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| State of New Jersey,<br><br>Plaintiff,<br><br>vs.<br><br>George E. Norcross, III, Phillip A. Norcross, William M. Tambussi, Dana L. Redd, Sidney R. Brown, AND John J. O'Donnell<br><br>Defendants. | SUPERIOR COURT OF NEW JERSEY<br>CRIMINAL DIVISION<br>MERCER COUNTY<br>INDICTMENT NO. 24-06-00111-S |

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

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Defendant William Tambussi, Esq. joins the Omnibus Motion to Dismiss the Indictment filed by Defendants on September 24. He brings this standalone Motion to Dismiss based on legal arguments unique to him.

## PRELIMINARY STATEMENT

The Attorney General is attempting to criminalize the routine practice of law.

In a 111-page, 242-paragraph indictment, William Tambussi, Esq. is barely mentioned. (See Certification of Lee Vartan, Esq. ("Vartan Cert."), Ex. A.) When he is mentioned, his "criminal" acts are legal research for a contemplated declaratory judgment action and arguing a pretrial motion before the Superior Court. If allowed to stand, the potential impact of the AG's Indictment would be as sweeping as it is chilling on the profession.

Without accusing Tambussi of violating any Rule of Professional Conduct—because he violated none—the AG calls his practice of law criminal. The Appellate Division has already held that violations of ethical and professional standards cannot form the basis for criminal liability. Given that, the routine practice of law, without any violation of any ethical or professional standard, certainly cannot be a crime.

First, criminalizing the routine practice of law would violate basic due process; there is no notice. Second, it would violate separation of powers; it is the Judiciary that regulates the legal profession under our state constitution, not the Executive. Third, it would chill zealous advocacy, particularly among the criminal defense bar. If the routine practice of law could turn defense attorney into defendant, the AG would have another arrow in its already full quiver. And fourth, it would allow for prosecution without guardrails. The AG alone would have the power to decide when the practice of law is just zealous enough and when it becomes too zealous and veers into the criminal. This is not a hypothetical. It is happening. Why was Tambussi indicted and not the

other attorneys from his law firm, Brown & Connery, LLP, who assisted with the declaratory judgment action research (in some instances, spending significantly more time on the matter than Tambussi)? The AG says why. Because Tambussi "is the long-time personal attorney to George E. Norcross, III." (Indictment ¶11.) The other attorneys are not. The Indictment must be dismissed.

But the Court can dismiss the Indictment for less heady reasons than due process and separation of powers. In presenting its case to the grand jury, the AG grossly distorted Tambussi's work as an attorney. Over and over again.

The AG told the grand jury that the Camden Redevelopment Agency ("CRA") had not authorized Tambussi and Brown & Connery's legal work when the CRA had. It told the grand jury that Tambussi and Brown & Connery were preparing a condemnation action without having taken the statutorily required steps when the AG knew they were preparing a declaratory judgment action. It told the grand jury there was something wrong with Tambussi and Brown & Connery having filed motions *in limine* so close to trial when, of course, that is when *in limine* motions are always filed. And the AG even suggested to the grand jury that in entertaining the motions and not summarily declaring them untimely, the Honorable Steven J. Polansky, J.S.C., might himself be "corrupt" and part of the "Norcross Enterprise."

The AG's actions should come as no surprise. The only way the AG could criminalize the routine practice of law was to repeatedly chip away at the integrity of the grand jury process. And that is what the AG did. The AG made it look like Tambussi was directing a public agency (the CRA) to take obviously incorrect legal positions to benefit George Norcross. But the AG knew he was not. Tambussi's law firm was researching a legal question at the direction of a client for the benefit of the client. The AG made it look like Tambussi was filing frivolous and out-of-time motions to protect George Norcross at the expense of his clients. But the AG knew he was not.

Tambussi was filing timely and necessary motions *in limine* to benefit his clients. And they did benefit his clients. In part because of Tambussi's motions, Carl Dranoff settled his lawsuit with the City of Camden and the CRA for $7.75 million. The AG's deliberate and repeated manipulation of the grand jury process—and the grand jurors themselves—requires dismissal of the Indictment.

