State of New Jersey,

Plaintiff,

vs.

George E. Norcross, III, Phillip 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

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO COMPEL PRODUCTION OF TITLE III WIRETAP APPLICATIONS

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PRELIMINARY STATEMENT

The Attorney General began investigating Defendants in 2019. An indictment was returned five years later. The central evidence before the grand jury (and likely any petit jury) was intercepts obtained from federal wiretaps authorized by the District Courts for the Eastern District of Pennsylvania and New Jersey. More than five months after the State returned its indictment, Defendants remain without the underlying wiretap applications and affidavits. Worse, it is totally unclear when—or even if—Defendants will ever get that discovery.

Some context is important.

The FBI, and Special Agent Stephen Rich in particular, have been investigating George Norcross's alleged misuse of tax credits for over a decade. Based on the discovery received to date, Mr. Rich's investigation began from the FBI's Philadelphia office. First, Mr. Rich shopped his case to the U.S. Attorney in New Jersey. That office saw no crime, and promptly closed whatever case was opened. (See Certification of Lee Vartan, Esq. ("Vartan Cert."), Ex. A ("Based on a review of the applicable law and evidence obtained during the investigation, we have concluded that no further action is warranted. Accordingly, this matter has been closed.").) Undeterred, Mr. Rich crossed back over the river and continued his investigation with the aid of the U.S. Attorney for the Eastern District of Pennsylvania.

In or about 2019, for unknown reasons, the New Jersey Attorney General joined the investigation. But critically, the AG joined in an odd way. Mr. Rich was deputized as a special state investigator, answerable to the Director of the AG's Office of Public Integrity and Accountability ("OPIA"). So too were other FBI agents. The Assistant United States Attorneys from Philadelphia, none of whom hold New Jersey law licenses, were also deputized as special deputy attorneys general answerable to the same Director. (See Vartan Cert., Ex. B.) Why? It's

not clear, but that maneuver gave the AG unfettered access to the federal files—the same files implicated in this motion.

Then, in April 2023, something remarkable happened. AUSA/Special Deputy Attorney General K.T. Newton sent a letter to Special Agent/Special State Investigator Stephen Rich saying defendants had committed no crime. (See Vartan Cert., Ex. C ("Based upon review of the available admissible evidence, the applicable law, the probability of a successful trial and the prosecution standards of the office, it is our opinion the matter should not be the subject of a federal prosecution.").)

But the same Ms. Newton and the same Mr. Rich, along with the same team of federal investigators and prosecutors deputized as special state investigators and prosecutors, had a different "opinion" with respect to a state prosecution. Just days before Ms. Newton sent her declination letter to Mr. Rich, the New Jersey Attorney General began a presentation to a state grand jury. While the "available admissible evidence" was not enough to meet the "prosecution standards" of the U.S. Attorney's Office, the exact same evidence was apparently enough to meet the obviously much lower "prosecution standards" of the Attorney General's Office. The 2023 presentation ended without an indictment, and the AG began a new presentation in January 2024, which culminated in the indictment before the Court.

For one FBI agent, Michael Breslin, cross-designation was not enough. He quit the FBI and took a job with OPIA as a deputy attorney general assigned exclusively to prosecuting Defendants. Making things odder still, another former AUSA from Philadelphia, Eric Gibson, just left the U.S. Attorney's Office to join OPIA and supervise the Defendants' prosecution. (See Vartan Cert., Ex. D.) Like many of his Pennsylvania confederates, Mr. Gibson does not hold a New Jersey law license.

