRA rather than the CRA directing Tambussi; and (2) that Tambussi lied to the court when he argued that "George Norcross and Phil Norcross were not parties" to the signed view easement agreement because he knew they were involved in the October 2016 discussions around the declaratory judgment action.

The State makes the first allegation explicit in its opposition papers. (See Opp'n at 99 (alleging that Tambussi "agree[d] to coopt a public entity").) But there are obvious problems with that allegation. First, it is unsupported by the indictment; ¶135 of the indictment makes clear that Brown & Connery attorneys spent hours communicating with the CRA. Second, the CRA, an independent public agency not charged as a co-conspirator, never claimed it was "coopt[ed]." And third, an attorney does not coopt his client when he provides legal advice to his client to achieve his client's goals. That is the routine practice of law.

On the second allegation, Tambussi did not lie to the Court. Neither George Norcross nor Philip Norcross were parties to the view easement agreement. That was a true statement, and part of a reasonable attempt by an attorney to limit the scope of evidence introduced at trial against his clients. The AG seems to take the position that Tambussi "assist[ed] in crime," (id. at 104), because his statement, while true, was incomplete, and should have included the proviso that the Norcrosses were aware of and supported the view easement agreement. That omission is not the basis for criminalizing a lawyer's oral argument around a motion *in limine*. And it is certainly not

the basis for thirteen first- and second-degree charges against a lawyer for the routine practice of law.

The AG says that Tambussi's legal work "went beyond zealous legal advocacy," (id. at 98), and "beyond the scope of lawful practice," (id. at 43), but the indictment does not say how. Instead, the indictment describes everyday lawyering for non-co-conspirator clients that clearly authorized and welcomed Tambussi's work.

LEGAL ARGUMENT

POINT ONE

WHETHER AN ATTORNEY PROVIDED BONA FIDE LEGAL SERVICES IS A MATERIAL ELEMENT (*MENS REA*) THAT THE STATE MUST PRESENT TO THE GRAND JURY AND BE INCLUDED ON THE FACE OF THE INDICTMENT.

This is a first-of-its-kind prosecution in New Jersey: the AG is prosecuting a lawyer as a criminal co-conspirator and criminal accomplice based on routine legal work he performed, that had a bona fide legal purpose and was authorized by his clients. This prosecution would be precluded in federal court under the safe harbor. See 18 U.S.C. § 1515(c). The AG does not dispute that in its opposition papers. It should be equally precluded in this Court based on Supreme Court and Appellate Division precedent.

Our Supreme Court has twice extended special protections to lawyers, first in Hawkins v. Harris and again in LoBiondo v. Schwartz. The Third Circuit did the same in Heffernan v. Hunter. And Congress did the same in enacting the federal safe harbor for attorneys. The unifying principle across courts and Congress is that if attorneys can be easily sued for advice given to their clients or, worse, prosecuted criminally for that advice, our adversary system suffers. Loyalties become divided. Advocacy becomes less zealous. In some cases, advocacy may be silenced altogether. To avoid that, our Supreme Court has made it hard to sue attorneys (and even their agents) for the

advice they dispense; federal courts have held that attorneys cannot conspire with their clients; and Congress has excepted attorneys from criminal prosecution where there is a bona fide reason for actions taken on behalf of clients.

In Mayo, the Appellate Division implicitly applied these principles in the civil RICO context, holding that an attorney cannot be a civil RICO co-conspirator based on his legal advice unless that advice is "so egregiously wrong." Mayo, Lynch & Assocs., Inc., 351 N.J. Super. at 497. If an attorney cannot be a civil RICO co-conspirator unless his advice is "so egregiously wrong," then he certainly cannot be a criminal RICO co-conspirator absent (at least) such a showing. But there is no such showing in the State's indictment against Tambussi.

The indictment does not allege that Tambussi's legal advice to the City or the CRA was bad, wrong, or unethical. The indictment does not allege that any client was dissatisfied with Tambussi or his advice. Indeed, because of Tambussi's representation, the City was successful in the litigation against Dranoff and recovered millions of dollars.

The AG's opposition papers confront none of this. Instead, the AG summarily declares that "attorneys can be, and are, criminally prosecuted for actions they take as lawyers," (Opp'n at 103), and then discusses two cases to prove the point; one where an attorney encouraged a witness to lie before the grand jury, and a second where an attorney took a bribe payment. Neither is this case. The indictment alleges that Tambussi conducted declaratory judgment research and filed and argued a motion *in limine*. That is it.