Routine lawyering is not a crime. And the AG certainly cannot make it a crime by telling the grand jury falsehoods and half-truths. The Indictment against William Tambussi, Esq. must be dismissed.

## RELEVANT FACTS

Despite its bluster and length, the AG's Indictment fails to allege a crime. At best, it alleges that George Norcross and his partners used sharp business practices to secure development rights along the Camden waterfront and obtained tax credits to make those rights more valuable. That is not a crime for the reasons stated in the Omnibus Motion to Dismiss. But whatever the Indictment is, it has almost nothing to do with Tambussi. Exhibit A makes that plain. Tambussi is not George Norcross's business partner; he is not an owner of the L3 Complex, Triad1828 Centre, or 11 Cooper; he is not a beneficiary of the "Grow NJ" tax credits; indeed, Tambussi was not even the attorney who assisted with the tax credit applications.

Tambussi features in just two of the alleged "incidents of racketeering conduct." Both involved routine lawyering. But routine lawyering is not a crime, so the AG deliberately and repeatedly misrepresented Tambussi's conduct to the grand jury.

### A. The Declaratory Judgment Action and View Easement

According to the AG, Tambussi was a rogue attorney who himself decided to file a condemnation action on behalf of his client, the CRA, without telling his client; did so knowing that a condemnation action was doomed to fail because the CRA had not met the statutory prerequisites to file a condemnation action; and did so not to benefit the CRA, but rather to benefit

his other client, George Norcross. That is what the AG told the grand jury. Through an FBI agent, it offered testimony that Saundra Johnson, the former Executive Director of the CRA, did not recall the contemplated condemnation action. (See 5/2/24 Grand Jury Tr. at 79:10-22, Vartan Cert., Ex. H.) Through a state investigator, the AG explained what a condemnation action was, what was required before a condemnation action could be filed, and how the CRA had not even tried to meet the statutory prerequisites. (See 1/25/24 Grand Jury Tr. at 100:20-104:8, Vartan Cert., Ex. D.) The grand jury was left believing what the AG wanted it to believe: that Tambussi was seeking to advance the interests of the "Norcross Enterprise" through whatever means necessary.

But none of that was true.

The AG told the grand jury that the contemplated action was a straight condemnation action, when the AG knew it was really a declaratory judgment action. (See id. at 105:4-7; 5/9/24 Grand Jury Tr. at 38:11-14, Vartan Cert., Ex. I.)

- The AG had the draft verified complaint, which made clear that the contemplated action was a declaratory judgment action. (Vartan Cert., Ex. K.)

- The AG had Tambussi's statement from the October 22, 2016 recorded call, which was equally clear: "[L]et me talk about the City's position on this a little bit. The City Redevelopment Authority that my partner Mark Asselta represents, feels strongly about the fact that Dranoff's position on the view easement basically kills the project, the waterfront project, for a period of time that is intolerable. So, the legal action would be to go into court on a declaratory judgment action and order to show cause to have the court declare that Dranoff does not have any defenses to the taking of the view easement and that the only issue that remains upon the filing of a condemnation, which is somewhat lengthy, is the value of the view easement." (Vartan Cert., Ex. L at 22:25-23:14 (emphasis added).)

Further, the AG knew that it was the CRA that authorized Tambussi and Brown & Connery to take the actions they took. James Harveson, the CRA's former Director of Development, testified that it was his idea to explore condemning Dranoff's view easement. (See 2/15/24 Grand Jury Tr. at 137:17-24, Vartan Cert., Ex. F.)

The AG did not like that testimony, so it asked the question again. (See id. at 170:10-13.) Harveson gave the same response. It did not fit the AG's narrative, so the AG disregarded Harveson's testimony in favor of Johnson's.