This is necessary context for Defendants' motion. A central component, if not the central component of the AG's prosecution of Defendants, is evidence obtained pursuant to a series of federal wiretaps. Five months after Defendants' indictment, Defendants are without a complete set of the wiretap applications, and the applications Defendants do have are heavily redacted. (See Vartan Cert., Exs. K, L, M.) The AG has not yet formally responded to Defendants' discovery demands, but based on a telephonic meet-and-confer, the AG takes the position that whether it can produce the wiretap applications, and in what form, is within the total control of the U.S. Attorneys for New Jersey and the Eastern District of Pennsylvania. How could that be? Mr. Rich was the affiant on many of the applications. He is a special state investigator answerable to the Director of OPIA. The applications are in the AG's possession and control. And the AG used their fruits. Intercepts were presented to the grand jury and quoted throughout the State's indictment.[1]

Even if the U.S. Attorneys for New Jersey and the Eastern District of Pennsylvania are in control of the applications, they are decidedly not in control of this prosecution. The AG is. Without complete, unredacted applications, Defendants cannot properly challenge the wiretaps and their fruits.

For these reasons, amplified below, the AG must be directed to immediately turn over the complete, unredacted wiretap applications and all applications on which they rely. Both federal and state law mandate that the AG produce these documents to Defendants. Pursuant to the federal statute authorizing wiretaps, the AG has an unambiguous obligation to produce the "full and

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[1] At a recent status conference, the State made the remarkable confession to the Court that while the State had sought and received permission under Touhy to present the wiretap evidence to the grand jury, it had not sought permission to disclose that same evidence to the defense until after the indictment was returned. And, of course, what has been disclosed is plainly deficient.

complete" applications submitted in support of a wiretap order. Congress has directed that wiretap communications are inadmissible at trial (whether federal or state) if the "full and complete" applications are not produced to a defendant. Additionally, under state law, the AG must produce all wiretap application materials to a defendant as part of his mandatory Brady and Rule 3:13-3 discovery obligations.

If the AG cannot meet his discovery obligations, whatever the reason, then the fruits of the wiretap applications must be suppressed.

STATEMENT OF FACTS

A. Overview of the federal investigation.

In 2015, the United States Attorney's Office for the Eastern District of Pennsylvania ("USAO-EDPA") was investigating bribery, conspiracy, and embezzlement of funds belonging to Local 98 of the International Brotherhood of Electrical Workers ("Local 98"). Throughout the course of that investigation, USAO-EDPA applied for, and successfully obtained, orders authorizing the interception of electronic and wire communications.

In or about October 2016, USAO-EDPA shifted its focus from Local 98's activities to George Norcross and others seeking tax credits for constructing buildings on the Camden waterfront. While USAO-EDPA appeared to have opened a new investigation based on information gleaned from wiretaps in the Local 98 case, USAO-EDPA did not apply for a fresh wiretap order with a new case number. Instead, USAO-EDPA relied on the thirteen prior affidavits to establish probable cause for its investigation of Mr. Norcross. These circumstances raise obvious red flags as to whether prosecutors and agents followed Department of Justice policies, the letter of the federal wiretap laws, and truly established probable cause as to Mr. Norcross. But the AG's steadfast refusal to provide Defendants with the complete wiretap applications and affidavits precludes any meaningful challenge.

From in or about April 29, 2015, through in or about October 18, 2016, the District Court for the Eastern District of Pennsylvania issued fourteen wiretap orders. The AG has produced only three of the fourteen wiretap applications, affidavits, and orders. (See Vartan Cert, Exs. K, L, M.)

In the June 10, 2016, wiretap order, Mr. Norcross became a wire communication interception target for the first time. (See Vartan Cert., Ex. K1.) Mr. Norcross remained a target in the July 28, 2016 and October 18, 2016 wiretap applications. (See Vartan Cert., Exs. L2, M2.) Philip Norcross and John O'Donnell were also identified as individuals that USAO-EDPA sought to intercept electronic and wire communications from in the June 10, 2016, July 28, 2016, and October 18, 2016 orders. (See Vartan Cert., Exs. K1, L1, M1.) The October 18, 2016 wiretap order also included Sidney Brown as an identified individual. (See Vartan Cert., Ex. M1.) USAO-EDPA never sought to intercept communications from Dana Redd or William Tambussi.