There has been no other prosecution like this one in New Jersey. And that is with good reason. This prosecution is contrary to Supreme Court and Appellate Division precedent. It could live in no other courtroom, state or federal, across the country. It should not be allowed to live here. The indictment omits the critical, heightened *mens rea* element required by Supreme Court

precedent and Mayo to prosecute an attorney for his routine legal work. The indictment must be dismissed against Tambussi.

A. The Supreme Court has created special protections around the routine practice of law.

The Supreme Court—across all types of matters—robustly protects our adversary system and especially the clients who are entitled to zealous advocacy.

In LoBiondo v. Schwartz, the Court adopted a heightened *mens rea* standard for Strategic Lawsuits Against Public Participation ("SLAPP") suits filed against attorneys. 199 N.J. 62 (2009). Specifically, the Court "require[d] a separate evaluation of the proof that the original claim was actuated by malice when the target is the attorney." Id. at 73. "In that event, the proof must focus on the motivation of the attorney and must demonstrate that his or her primary motive was an improper one." Id. The Supreme Court justified this heightened requirement because "the attorney's primary duty is to be a zealous advocate for his or her own client and recogniz[ed] the potential for harm that may arise from permitting a suit by a nonclient arising from the attorney's role in representing a client." Id.

In Hawkins v. Harris, the Supreme Court clarified that the litigation privilege "provid[es] an absolute privilege for statements made in and pertaining to a judicial proceeding by a judge, attorney, witness, juror, or other participant." 141 N.J. 207, 215, 221 (1995) (quotation omitted). In doing so, the Court compared the absolute litigation privilege to other absolute privileges. The Court explained that these absolute privileges are not intended to protect the recipient of the privilege, but rather exist for the public's benefit. Id. at 213-14. The Court went on to explain that the absolute litigation privilege for attorneys is "grounded in similar public-policy concerns." Id.

at 214.[2]

The breadth of the privilege is deliberate. The Supreme Court explained that these protections are "granted to good and bad alike" and recognized that such broad application could also include "a cloak of immunity from prosecution." Id. at 213 (quotation omitted). This was an acceptable, even if undesirable outcome, necessary to "protect[] lawyers," as bad actors would still be subject to disciplinary action with potentially severe sanctions available. Id. at 221-22. "That trade-off is the necessary price that must be paid for the proper functioning of our judicial system, a system that requires attorneys to vigorously and fearlessly represent their clients' interests." Loigman v. Twp. Comm. of Twp. of Middletown, 185 N.J. 566, 587 (2006). The Supreme Court was cognizant that imposing liability on attorneys could "become a weapon used to chill the entirely appropriate zealous advocacy on which our system of justice depends." LoBiondo, 199 N.J. 62 at 101.

Although Hawkins was a civil action concerning potentially defamatory statements, the policy rationale was not limited to civil actions. Imposing criminal liability has always required a higher burden than imposing civil liability. See State v. Cameron, 100 N.J. 586, 592 (1985). Indeed, the Supreme Court opened the door to the possibility that an attorney's representation of a client could be "immune[e] from prosecution." Hawkins, 141 N.J. at 213.

B. The Appellate Division in *Mayo* adopted a specific *mens rea* standard for attorneys alleged to have violated RICO.

In Mayo, the Appellate Division applied the lessons of LoBiondo and Hawkins, at least

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[2] As the omnibus brief and reply brief in support of Defendants' motion to dismiss notes, there are separate constitutional reasons for this protection as well. The Noerr-Pennington doctrine broadly protects citizens' constitutional right to petition the government through the court system. (See Defendants' Br. at 24-27; Defendants' Reply Br. at 16-19.)

implicitly, when it adopted a specific *mens rea* requirement for attorneys alleged to have violated the RICO statute based on legal advice they dispensed. (See Tambussi Br. at 31-33.) In Mayo, the court was tasked with determining whether there was sufficient evidence to establish that an attorney knowingly participated in a RICO enterprise. 351 N.J. Super. at 494. The Appellate Division explained that the attorney's legal advice "was so egregiously wrong that a jury could find that it surpassed negligence or recklessness, and could infer knowledge of the bid-rigging scheme and intent to participate in it." Id. at 497. Thus, the Appellate Division imposed a requirement that an attorney must have intentionally provided bad or improper advice before his work product can establish the attorney's state of mind for violating the RICO statute. Id. at 497-98.