Months after Harveson testified before the grand jury (and the AG knew his testimony was forgotten by grand jurors), the AG proffered an FBI agent, not Saundra Johnson, to tell the grand jurors that Johnson had no recollection of the declaratory judgment action even though:

- The AG knew that Harveson's testimony was unequivocal. (See id. at 137:17-24; 170:10-13.)

- The AG knew that Johnson's memory was uncertain because she was caring for her ailing mother in South Carolina at the time, (Vartan Cert., Ex. M at 21:1-9); was out of the office, (id.); and specifically told the AG that Harveson, and not she, was overseeing the Camden waterfront project for the CRA. (See id. at 21:25-22:3.)

- The AG knew that it had asked Johnson during a recorded interview: "The CRA was not the driving force behind this [the proposed declaratory judgment action] … You didn't have much of a role in that, am I correct in saying that?" (Vartan Cert., Ex. M at 47:18-25.) To which Johnson responded: "If I signed this [the Rule 4:5-1 certification verifying the accuracy of the proposed declaratory judgment complaint], there was a role that the Executive Director played, and that was putting forth redevelopment at the riverfront that was found to be elevating for the City of Camden." (Id. at 48:1-5.)

- The AG had Brown & Connery's billing records to the CRA, which reflected conversations between Brown & Connery, Johnson, and Harveson about condemning the view easement. (Vartan Cert., Ex. N (Grand Jury Ex. 27).)

- The AG had an email chain involving Mark Asselta, a partner at Brown & Connery, Johnson, and Harveson dated October 20, 2016 where the contemplated declaratory judgment action was discussed, and Johnson specifically said: "Just talked with [A]sselta about [the declaratory judgment action]. I plan to discuss with him again in pm. The following action will be taken: I will talk with Torres [the former chairperson of the CRA Board] as a resolution may be in order … and it may require ratification. A court action may be executed." (Vartan Cert., Ex. O (Grand Jury Ex. 119).)

The cumulative effect of the AG's grand jury presentation was to suggest criminality when the AG knew there was none. Tambussi and Brown & Connery were doing what every attorney

does every day—receiving direction from their client and advancing their client's interests through litigation.

**B. The Motions *in Limine***

The AG engaged in the same manipulation of the grand jury process in describing Tambussi's legal work on behalf of Camden and the CRA in an action originally brought by Dranoff. Dranoff sued the City, the CRA, and others over the Radio Lofts development. Tambussi and Brown & Connery were counsel. They filed motions *in limine* shortly before trial seeking to exclude mention of George and Phil Norcross at trial. (See 6/10/24 Grand Jury Tr. at 62:20-25, Vartan Cert., Ex. J.) The AG tried to criminalize this routine legal work, presenting testimony to the grand jury that there was something suspect in Tambussi filing motions so close to trial, (see id. at 63:1-15), and something even more suspect in Judge Polansky not issuing a ruling on the motions, (see id. at 63:9-15), even going so far as to suggest that Judge Polansky was "corrupt." (Id. at 63:22-64:10.) There was nothing suspect or corrupt, and the transcript of the September 2023 pretrial conference proves it.

The September 2023 transcript makes clear:

- Dranoff specifically challenged the timing of the motions *in limine*. Judge Polansky rejected the challenge, noting that if he enforced the rule that required *in limine* motions to be brought seven days before the initial trial date, "the Appellate Division wouldn't uphold [it] and … [he] probably wouldn't have to hear any [motions *in limine*] in most of [his] cases … " (Vartan Cert., Ex. P at 34:12-15 (Grand Jury Ex. 51).)

- Judge Polansky also expected the motion to be filed: "I expected the objections, quite frankly, based on what's happened in this case over the last few years at the time the first mention [of the Norcrosses] came up. So that wasn't a surprise to me to see the motion. It shouldn't have been – so certainly that issue is coming up sooner or later. I knew that. It doesn't – it should be – it's easier if it's brought in as a motion *in limine*. Yes, it should have been done earlier, but it wasn't. But it's not mandated that that be addressed by any *in limine* motion." (Id. 48:17-49:2 (emphasis added).)