Ultimately, USAO-EDPA declined prosecution: "Based upon review of the available admissible evidence, the applicable law, the probability of a successful trial and the prosecution standards of the office, it is our opinion the matter should not be the subject of a federal prosecution." (Vartan Cert., Ex. C.) The declination letter was signed by K.T. Newton, Assistant United Stated Attorney, and sent to Special Agent Stephen Rich. (Id.)

B. The AG deputized the federal prosecutors and agents.

At the time the declination letter was issued, both Ms. Newton and Mr. Rich were state agents under the supervision of the Office of Public Integrity and Accountability. On November 7, 2019, Ms. Newton was sworn in as a special deputy attorney general, and Mr. Rich was sworn in as a special state investigator. (See Vartan Cert., Ex. B.) In total, five federal agents and four federal prosecutors were deputized as agents of the State. (Id.) One of the other attorneys

deputized the same day as Ms. Newton and Mr. Rich was Frank Costello. Mr. Costello signed many of the wiretap applications at issue in this motion.[2]

Each federal prosecutor and agent swore an affirmation that "[w]hile performing [their] duties as an agent of the State, [they] will serve under the authority and supervision of the Director, Office of Public Integrity and Accountability or his designee." (Vartan Cert., Ex. B.) The designations continue today. (Id. ("The duration of my appointment as [Special State Investigator/Special Deputy Attorney General] will be for the period encompassing the investigation and prosecution of [this case].").)

As discussed below, it is unclear why, if the federal prosecutors and agents are answerable to the Director of OPIA, the wiretap applications have not already been turned over; they are in the possession and control of the AG.

C. The documents at issue.

The AG seeks to use communications obtained from the federal wiretaps as evidence against Defendants. In fact, the wiretap communications are central to the indictment. For example, wiretap communications form the basis for the AG's accusations that the so-called

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[2] None of the four attorneys deputized as special deputy attorneys general appears to be admitted to practice law in the State of New Jersey. See Attorney Search, New Jersey Courts, available at https://portalattysearch-cloud.njcourts.gov/prweb/PRServletPublicAuth/app/Attorney/-amRUHgepTwWWiiBQpI9_yQNuum4oN16*/!STANDARD?AppName=AttorneySearch (last accessed November 19, 2024).

Rule of Professional Conduct 5.5(b) permits an out-of-state lawyer to practice law in the state in only limited, defined situations. Defendants have asked the AG to identify under what authority the AG deputized individuals who are not authorized to practice law in the state, but no justification has yet been provided. (See Vartan Cert., Ex. J.) As this Court is aware, the unauthorized practice of law is a crime. See N.J.S.A. 2C:21-22. Whether OPIA obtained evidence through criminal conduct is concerning and will likely be the subject of future motion practice.

"Norcross Enterprise" sought to use a government agency to harm Carl Dranoff. (See Indict. ¶¶126-151.) The AG even quotes the wiretap communications in titling sections of the indictment in the hopes that colorful language will distract from the lack of legal substance: *"A Bat Over His Head": The Norcross Enterprise Follows Through on Its Threats by Plotting a Condemnation Action to Strip [Dranoff] of His Interests*." (See id. p. 50.) The State relies heavily on the fruits of the wiretap orders but continues to be delinquent in producing the complete applications.

Defendants intend to challenge three of these wiretap orders (June 10, 2016, July 28, 2016, and October 18, 2016) in a motion to suppress.[3] Before Defendants can bring their motions, however, the AG must be compelled to fulfill his discovery obligations. To date, the AG has only produced incomplete applications for these three wiretap orders.

1. Prior applications "incorporate[d] by reference."

USAO-EDPA's June 10, 2016 wire application approved by the Honorable Paul S. Diamond, U.S.D.J. explicitly stated that "[t]his application constitutes a request to renew previously authorized interceptions" for certain individuals "and for the initiation of the interception of wire communications on Target Telephone #9." (Vartan Cert., Ex. K2 at ¶3.) The application identifies Mr. Norcross as "Target Telephone #9." (Id.) The July 28, 2016 application contains the same language. (See Vartan Cert., Ex. L2 at ¶3 ("This application constitutes a request to renew previously authorized interceptions for Target Telephones #1 through #4, and Target Telephones #6, #8 and #9, and for the initiation of the interception of electronic communications on Target Telephone #9, and wire communications on Target Telephone #10.").) "Target

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[3] Defendants reserve their rights to challenge other wiretap orders, such as the one issued by the District Court for the District of New Jersey. But the defense cannot begin to assemble complete motions to suppress given the AG's failure to provide relevant discovery well past its deadline to do so.