This is the minimum *mens rea* standard the Court must apply to the allegations against Tambussi. The four corners of the indictment are silent on this front. Accordingly, the indictment fails to allege a crime because the indictment contains no allegations that Tambussi's "advice was so egregiously wrong that a jury could find that it surpassed negligence of recklessness." See id. at 497. The AG totally ignores this argument in its opposition papers. In one paragraph, the AG attempts to diminish the significance of this binding opinion by stating that Mayo demonstrates that attorneys can be liable for lawyering activities that further a conspiracy if the attorney possessed the requisite state of mind.[3] (See Opp'n at 107.) The State is correct that "attorneys can permissibly be held liable for participating in conspiracies," (id. (emphasis added)), but only if the Mayo *mens rea* requirement is first met.

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[3] As the AG acknowledges, "this Court is bound by published New Jersey appellate precedent." (Opp'n at 37 n.5.)

C. New Jersey's *mens rea* standard for attorneys is consistent with federal standards for determining whether attorneys can be held civilly and criminally liable.

Federal courts also take a protective approach to the adversary system, ensuring that before liability can attach to an attorney, specific intent requirements are met.

In fact, Mayo's specific *mens rea* for attorneys is like the standard federal courts use where attorneys are alleged to have engaged in civil conspiracies. The Third Circuit has adopted a principle that where attorneys "acted within the attorney-client relationship, they cannot be considered conspirators." Heffernan v. Hunter, 189 F.3d 405, 407 (3d Cir. 1999). In Heffernan, an attorney allegedly "file[d] a frivolous lawsuit and disseminate[d] defamatory information to the media to intimidate and punish" a witness before a trial. Id. at 408. The plaintiff sought damages based, in part, on a theory that the defendant attorney conspired to take these actions. Id. The district court granted a motion to dismiss the lawsuit with prejudice, finding that the attorney, as a matter of law, could not have engaged in a conspiracy for actions taken on behalf of his client. Id.

The Third Circuit affirmed, concluding that whether the complaint "has set out actionable conspiracies" was a "threshold issue" and "dispositive." Id. at 411. Based on "compelling policy concerns," the court adopted a "ban on conspiracies in the attorney-client context." Id. at 413. In so doing, the court emphasized the role of attorneys:

> The right of a litigant to independent and zealous counsel is at the heart of our adversary system and, indeed, invokes constitutional concerns. Counsels' conduct within the scope of representation is regulated and enforced by disciplinary bodies established by the courts. Abuses in litigation are punishable by sanctions administered by the courts in which the litigation occurs.
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> [Id.]

Of course, the court explained that actions taken outside the scope of client representation would subject an attorney to conspiracy liability. Id. But, even if the alleged conduct "violate[d] the canon of ethics," an attorney could not have committed a conspiracy "so long as it is within the

scope of representation." Id.

Similarly, in General Refractories Co. v. Fireman's Fund Insurance Co., 337 F.3d 297, 314 (3d Cir. 2003), the court rejected arguments like those the AG raises here, (see, e.g., Opp'n at 99-100), that conspiracy liability should attach. Specifically, the plaintiff alleged that either "the mere nature of the conduct," which plaintiff claimed was "outrageous," or the attorney's "illegitimate purpose" rendered the conduct "beyond the scope of the attorney-client relationship." Id. Relying on Heffernan, the court held that "so long as it is within the scope of representation," an attorney's actions cannot qualify as part of a conspiracy. Id. Merely alleging that the attorney "acted in bad faith or with the illegitimate purpose of abusing process" was insufficient to state a claim of conspiracy outside the scope of representation. Id. Likewise, under federal conspiracy law, no conspiracy arises "where the allegedly unlawful actions of the attorneys and their client are—ethical or not—within the scope of the attorney-client relationship." Ching-Luo v. Owen J. Roberts Sch. Dist., No. 19-3997, 2022 WL 4480559, at *3 n.5 (3d Cir. Sept. 27, 2022) (citing Heffernan, 189 F.3d at 413).

The federal criminal safe harbor for attorneys also mimics the *mens rea* standard adopted by the Appellate Division in Mayo. Tambussi pointed to the federal safe harbor to direct this Court to an example of the *mens rea* necessary to convict an attorney for providing legal advice. (See Tambussi Br. at 32-33.)