- Judge Polansky did not immediately decide the motions because Dranoff wanted time to respond, and Judge Polansky gave it to him. (See id. at 49:8-9). Before responding, Dranoff settled the case for approximately $7.75 million.

Had the AG not selectively pulled from the pretrial conference transcript, and instead provided the grand jury with necessary context and legal background, the grand jury would have known that everything involving the motions in limine was the routine practice of law. Tambussi's statement at the pretrial conference was true. As the Indictment itself acknowledges, neither George Norcross personally nor Phil Norcross at all were parties to the settlement agreement with Dranoff over the view easement. (See Indictment ¶157.) Neither Dranoff's attorneys nor Judge Polansky challenged Tambussi's statement at the conference because they knew Tambussi was correct—Dranoff had the four-party settlement agreement, and George and Phil Norcross were not parties to it.

* * *

There is only one fair reading of what the AG did in the grand jury. It took the routine practice of law and criminalized it before lay grand jurors by feeding them deliberate untruths. And the AG did so for one reason: because Tambussi "is the long-time personal attorney to George E. Norcross, III." (Indictment ¶11.)

## LEGAL ARGUMENT

## POINT ONE

### THE INDICTMENT MUST BE DISMISSED BECAUSE THE GRAND JURY PRESENTATION WAS IMPROPER.

The grand jury "occupie[s] a high place as an instrument of justice in our system of criminal law." State v. Murphy, 110 N.J. 20, 36 (1988). "The grand jury is a judicial, investigative body, serving a judicial function; it is an arm of the court, not a law enforcement agency or an alter ego of the prosecutor's office." State v. Bell, 241 N.J. 552, 559 (2020) (quoting In re Grand Jury

Appearance Request by Loigman, 183 N.J. 133, 141 (2005)).

"[P]rinciples of fairness are particularly important in a grand jury setting in which the prosecutor questions witnesses, introduces evidence, and explains the law to the jurors without a judge or defense attorney in attendance. While performing those functions, the prosecutor cannot impinge on a grand jury's independence and improperly influence its determination." State v. Tucker, 473 N.J. Super. 329, 348 (App. Div. 2022), leave to appeal denied, 252 N.J. 481 (2023) (quotations omitted). "Imbued with principles of fairness by the Rules of Professional Conduct and case law, a prosecutor has the primary duty of ensuring that justice is done and may not use improper methods calculated to produce a wrongful conviction." State v. Triestman, 416 N.J. Super. 195, 205 (App. Div. 2010).

"[T]he prosecutor must clearly and accurately explain the law to the grand jurors and not leave purely legal issues open to speculation by lay people who are simply performing their civic duty." State v. Brady, 452 N.J. Super. 143, 166 (App. Div. 2017). Accord State v. Wade, No. A-2855-21, 2022 WL 14177222, at *5 (App. Div. Oct. 25, 2022) (granting defendant leave to appeal, finding that prosecutor's legal statements to grand jury were "inartful" and "inaccurate," holding that dismissal of the indictment was warranted, and reversing trial court's denial of motion to dismiss).

These are basic principles of our grand jury system. The AG violated them all. The AG's presentation surrounding Tambussi's practice of law improperly put forward a "distorted version of the facts," which was "tantamount to telling the grand jury a half-truth," requiring dismissal of the Indictment. See State v. Hogan, 144 N.J. 216, 236 (1996).

The AG treated the grand jury as its "rubber stamp" and its "playtoy" by "skillfully misle[a]d[ing] [grand jurors] by omission." State v. Gaughran, 260 N.J. Super. 283, 290 (Law Div.