Telephones #9 and #10" are numbers used by Mr. Norcross. (Id.)

Further, to establish probable cause for the July 28, 2016 wiretap, FBI Special Agent Jason Blake's affidavit relied on the twelve wiretap affidavits previously attested to in the investigation. Paragraph 16 of Special Agent Blake's affidavit stated:

> I incorporate by reference the affidavits in Miscellaneous Matter 15-2005, submitted on April 29, 2015, June 2, 2015, July 9, 2015, August 12, 2015, September 22, 2015, October 23, 2015, November 25, 2015, December 31, 2015, February 5, 2016, March 17, 2016, April 25, 2016, and June 10, 2016, in support of Applications for authorization under Title 18, United States Code, Section 2518, for Orders to intercept electronic and wire communications on TARGET TELEPHONES #1 through 8, and wire communications on TARGET TELEPHONES #7 and 9.

(Vartan Cert., Ex. L3 at ¶16.) Special Agent Blake went on to explain that Target Interceptees #1 through 9 "are more fully described in the prior affidavits listed" in Paragraph 16. (Id. at ¶17.) Despite USAO-EDPA's reliance on the April 29, 2015, June 2, 2015, July 9, 2015, August 12, 2015, September 22, 2015, October 23, 2015, November 25, 2015, December 31, 2015, February 5, 2016, March 17, 2016, and April 25, 2016 wiretap affidavits to establish probable cause for the July 28, 2016 wiretap order, the AG has not produced these eleven applications, affidavits, and orders.

USAO-EDPA's October 18, 2016 wiretap affidavit, sworn by Mr. Rich, contains nearly identical language to Mr. Blake's July 28, 2016 affidavit. Like the July 28, 2016 affidavit, Mr. Rich incorporated by reference the thirteen prior wiretap affidavits "in support of Applications for authorization under Title 18, United States Code, Section 2518, for Orders to intercept electronic and wire communications on Target Telephones #1 through 4, 6, 8, and 9, and wire communications on Target Telephones #5, 7, and 10." (Vartan Cert., Ex. M3 at ¶16.) Once again, the affidavit provided that "[t]he previously identified target interceptees [George Norcross, Philip

Norcross, John O'Donnell, and others] are more fully described in the prior affidavits listed above." (Id. at ¶17.)

To date, the AG has not produced the eleven applications, affidavits, and orders that were used to support the probable cause determinations for the June 10, 2016, July 28, 2016, and October 18, 2016 wiretap orders.

2. Redactions.

Of the three sets of USAO-EDPA wiretap applications, affidavits, and orders actually provided to the defense, the only documents that do not contain redactions are the October 28, 2016 application and order. All the other applications, affidavits, and orders are heavily redacted, leaving Defendants unable to evaluate and potentially challenge the validity of the wiretaps.

The tables below capture the scope of the redactions.

Wiretap	Pages with redactions	Total pages
June 10, 2016 application	11	23
June 10, 2016 affidavit	163	248
June 10, 2016 order	9	21

Wiretap	Pages with redactions	Total pages
July 28, 2016 application	11	23
July 28, 2016 affidavit	182	281
July 28, 2016 order	10	21

Wiretap	Pages with redactions	Total pages
October 18, 2016 application	--	11

October 18, 2016 affidavit	4	39
October 18, 2016 order	--	9

The majority of pages in the June 10, 2016 and July 28, 2016 affidavits, then, contain redactions. The redactions in those documents are not limited to protect personally identifiable information or the names of certain individuals for privilege reasons. Nor do the redactions consist of a few sentences on each page. Rather, a large majority of these pages are redacted in their entirety and provide Defendants with no guidance as to why so much information must be shielded from discovery.