The safe harbor does not provide complete criminal immunity to attorneys, but rather "the safe harbor prevents the criminalization of a lawyer merely for doing his or her job." United States v. Gerace, 731 F. Supp. 3d 497, 507 (W.D.N.Y. 2024). "[I]f there is an objectively bona fide reason for taking a certain strategic action on behalf of a client, a lawyer who takes that action—even a lawyer who the government might think has a 'corrupt' motive—cannot be prosecuted."

Id. at 512. This is so because an attorney "performing bona fide legal representation" does not have the requisite *mens rea* to commit a crime; rather, the attorney's intent—"to zealously represent his client"—"is fully protected by the law." United States v. Kloess, 251 F.3d 941, 948 (11th Cir. 2001).[4]

This Court should give minimal consideration to the AG's single footnote trying to brush aside the applicability of the federal safe harbor. Citing Kloess, the State calls the safe harbor "an affirmative defense rather than an element of the crime." (Opp'n at 106 n.21). But the circuit split discussed in Kloess no longer exists. The Supreme Court recently held that *mens rea* is incorporated into every element of a crime. Ruan v. United States, 597 U.S. 450, 462 (2022). The Supreme Court specifically rejected the position that a specific *mens rea* requirement would be an affirmative defense instead of an element. Id.; id. (Alito, J., concurring) (arguing that majority conflates element of offense with affirmative defense).

But how federal courts resolve an element of an offense compared to an affirmative defense is irrelevant. This Court must analyze whether under New Jersey law, *mens rea* and an attorney safe harbor would be an element or a defense. New Jersey law leads to only one conclusion. In New Jersey, the requisite *mens rea*, the actor's intent, is incorporated into "each material element of the offense." N.J.S.A. 2C:2-2(a).

Thus, intent is a material element that must be presented to the grand jury. This is not a

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[4] Federal law provides similar safe harbors for other professions. In United States v. Daniel, 3 F.3d 775, 778 (4th Cir. 1993), for example, the Fourth Circuit held that to prosecute a doctor for criminally dispensing controlled dangerous substances, the indictment must allege that § 822(c) is inapplicable. Section 822(c) requires proof that the distribution "falls outside the boundaries of the registrant's professional practice," or in other words, that it was "not for a legitimate medical purpose." Id. Thus, there is a specific criminal carve-out for physicians and pharmacists who prescribe and dispense controlled substances in accordance with their professional standards.

controversial point. As the AG acknowledges, (see Opp'n at 32), the failure to do so requires dismissal of an indictment. See, e.g., State v. Majewski, 450 N.J. Super. 353, 366 (App. Div. 2017) (reversing trial court's failure to dismiss an indictment because the State failed to define applicable *mens rea* requirement to the grand jury).

A dismissal here would be like the one affirmed in State v. Jeannotte-Rodriguez, 469 N.J. Super. 69 (2021), which the State concedes provides grounds to dismiss an indictment when an element of the crime was not charged and explained to the grand jury. (See Opp'n at 32.) Directly relevant to this case, the Appellate Division specifically rejected the State's arguments that "it presented sufficient evidence to survive dismissal." Id. In dismissing the indictment, the Appellate Division explained that "an indictment must allege all the essential facts of the crime." Id. at 103 (quotation omitted). The court emphasized that bare allegations are insufficient as "[a] valid indictment may not simply allege the essential elements of the offense." Id. (quotation omitted). Rather, each allegation of an element of a crime must be supported by "specific facts that satisfy those elements." Id. (quotation omitted).

The arguments Tambussi now raises parallel those raised in Jeannotte-Rodriguez.[5] The State's position that "it presented sufficient evidence to survive dismissal" should be rejected, just as it was in Jeannotte-Rodriguez. See id. at 78. Tambussi's arguments similarly levy facial attacks

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[5] Jeannotte-Rodriguez also provides a useful guide on the standard an indictment must meet to allege that professional conduct was knowingly criminal. The Appellate Division explained the trial court was justified in dismissing the indictment without prejudice for multiple reasons—two of which are pertinent to the arguments raised by Tambussi. First, the State failed to "to adequately and accurately instruct the grand jury" on the professional services a medical assistant can provide. 469 N.J. Super. at 78. And second, the relevant crimes did not "clearly draw a line around a medical assistant's allowable activities," and "prosecuting someone for crossing the line may violate the right to fair warning." Id.

on the sufficiency of the indictment for failing to include a material element. That requires dismissal.