1992). The AG's "skillful[] … omission" took four primary forms: (1) the AG falsely characterized the CRA's contemplated action against Dranoff's view easement as a condemnation action and not a declaratory judgment action. It would have been a declaratory judgment action; (2) the AG misled the grand jury into believing the CRA had not authorized Brown & Connery's work when the AG knew the CRA had; (3) the AG deliberately failed to explain what a motion *in limine* is and when such motions are filed in a litigation; and (4) in the foulest blow, implicated Judge Polansky in the "Norcross Enterprise" in an effort to explain why Dranoff settled his lawsuit with Camden and paid the City millions of dollars to do so.

These actions were deliberate. The AG knew that Tambussi was engaged in the routine practice of law—strategy, research, advocacy. That was not enough to make him part of the "Norcross Enterprise." To turn him from lawyer into co-conspirator, the AG had to totally misrepresent his work to the grand jury. Instead of preparing for a declaratory judgment action for the CRA at the request of the CRA—which was the truth—the AG told the grand jury that Tambussi was pursuing a legally impossible condemnation action without the knowledge of the CRA to benefit George Norcross. Instead of filing motions *in limine* shortly before the start of trial to prevent the jury from hearing irrelevant testimony and argument because that is what lawyers do—which was the truth—the AG told the grand jury that Tambussi lied to protect George Norcross. And because the AG had to explain why Dranoff lost notwithstanding Tambussi's repeat, "criminal" lawyering, the AG suggested to the grand jury that Judge Polansky was himself part of the "Norcross Enterprise."

The AG's grand jury presentation was carefully curated to make it appear that Tambussi had criminal intent when the AG knew he had none. This requires dismissal of the Indictment. See State v. Eldakroury, 439 N.J. Super. 304, 309 (App. Div. 2015) (affirming trial court's dismissal

of indictment where prosecutor's presentation to grand jury improperly "relieved the State of the burden of proving defendant's mens rea as to an essential element of the offense"). See also Hogan, 144 N.J. at 229 (holding an indictment should be dismissed where the grand jury proceedings contain a "deficiency" that "affects the grand jurors' ability to make an informed decision whether to indict"). Dismissal is required "where a prosecutor's instructions to the grand jury were misleading or an incorrect statement of law," Triestman, 416 N.J. Super. at 205, and where the prosecutor "mislead[s] the grand jury by allowing the telling of a 'half-truth' or a 'distorted version of the facts,'" Loigman, 183 N.J. at 144 (quoting Hogan, 144 N.J. at 236).

## A. The CRA Authorized Tambussi and Brown & Connery to Conduct Research on Filing a Declaratory Judgment Action.

The evidence is undisputed. The CRA instructed Tambussi and Brown & Connery to research filing a declaratory judgment action against Dranoff's view easement. No action was ever filed because Dranoff voluntarily surrendered his view easement pursuant to a settlement agreement where he was paid $1.95 million. Dranoff's decision to settle had nothing to do with the contemplated declaratory judgment action because Dranoff never knew the CRA was considering litigation. Because no action was filed, Tambussi and Brown & Connery chose not to bill the CRA to maintain client relations. All routine lawyering.

But that is not what the grand jury was told or how the Indictment reads. Instead, the AG presented "half-truth[s]" leading to a "distorted version of the facts." See Hogan, 144 N.J. at 236.

First, the AG introduced the eminent domain statute, N.J.S.A. 20:3-6, to the grand jury as an exhibit, (see Vartan Cert., Ex. R (Grand Jury Ex. S-26)) and instructed grand jurors on the steps a public agency must take before filing a condemnation action. (See 1/25/24 Grand Jury Tr. at 100:20-102:23, Vartan Cert., Ex. D); (2/15/24 Grand Jury Tr. at 119:23-121:7, Vartan Cert., Ex. F); (2/29/24 Grand Jury Tr. at 30:20-32:1, Vartan Cert., Ex. G.) Why? To make it appear that

Tambussi and Brown & Connery were on the precipice of filing an obviously invalid condemnation action to further the "Norcross Enterprise":

> **Q:** Based on your participation in this investigation, is there any evidence that the City of Camden was independently involved in negotiations between Dranoff and Liberty Property?
>
> **A:** No.
>
> **Q:** Is there any evidence the City of Camden contacted Carl Dranoff and attempted to engaged in bona fide negotiations with him over the value of his view easement?
>
> **A:** No.
>
> **Q:** Is there any evidence the City of Camden made any offer in writing to Carl Dranoff with an explanation as to how it had calculated its price?
>
> **A:** No.
>
> **Q:** Is there any evidence that the City of Camden had an appraisal done to determine what the value of that view easement might be?
>
> **A:** No.