D. Meet-and-confer process.

The defense has made numerous requests for the complete wiretap applications. The AG has refused to provide them notwithstanding that the State's discovery obligations were triggered upon the unsealing of the indictment on June 17, 2024. See R. 3:13-3(b)(1). The first request for these documents was made one-week later, on June 21. (See Vartan Cert., Ex. E (requesting the production of "all federal and state wiretap applications, affidavits, orders, records and reports regarding (including, but not limited to, 15 Day Reports), minimization instructions (including, but not limited to, instructions regarding privileges), as well as all recordings (including those identified as privileged) and transcripts").) Follow-up requests have also been made.[4] (See Vartan Cert. Exs. F, H, I.)

During the meet-and-confer process, the AG has represented that he has not requested—or

[4] Defendants are still meeting and conferring with the AG on other discovery deficiencies, and Defendants reserve their rights to bring any motions related to those documents if they are not produced. (See generally Vartan Cert., Exs. G, H, J.) Defendants bring this narrow motion to focus solely on the most immediate (and plainest) discovery deficiency.

determined whether he even will request—these documents (the prior applications or the unredacted versions) from the federal government. Counsel's efforts to meet-and-confer have been unsuccessful, necessitating this motion to compel.

The fact that five months after the unsealing of the indictment, the AG has not even begun the process of requesting these critical documents, and may never do so, is troubling. The AG knew in advance he was going to unseal an indictment—which relied heavily on these wiretap applications—yet for whatever reason failed to obtain these documents in advance of that unsealing (or since). There is no justification for such blatant delinquency. The indictment should not have been brought and unsealed if the AG was so wholly unprepared to meet his mandatory discovery obligations. This Court must compel the immediate production of these documents.

LEGAL ARGUMENT

POINT ONE

THE AG MUST PRODUCE THE ENTIRE TITLE III WIRETAP APPLICATIONS AND SUPPORTING AFFIDAVITS.

The AG is deficient in providing to the defense the applications and affidavits submitted in support of the Title III wiretaps. Specifically, the AG has failed to provide the complete applications and affidavits submitted to the United States District Court for the Eastern District of Pennsylvania that led to the issuance of the June 10, 2016, July 28, 2016, and October 18, 2016 wiretap orders.

The AG's deficiencies come in two forms. First, the agents' affidavits submitted in support of the applications each incorporated by reference prior applications for wiretaps and their affidavits. The AG has not produced any of the incorporated documents. Second, what the AG has produced of these applications is peppered with redactions. The AG has not provided the full

and complete unredacted versions.[5]

Defendants are entitled to the complete applications, including the applications incorporated by reference and the unredacted versions, under both federal statutory law and state discovery law.

A. Federal law requires that the "full and complete" applications for the Title III wiretap orders be produced to Defendants.

The defense is entitled to the applications filed by the federal agents to obtain the Title III wiretaps. This is not a controversial statement. Under federal law, a defendant must be provided with the applications submitted to support a wiretap order. Congress has made this clear—when a wiretap is obtained, the defendant must be given access to all information relied upon by the issuing magistrate so that the defendant has the opportunity to file a suppression motion challenging the validity of the wiretap. The AG has chosen to use materials obtained from a federal Title III wiretap, and as such, the AG is bound by that federal law.

18 U.S.C. § 2518(9) provides:

> The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

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[5] The AG's failure to provide unredacted versions of discovery also violates the Court's Interim Consent Protective Order Regarding Discovery, dated November 6, 2024. Paragraph 2 provides: "The State shall provide an unredacted copy of the State's discovery in the above-captioned matter to defense counsel; likewise, the Defendants will provide unredacted copies of any applicable defense discovery to the State."

The congressional language is unambiguous. A defendant must be provided with "a copy of the court order, and accompanying application, under which the interception was authorized or approved." Id. The failure to do so results in the absolute preclusion of the wiretap communications and "evidence derived therefrom" at trial. Id. And Congress explicitly stated that this prohibition applies regardless of whether the prosecution is "in a Federal or State court." Id.