D. The AG did not charge the grand jury on the required *mens rea* standard, and the indictment against Tambussi must be dismissed.

However the State's opposition papers may spin the indictment, Tambussi is charged because of his routine practice of law. The indictment alleges no other actions by him. He could not be civilly prosecuted for his actions since his "primary motive was [not] an improper one," LoBiondo, 199 N.J. at 73, and because his actions enjoyed an "absolute" litigation privilege, Hawkins, 141 N.J. at 213-14. Nor could he be charged as a civil RICO co-conspirator because his actions were not "so egregiously wrong." Mayo, 351 N.J. Super. at 497. Those same actions then cannot be the basis for a criminal prosecution. There are two reasons why.

First, under Mayo, the State had an obligation to charge the grand jury on bona fide legal services; it's an element of the offense. See supra. The State did not do so. As a result, the grand jury did not return a valid indictment charging Tambussi with each element of each offense. The indictment simply fails to charge that Tambussi acted with the requisite intent.

Second, this Court should apply an attorney safe harbor provision, akin to the federal safe harbor, to Tambussi's actions. The primacy of protecting the adversary system as expressed by the Supreme Court requires it. While there is presently no attorney safe harbor in New Jersey law, there has also never been a prosecution like this one. Principles of fundamental fairness permit courts to fill in gaps in statutory schemes to create a remedy where "'someone [is] being subjected to potentially unfair treatment and there [is] no explicit statutory or constitutional protection to be invoked.'" State v. Njango, 247 N.J. 533, 548-49 (2021) (quoting Doe v. Poritz, 142 N.J. 1, 109 (1995)). The Court should fill that gap here. The dispositive issue in assessing if an attorney's legal representation is criminal should be whether the attorney had an objectively legitimate reason

to take the legal action he took on behalf of a client. If an attorney had mixed motives—that is, an objectively legitimate reason, but also a nefarious or illegitimate purpose—the legal action still should not give rise to criminal liability. It is not the presence of an illicit purpose that makes lawyering criminal, it is the absence of any bona fide intent. See Gerace, 731 F. Supp. 3d at 513. Any different standard would "become a weapon used to chill the entirely appropriate zealous advocacy on which our system of justice depends." LoBiondo, 199 N.J. 62 at 101.

POINT TWO

THE INDICTMENT VIOLATES THE FEDERAL AND STATE CONSTITUTIONS AND MUST BE DISMISSED.

A. The novel prosecution of the practice of law violates principles of due process and fair notice.

Tambussi explained in his opening brief that no reasonable attorney would be on constitutional notice that his conduct—researching a potential declaratory judgment action and filing a motion *in limine*—was criminal. (See Tambussi Br. at 19-26.) The opposition papers highlight the constitutional infirmities with the AG's theory. (See Opp'n at 99-101.)

Without any elaboration or justification, the AG merely asserts that Tambussi's actions "cross[ed] the line." (Id. at 99.) But defining precisely where the line stands is of constitutional importance. No reasonable attorney can be on notice that an action will be criminal just because a line exists. Notice requires that the line be identified. This Court must draw a line between when lawyering is lawful and when it is criminal. If no clear line can be drawn, then lawyering conduct cannot be made criminal. And critically, the line cannot conflict with standards already established by the Supreme Court.

"Fair notice, for purposes of constitutional due process, can best be assessed by considering the circumstances of the crime." State v. S.J.C., 471 N.J. Super. 608, 628 (App. Div.), leave to appeal denied, 251 N.J. 372 (2022). Tambussi engaged in two acts that the indictment calls

criminal. The first is that Tambussi's law firm researched whether filing a declaratory judgment action was viable and, upon not filing the action, did not bill the client. (Indictment ¶¶126-35.) The second is that Tambussi "filed a pre-trial motion to preclude reference to George E. Norcross, III and Philip A. Norcross" in a pending trial and then "argued" that motion before the judge. (Id. ¶¶156, 157.) Both actions constitute legal services. The AG's description of each action demonstrates that there is no clear line between what is criminal and what is lawful legal representation.

The State's explanation of why Tambussi filing and arguing a motion *in limine* was criminal offers no clear guidelines or standards.