(1/25/24 Grand Jury Tr. at 103:16-104:8, Vartan Cert., Ex. D.)

This was deliberately misleading testimony. The AG knew that Tambussi and Brown & Connery were preparing to file a declaratory judgment action—not a condemnation action—on behalf of the CRA to first determine if the CRA could condemn a view easement. This was made plain by the Brown & Connery billing records. (See Vartan Cert., Ex. N (Grand Jury Ex. S-27).) It was also made plain by Tambussi's own recorded statement, which the AG shared with the grand jury, but without any explanation of the legal terms and concepts used:

> the legal action would be to go into court on a declaratory judgment action and order to show cause to have the court declare that Dranoff does not have any defenses to the taking of the view easement and that the only issue that remains upon the filing of a condemnation, which is somewhat lengthy, is the value of the view easement.

(Vartan Cert., Ex. L at 23:7-14.) While the AG spent multiple grand jury sessions informing grand jurors of the requirements that must be satisfied before a condemnation action can be filed, the AG never explained what a declaratory judgment action is or the material ways it differs from a condemnation action.

Second, the AG led the grand jury to believe that there was something unusual about Brown & Connery not billing the CRA for its work. Why? To make it appear that Tambussi knew that the CRA had not authorized Brown & Connery's work:

> **Q:** Does it surprise you that a law firm would do close to a 100 hours[']  worth of work and not charge for it? Again, it is an opinion question.
>
> **A:** Yeah. They usually charge.
>
> **Q:** Lawyers usually charge, right? Not a great business plan to do your work for free.

(2/15/24 Grand Jury Tr. at 137:12-17, Vartan Cert., Ex. F.)

This too was false testimony. Write-offs are an everyday part of the private practice of law. Brown & Connery's decision to not bill for its work where no litigation was filed is not evidence of criminal intent. Private attorneys frequently write-off their time to maintain client relationships and win continued (or new) business. The AG knew that billing practices are foreign to lay jurors. Indeed, during the 2023 aborted grand jury proceedings in this case, the grand jury specifically asked about attorney billing practices. (See 8/1/23 Grand Jury Tr. at 47:12-17, Vartan Cert., Ex. C.)[1] Instead of explaining to the grand jury how the private practice of law works, the AG leveraged

[1] The 2023 grand jury presentation is further evidence of the AG's obfuscation in this matter. In 2023, the AG convened a grand jury and held four sessions related to this investigation. (See 4/4/23 Grand Jury Tr. at 3:8-14, Vartan Cert., Ex. B.) Three of the four sessions focused on Tambussi's representation of various individuals and entities involved in the investigation, as well as Brown & Connery's billing practices. (See Grand Jury Tr. 6/27/23, 8/1/23, 8/8/23.) The 2023 testimony focused on Tambussi's state of mind in providing legal services, which is directly at issue in this

the grand jury's relative lack of knowledge to its benefit, suggesting that grand jurors should conclude that write-offs are inherently nefarious. That, of course, is false.

Third, the AG told the grand jury that Tambussi and Brown & Connery communicated too little with their client, the CRA. Why? Again, to make it appear that it was Tambussi directing his client rather than his client directing him:

> **Q:** Is it fair to say in looking at these billing records as a whole, there is very little contact between Brown and Connery and City officials?
>
> **A:** Yes, that's correct.

(1/25/24 Grand Jury Tr. at 112:1-4, Vartan Cert., Ex. D.)