The purpose of the full disclosure provision in subsection 9 is to enable a defendant to have sufficient knowledge to bring an informed motion to suppress; that is, a motion challenging that "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a). The legislative history confirms this congressional intent. Subsection 9's requirement that the application be produced was specifically "designed to give the party an opportunity to make a pretrial motion to suppress" under Subsection 10. S. REP. NO. 1097 (1968), as reprinted in U.S.C.C.A.N. 2112, 2196.

Courts have echoed that the purpose of disclosure of the wiretap application under Subsection 9 is to allow a defendant to file an effective motion to suppress. See, e.g., United States v. Manuszak, 438 F. Supp. 613, 624 (E.D. Pa. 1977) ("[A] party must have access to these documents [the wire application and order] in order to make any kind of effective assessment of the surveillance's validity no matter what grounds may ultimately be relied upon to support a suppression motion."); Reyeros v. United States, No. 10-2907, 2011 WL 5080308, at *4 (D.N.J. Oct. 24, 2011); In re Globe Newspaper Co., 729 F.2d 47, 55 (1st Cir. 1984) ("The suppression provisions of § 2518(9) and § 2518(10)(a) reflect Congress's belief that parties against whom Title

III evidence is offered should have an opportunity to examine the documentation and test the legality of the surveillance.").

Indeed, disclosure was of such importance to Congress that the law prohibits the use of evidence obtained from a wiretap at trial, unless the application securing that wiretap was disclosed. "[C]ommunication[s] intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, or other proceeding in a Federal or State court," unless the applications for those wiretaps have first been produced. 18 U.S.C. § 2518(9) (emphasis added). Congress could have chosen any remedy for the failure to produce wiretap applications; attesting to the importance of this mandate, it chose suppression.

The next question is what in the application must be produced to a defendant. Fortunately, Congress was just as specific in defining the scope of the "application" as it was in mandating the provision of the application itself. In the same statute, Congress explained that the "application shall include," among other items, the "full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued." 18 U.S.C. § 2518(1)(b).

"[C]ongressional intent to require complete disclosure of the affidavit is clear." United States v. Perez, 353 F. Supp. 3d 131, 139 (D. Mass. 2018) (emphasis added). Subsection 9 of § 2518 and Subsection 1(b) of § 2518 must be read in tandem. See Manuszak, 438 F. Supp. at 621 (reviewing legislative history and holding that subsections of 2518 must be read together). Thus, the "accompanying application, under which the interception was authorized or approved" that must be produced under 18 U.S.C. § 2518(9), includes the "full and complete statement of the facts and circumstances relied upon by the applicant," 18 U.S.C. § 2518(1)(b).

When an applicant for a wiretap incorporates facts and circumstances in his affidavit, then those facts and circumstances become part of the "accompanying application under which the interception was authorized." See 18 U.S.C. § 2518(9). Thus, in United States v. Manuszak, the court explained that "once [a statement] is incorporated into another application it becomes part of the foundation upon which the legality of the other interception depends and for the reasons stated in the text its disclosure then becomes of paramount importance to a party facing a 'proceeding' based on that interception." 438 F. Supp. at 624 n.16 (citing 18 U.S.C. §§ 2518(9) and (10)(a)); see also United States v. Cervantes, No. 21–328, 2024 WL 4795707, at *5 (N.D. Cal. Aug. 12, 2024) ("[B]ecause [the prior affidavits] are 'expressly incorporated' into the [latest] Application, they are necessarily components of the application and must have been produced to the defense.").

There can be no question that the prior affidavits are part of the "full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued." 18 U.S.C. § 2518(1)(b). Indeed, the affiant admitted this in all three applications. The three affidavits each explicitly "incorporate[d] by reference" all prior affidavits. (Vartan Cert., Exs. K3, L3, M3 at ¶16.) The affidavits also relied on facts that "[a]re more fully described in the prior affidavits listed above." (Vartan Cert., Exs. K3, L3, M3 at ¶17.) Once those prior affidavits were "incorporated into" the current wiretap application, those prior affidavits became "necessarily components of the application" and "bec[a]me[] part of the foundation" upon which the current wiretaps were issued. See Cervantes, 2024 WL 4795707, at *5; Manuszak, 438 F. Supp. at 624 n.16.