> As to the pretrial motion Tambussi filed and argued seeking to preclude any reference to George or Philip Norcross in litigation over the Radio Lofts site, see Indict. ¶¶ 155-57, Tambussi's actions in connection with this motion are not themselves charged as crimes. Rather, these actions show continued coordination among the Enterprise's associates to conceal evidence and suppress awareness of their conspiratorial activities.
>
> [Opp'n at 101.]

The AG's description of the declaratory judgment action fairs no better in identifying boundaries. The State asserts that "[i]t is agreeing to coopt a public entity to advance the Enterprise's private, illicit purposes that crosses the line—not researching a legal issue." (Id. at 99.)

For the provision of legal services to be criminal conduct, there must be precise standards such that a reasonable attorney knows when an action is routine lawyering and when it is the *actus reus* of a crime. The State proposes no standard other than: "It's a crime because we alleged it to be a crime." But constitutional notice requires more.

Nor could a lawyer have been on notice that Tambussi's conduct was criminal because, to date, such lawyering has broadly been given immunity by New Jersey courts. (See Tambussi Br. at 21-23.) The AG seeks to abruptly change course and adopt a "novel construction" of the

Criminal Code that "neither [] statute nor any prior judicial decision has fairly disclosed to be within its scope." See United States v. Lanier, 520 U.S. 259, 266 (1997). And the examples the AG cites of cases where an attorney was prosecuted, (see Opp'n at 103), fail to provide any constitutional notice. Those cases involve attorneys taking actions, such as fraud and bribery, which were untethered to the provision of routine legal services.

B. The Supreme Court has the sole authority to regulate the legal profession, including researching potential declaratory judgment actions and filing motions *in limine*.

The State contorts Tambussi's argument regarding the AG's infringement on the Supreme Court's sole authority to regulate and oversee the professional conduct of lawyers. (See Tambussi Br. at 26-29.) Tambussi does not contend that the Supreme Court's plenary authority to regulate professional conduct immunizes attorneys from criminal charges. (See Opp'n at 105.) Rather, the Supreme Court's sole authority to define the standards of professional legal conduct means the Executive cannot implement its own standards—particularly when its standards conflict with those promulgated by the Supreme Court.

The Supreme Court indisputably has the "exclusive constitutional responsibility" to regulate "the practice of law" and "the conduct of attorneys." Taylor v. Bd. of Educ., 187 N.J. Super. 546, 533 (App. Div. 1983). In fact, the Supreme Court has affirmatively invoked its authority to regulate this precise conduct. The Supreme Court adopted Rule 4:42-3 to govern declaratory judgment actions and Rule 4:25-8 to govern motions *in limine*. Additionally, the Supreme Court adopted numerous Rules of Professional Conduct to govern all filings before the courts, including motions and initial pleadings. See, e.g., RPC 3.1, 3.3, 8.4. Because the Supreme Court has sanctioned the professional use of certain activities, such as filing motions *in limine*, the Executive Branch, through the AG, cannot criminalize that same conduct.

The other branches of government are bound by the Judiciary's oversight and regulation

of the legal profession. The AG cannot unilaterally decide that conduct that is permissible pursuant to court rules and the Rules of Professional Conduct is criminal. The Supreme Court remains the sole arbiter of whether the legal services provided by an attorney are proper.

The handful of disciplinary cases the AG cites where the Supreme Court penalized lawyers do not involve lawyers engaged in routine lawyering; instead, they involve obstruction of justice, fraud, and bribery. (See Opp'n at 105.) These examples prove no point because they do not involve prosecutors criminalizing legal research or motions *in limine*. Conduct like bribery is not the practice of law, and thus is outside the Supreme Court's plenary authority to regulate the profession. Fraud has nothing to do with researching potential legal actions and deciding not to bill the client for the research or filing and arguing a motion *in limine*. This is especially the case when there are no allegations that the work was frivolous, unethical, or in any way improper or unauthorized. As the AG notes, "None of these actions infringed on our Supreme Court's authority to regulate the profession," (id.), but that's because none of those actions involved professional conduct of lawyers that the Supreme Court has the exclusive constitutional authority to regulate.