This testimony was likewise false. There are specific Rules of Professional Conduct detailing an attorney's duty to communicate with a client. See RPC 1.4(b) ("A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."); RPC 1.4(c) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.") The AG, however, failed to explain these RPCs to the grand jury.

Moreover, there was no testimony from the CRA witnesses that the CRA was not

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Indictment. None of the witnesses in 2023 testified or in any way suggested that Tambussi attempted to disregard his known legal duties, which is likely why the AG abandoned the proceedings rather than risk the grand jury returning a no-bill against Tambussi.

It is fundamental that grand jurors "cannot be denied access to evidence that is credible, material, and so clearly exculpatory." Hogan, 144 N.J. at 236. The 2023 grand jury testimony is clearly exculpatory as to Tambussi's state of mind. But the AG did not read-in or provide the 2023 grand jury transcripts to the new panel convened in 2024. By failing to provide the 2024 grand jury with this relevant testimony, the Indictment cannot stand. See id. See also State v. Ciba-Geigy Corp., 222 N.J. Super. 343, 354 (App. Div. 1988) (finding presumption of indictment's validity rebutted where grand jurors had not read every grand jury transcript and remanding matter to determine whether the missing information was exculpatory and whether to dismiss all or part of indictment).

reasonably informed about the progress of the declaratory judgment action or was unable to make informed decisions (such as declining to file the action). Nor was there any testimony that Tambussi or Brown & Connery failed to comply with any requests for information. Rather, the AG withheld the CRA's privilege log from the grand jury, which demonstrated continuous communication—21 emails—between Brown & Connery and the CRA during the seven-day period Brown & Connery was preparing the declaratory judgment action. (See Vartan Cert., Ex. Q.) The AG also failed to explain that the contents of communications between an attorney and client are rarely disclosed, even to the AG, because of the attorney-client privilege. Finally, Asselta, who was the CRA's lead attorney, spoke with the CRA for a total of five hours spread across four days. (See Vartan Cert., Ex. N (Grand Jury Ex. 27.)) Two of the three days that Brown & Connery did not communicate with the CRA were weekend days. (Id.) This was not enough communication for the AG, although the AG never explained to the grand jury why.

Fourth, Special Agent Steve Rich testified that Johnson, the former Executive Director of the CRA, had "no recollection" of a view easement condemnation. (5/2/24 Grand Jury Tr. at 79:19-22, Vartan Cert., Ex. H.); (5/9/24 Grand Jury Tr. at 41:24-42:4, Vartan Cert., Ex. I.) Why? To make it appear that the CRA was not involved in the contemplated declaratory judgment action. That was false. James Harveson, a former CRA attorney and the Director of Development, testified that the condemnation idea was his, and he directed the CRA's attorneys to explore it:

> **Q:** Do you recall who approached who about starting this view easement process and feel free to review that if that helps you?
>
> **A:** It is probably me [James Harveson].
>
> **Q:** You reach out to?
>
> **A:** To Mark [Asselta] because it was, as I said before, it was kind of a fascinating idea, a whole new area.

(2/15/24 Grand Jury Tr. at 137:17-24, Vartan Cert., Ex. F.) The AG was unwilling to accept Harveson's response and asked again:

> **Q:** Is it possible that Brown and Connery reached out to you about condemnation or are you sure that you reached out to them?
>
> **A:** My recollection is I reached out to them.

(Id. at 170:13.)