Defendants here are entitled to the "full and complete statement of the facts and circumstances relied upon by the applicant." This includes (1) the prior affidavits that are explicitly relied upon and incorporated into each affidavit; and (2) unredacted versions of the

applications. Defendants cannot bring a § 2518(10)(a) motion to suppress without these full and complete applications. Unless the applications are provided in their entirety, then "[the] contents of any wire, oral, or electronic communication intercepted," as well as any "evidence derived therefrom," "shall not be received in evidence or otherwise disclosed in any trial." See 18 U.S.C. § 2518(9).

The Court must compel production of the complete June 10, 2016, July 28, 2016, and October 18, 2016 applications. This includes the substantial portions that were produced but redacted. This also includes applications "incorporate[d] by reference" into these affidavits, specifically the April 29, June 2, July 9, August 12, September 22, October 23, November 25, and December 31, 2015, and the February 5, March 17, and April 25, 2016 applications.

If the AG is unable or unwilling to produce these materials as required by law, then, at a minimum, all communications intercepted from the June 10, 2016, July 28, 2016, and October 18, 2016 orders and all derivative evidence obtained must be suppressed.

B. Defendants are entitled to the complete applications under state law.

Defendants are independently entitled to the complete applications under state law, including those prior applications incorporated by reference and unredacted versions. Defendants are entitled to these applications under Rule 3:13-3 and as Brady material. New Jersey courts require that a defendant have the complete supporting applications for warrants and wiretaps so that a motion to suppress can be made.

"Defendant's post-indictment right to discovery is automatic." Pressler & Verniero, New Jersey Court Rules, comment 3.1 to Rule 3:13-3 (2025). The Supreme Court has recognized "the court rule that makes pretrial access to the evidence a critical right for all defendants." State v. Scoles, 214 N.J. 236, 257 (2013). To protect a defendant's "right to discovery," prosecutors must timely provide relevant discovery. "[T]he prosecutor's discovery for each defendant named in the

indictment shall be provided by the prosecutor's office upon the return or unsealing of the indictment." R. 3:13(b)(1). Accord R. 3:9-1(a).

Here, all discovery was due on June 17, 2024, when the indictment was unsealed. The more than five months that has now passed is an inexcusable delay, and another glaring red flag in a case already riddled with prosecutorial overreach and legal error.

Pursuant to Brady, the State has a constitutional obligation to produce to a defendant all "material" evidence "favorable to the accused, either as exculpatory or impeachment evidence." State v. Brown, 236 N.J. 497, 518 (2019). "In deciding materiality, 'we examine the circumstances under which the nondisclosure arose' and '[t]he significance of a nondisclosure in the context of the entire record.'" Id. (citation omitted).

The full applications used in support of all wiretap orders are material and relevant to bringing a facial challenge to the orders. These include, but are not limited to, the applications "incorporated by reference," as well as the unredacted versions of the applications themselves.

It is axiomatic that on a facial challenge to a warrant or wiretap order, the reviewing court must consider the four corners of the supporting application when deciding the motion to suppress. When a motion to suppress is brought challenging the basis for probable cause, "the judge may consider only information which is 'contained within the four corners of the supporting affidavit' or sworn testimony provided by law enforcement personnel." State v. Pinson, 461 N.J. Super. 536, 549 (App. Div. 2019) (quoting Schneider v. Simonini, 163 N.J. 336, 363 (2000)). To that end, it is "the State's burden to produce evidence showing that all information used to support probable cause was tendered to the judge under oath or affirmation." State v. Bitzas, No. A-3213-21, 2024 WL 2764641, at *7 (App. Div. May 30, 2024), certif. denied, 258 N.J. 506, 322 (2024).