No matter how the AG attempts to spin the indictment, the allegations are plain that Tambussi's role in researching a potential declaratory judgment action and filing and arguing a motion *in limine* were not out of bounds. And the authority to govern and set the standards for these actions falls solely to the Supreme Court to regulate the legal profession. The AG exceeds his constitutional authority, and the indictment must be dismissed.

POINT THREE

THE SUBSTANTIVE COUNTS (COUNTS 5-13) MUST BE DISMISSED.

A. The AG concedes that Tambussi is not charged as a principal, and the indictment facially fails to allege that Tambussi was an accomplice to each of the nine substantive counts.

The AG writes that Tambussi's arguments on the substantive counts can be "easily rejected" because Tambussi "simply quarrels with what the grand jury charged." (Opp'n at 87.) But the grand jury simply did not return a charge on accomplice liability because the indictment contains no allegations that Tambussi "solicit[ed]" or "aid[ed]" an identified person to commit any of the crimes charged in Counts 5 through 13—let alone allegations that are sufficient to make a *prima facie* case of nine separate substantive counts. This is an entirely unforced error of the AG's making. And it is an error that necessitates dismissal of all the substantive counts against Tambussi. See Jeannotte-Rodriguez, 469 N.J. Super. at 89.

There can be no mistake that Tambussi is not alleged to have been the principal actor in any of the substantive counts. Tambussi argued this in his opening brief. (See Tambussi Br. at 34-37.) And the State does not refute it. Instead, the AG acknowledges that Tambussi's liability on the substantive counts is based entirely on a theory of accomplice liability. (See Opp'n at 69 n.12, 87.)

There are two ways for a valid theory of accomplice liability to proceed against a defendant. First, and most common, is when the accomplice liability charge to the grand jury is accompanied by, and is thus considered part of, an allegation that a defendant was the principal who personally committed the conduct charged. Second, prosecutors can separately charge the grand jury on accomplice liability and instruct them on N.J.S.A. 2C:2-6(c). In short, it is an either/or situation. Either there is an indictment alleging conduct that is principal liability (which necessarily

incorporates accomplice liability) or there is an indictment alleging conduct that is accomplice liability. There must be one or the other. Here, there was neither.

Because the AG acknowledges that the indictment does not contain allegations of principal liability against Tambussi on the substantive counts, accomplice liability is the only remaining theory of liability against him. As such, a theory of accomplice liability must be on the face of the indictment for each and every one of the nine substantive counts. It is not. See State v. Saavedra, 222 N.J. 39, 57 (2015) (explaining that to be facially valid, an indictment must contain "some evidence" that establishes "each element of the crime to make out a prima facie case." (quotation omitted)).

A person can be held criminally liable as an accomplice if that person acted "[w]ith the purpose of promoting or facilitating the commission of the offense; [] (a) solicits such other person to commit it; (b) aids or agrees or attempts to aid such other person in planning or committing it; or (c) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do." N.J.S.A. 2C:2-6(c)(1). Each of the substantive counts fails to allege two critical elements of accomplice liability. Either one of these defects renders the substantive counts facially invalid. First, the indictment contains no allegation that Tambussi "solicited" or "aid[ed] or agree[d] or attempt[ed] to aid" someone to commit financial facilitation, corporate misconduct, or official misconduct. Second, the accomplice liability statute requires there be an identified "other person." But even if all the conduct the State alleges against Tambussi qualifies as solicitation or aiding the commission of each of the substantive offenses, the indictment is wholly silent on who the "other person" is. Even after the State has submitted hundreds of pages through the indictment and an opposition brief, there is still no indication on who the State has alleged to be the principal for each of the substantive counts (aside from official misconduct).

The State's lone retort in its opposition brief is to repeatedly use broad and imprecise language that "Defendants" "agreed" to "conspire" with the other "Defendants." (Opp'n at 87-89.) But whether the indictment sufficiently states "that Tambussi agreed to the charged conspiracies," (Counts 1 to 4), is an entirely different question then whether the indictment facially alleges that Tambussi was an accomplice to each of the nine substantive counts, (Counts 5 to 13). Accomplice liability and conspiracy are different legal theories. State v. Roldan, 314 N.J. Super. 173, 189 (App. Div. 1998) ("The subject of vicarious accomplice liability is governed by different sections of the Code than vicarious conspiratorial liability and consequently must be separately analyzed."). A mere agreement is insufficient to sustain an allegation of accomplice liability; rather, "a defendant must not only have the purpose of promoting or facilitating the commission of a crime but also must have at least indirectly participated in the commission of the criminal act." Id. (quotation omitted). The State's vague assertions of an agreement are thus insufficient to state a *prima facie* charge of accomplice liability.