The complete applications for a wiretap order, including all statements incorporated therein and the unredacted versions, are, accordingly, essential to this inquiry. Without them, Defendants lack the ability to bring a motion to suppress; nor, without them, can the Court make a probable cause determination: it simply cannot review the four corners of the wiretap orders and applications to determine if the orders are facially deficient if the AG has not provided the complete orders and applications. Further, to the extent the AG intends to call the affiants as witnesses at trial, then their sworn statements are impeachment material that must be provided. See R. 3:13-3(b)(1)(G).

Under Brady and Rule 3:13-3, Defendants are entitled to the complete applications for the June 10, 2016, July 28, 2016, and October 18, 2016 wiretap orders, including all materials incorporated by reference. The AG must be compelled to provide them.

POINT TWO

THE AG CANNOT HIDE BEHIND THE TOUHY REGULATIONS BECAUSE THE AG CHOSE TO DEPUTIZE NINE INDIVIDUALS AND MADE THEM AGENTS OF THE STATE WITH INDEPENDENT OBLIGATIONS TO PRODUCE DISCOVERY.

The AG will likely cite the Touhy process in his response, but this Court need not even consider Touhy. Touhy applies to federal employees acting in their capacity as federal employees only. See 28 C.F.R. §§ 16.21(a), 16.22(a). It does not apply to joint federal and state investigations, see State v. Knight, 145 N.J. 233, 259, (1996), and it certainly does not apply to federal employees "serv[ing] under the authority and supervision of the Director, Office of Public Integrity and Accountability, or his designee," (see Vartan Cert., Ex. B). Touhy prevents a federal employee from "disclos[ing] any information or produc[ing] any material acquired as part of the performance of that person's official duties or because of that person's official status." 28 C.F.R. § 16.22(a).

Defendants understand that in the usual case, a U.S. Attorney's Office can withhold Touhy authorization, and prevent its employees from producing documents or from testifying. But this is not the usual case. Rather, in this case, the AG chose to deputize nine federal employees and make them agents of state government.

The AG's deliberate decision to make these deputizations takes this situation outside of Touhy. "'[A]ntecedent mutual planning, joint operations, cooperative investigations, or mutual assistance between federal and state officers may sufficiently establish agency and serve to bring the conduct of the federal agents under the color of state law.'" Knight, 145 N.J. at 259 (quoting State v. Mollica, 114 N.J. 329, 35-56 (1989)). Thus, all nine of these individuals, as state agents, are subject to state law and discovery obligations. See State v. Burns, 462 N.J. Super. 235, 247–48 (App. Div. 2020) (finding that federal Drug Enforcement Agency agents deputized by county prosecutor's office were law enforcement officers within meaning of state law).

With Touhy inapplicable to the discovery of these documents, the sole question for this Court is the AG's general discovery obligations. And those obligations require the production of all materials "that are in the possession of the prosecutor, law enforcement officials, and other agents of the State." State v. Robinson, 229 N.J. 44, 71 (2017) (citing State v. W.B., 205 N.J. 588, 608 (2011)). This includes the nine individuals deputized as state law enforcement officials.

Whatever materials these special state investigators and special deputy attorneys general have in their possession, custody, or control belong to the AG and, therefore, must be produced under Rule 3:13-3. The special deputy attorneys general, as attorneys and prosecutors, also have professional responsibility obligations to satisfy in addition to the discovery rules. See, e.g., R.P.C. 3.8.

This Court must compel the production of these materials. Touhy does not apply to the wiretap materials, and the AG's Rule 3:13-3 discovery obligations mandate the immediate production of the unredacted applications and all applications incorporated by reference.

CONCLUSION

It is far past time for the self-titled Office of Public Integrity and Accountability to stop playing a cynical game of hide-the-ball. This Court should compel the production of the complete applications submitted in support of the June 10, 2016, July 28, 2016, and October 18, 2016 wiretap orders, along with the complete applications incorporated by reference.

Respectfully submitted,

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