Because the indictment does not contain facial allegations that Tambussi was an accomplice to nine separate substantive offenses, the indictment is deficient on these counts, and the substantive counts against Tambussi must be dismissed.

B. The AG misapplies the standards governing dismissal for violating the statute of limitations.

The indictment does not claim on its face, whether with specific facts or even in a bare allegation, that Tambussi took any personal actions with respect to the substantive offenses within the applicable statutes of limitation. (See Tambussi Br. at 37-39.) In a series of footnotes, the State claims that this is a "sufficiency of the evidence" argument. (See Opp'n at 126 n.28, 127 nn.29 & 30.) This is mistaken. The indictment's failure to charge that a crime occurred during the relevant statutory period renders the indictment facially defective. Each substantive offense

must be dismissed with respect to Tambussi.

"The statute of limitations in a criminal statute is a complete defense to the prosecution of the crime." State v. Thompson, 250 N.J. 556, 573 (2022). "The statute of limitations is not intended to assist the State in its investigations; it is intended to protect a defendant's ability to sustain his or her defense." State v. Twiggs, 233 N.J. 513, 539 (2018). "A statute of limitations balances the right of the public to have persons who commit criminal offenses charged, tried, and sanctioned with the right of the defendant to a prompt prosecution." State v. Diorio, 216 N.J. 598, 612 (2014).

"[I]t has traditionally been the rule that 'time and place have been viewed as not requiring great specificity,' as they typically are not elements of the crime; thus, the time allegation can refer to the event as having occurred 'on or about' a certain date and, within reasonable limits, proof of a date before or after that specified will be sufficient, provided it is within the statute of limitations." Jeannotte-Rodriguez, 469 N.J. Super. at 103–04 (emphasis added).

Whether an indictment facially alleges a crime occurred within the relevant statutory period is a question of law ripe for review on a motion to dismiss. The AG's footnotes contending that the statute of limitations is a sufficiency of the evidence issue contains no citation in support of that position. Indeed, the case law says the opposite.

Pre-trial motions to dismiss an indictment as outside the statute of limitations are routinely granted. See, e.g., State v. Bautista, No. A-3126-22, 2024 WL 748602, at *1 (App. Div. Feb. 23, 2024) (affirming on appeal trial court's dismissal with prejudice of indictment as "time-barred" in violation of the five-year statute of limitations); State v. Twiggs, 445 N.J. Super. 23, 25 (App. Div. 2016) (affirming trial court's dismissal of indictment "because the State initiated its prosecution beyond the time permitted by the criminal statute of limitations"), aff'd, 233 N.J. 513 (2018).

When pre-trial motions to dismiss are denied, the Appellate Division has often granted leave to appeal and reversed the trial court's denial. State v. Rosado, 475 N.J. Super. 266, 270, (App. Div.) (granting leave to appeal and reversing trial court's denial of motion to dismiss indictment as outside the five-year statute of limitations), aff'd o.b., 256 N.J. 93 (2023); State v. Cobbs, 451 N.J. Super. 1, 5 (App. Div. 2017) (granting leave to appeal and reversing trial court's denial of motion to dismiss indictment as time-barred).

While the State contends that a court may be less likely to dismiss an indictment on a conspiracy charge as outside of the statute of limitations, State v. Cagno, 211 N.J. 488 (2012), here, Tambussi has only moved to dismiss the substantive counts as time-barred.

The indictment does not allege that Tambussi committed the elements of the substantive offenses during the statutory periods of five-years (N.J.S.A. 2C:1-6(b)(1)) or seven-years (N.J.S.A. 2C:1-6(b)(3)). Nor does the AG in its opposition dispute Tambussi's argument that none of these offenses qualifies as continuing-course-of-conduct crimes under N.J.S.A. 2C:1-6(c). (See Tambussi Br. at 38 n.10.)

Because the indictment is facially deficient for failing to allege that Tambussi committed any substantive crime during the relevant statutes of limitation, Counts 5-13 must be dismissed.

CONCLUSION

For the foregoing reasons, and those set forth more fully in the opening brief, this Court should dismiss the indictment against William M. Tambussi, Esq.

Respectfully submitted,

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