Despite Harveson telling the AG twice—under oath—that it was his idea to take steps towards filing a condemnation action, the AG disregarded Harveson's testimony, and months later, presented Johnson's "no recollection" statement through Agent Rich. The AG did so even though it knew: (1) that Johnson's statement was uncertain because she was out of the office at the time caring for her ailing mother in South Carolina, (Vartan Cert., Ex. M at 21:1-9); (2) she had specifically told investigators that it was Harveson, and not she, charged with overseeing the Camden waterfront project for the CRA, (id. at 21:24-22:3); (3) she had disagreed with investigators that the CRA did not have "much of a role" in the declaratory judgment action, responding: "If I signed this [the Rule 4:5-1 certification verifying the accuracy of the proposed declaratory judgment complaint], there was a role that the Executive Director played, and that was putting forth redevelopment at the riverfront that was found to be elevating for the City of Camden," (id. at 47:18-48:5); and (4) there was an email chain involving Asselta, Johnson, and Harveson from October 2016 where the contemplated declaratory judgment action was discussed, and Johnson specifically said: "Just talked with [A]sselta about [the declaratory judgment action]. I plan to discuss with him again in pm. The following action will be taken: I will talk with Torres [the former chairperson of the CRA Board] as a resolution may be in order … and it may require ratification. A court action may be executed," (Vartan Cert., Ex. O (Grand Jury Ex. 119).)

The AG told the grand jury none of this. Instead, grand jurors were told that the CRA Executive Director had "no recollection" of the declaratory judgment action. The only conclusion for the grand jury to draw was the one the AG wanted it to draw: that Tambussi was doing the bidding of the "Norcross Enterprise," and not engaged in the routine practice of law.

**B. The AG Misled the Grand Jury into Believing that Filing Motions *in Limine* Immediately before Trial Was Unusual, and Judge Polansky's Decision to Reserve on Them Was Criminal.**

The grand jury presentation around Tambussi's filing of the motions *in limine* was equally misleading. Again, the AG took the routine practice of law and made it "criminal" by not explaining to the grand jury how civil litigation works.

The AG made it appear that there was something wrong with Tambussi filing motions *in limine* so close to trial:

> **Q:** According to an interview with Mr. Dranoff was this motion filed right before the trial was about to start?
>
> **A:** Yes.
>
> **Q:** Is it also accurate that the judge declined to rule on this motion at the time it was filed[,] which meant that Mr. Dranoff potentially had to prepare for a trial that was happening within days without knowing if he could call key witnesses to present his side of the case?
>
> **A:** Yes.

(6/10/24 Grand Jury Tr. at 63:5-15, Vartan Cert., Ex. J.); (See also 2/1/24 Grand Jury Tr. at 71:25-72:5, Vartan Cert., Ex. E.) But the AG did not stop there. It then made it appear that Judge Polansky was "corrupt," and part of the "conspiracy," for not immediately deciding the motions in Dranoff's favor:

> **Q:** To be clear, Mr. Dranoff did not have specific evidence or information that indicated that the Court was somehow corrupt or not on his side. Is that accurate?
>
> **A:** Accurate.

**Q:** However, is it also accurate that Mr. Dranoff at this time was aware through the depositions in that lawsuit of Phil Norcross's presence in the meeting and telling official from the city of Camden to both slow down the Aimco PILOT review and terminate the Radio Lofts agreement?

**A:** Yes.

**Q:** I believe the testimony was previously given was that Dranoff's interest should be handled as a package. Is that accurate?

**A:** Correct.

**Q:** Did this information in addition to Mr. Dranoff's other experiences in Camden that have come before this Grand Jury make Mr. Dranoff concerned about whether or not the Court system in Camden was also perhaps under the influence of George Norcross and would not be fair?

**A:** Yes.

(6/10/24 Grand Jury Tr. at 64:6-65:3, Vartan Cert., Ex. J.)

The AG desperately needed the act of filing the motions *in limine* shortly before trial to appear corrupt. The prosecutors misled the grand jury into believing that Tambussi improperly sprung the motions on Dranoff, and inaccurately advised the grand jury that because Judge Polansky declined to rule on the motions at the pretrial conference, Dranoff was forced "to prepare for a trial that was happening within days without knowing if he could call key witnesses to present his side of the case." (Id. at 63:9-15.)

Nowhere in the grand jury presentation is it mentioned that Brown & Connery timely filed its motions *in limine* in accordance with Appendix XXIII to New Jersey Court Rule 4:25-7(b). In addition, contrary to the AG's representations that Judge Polansky erred by failing to decide the motions before trial and thus did not allow Dranoff time to adequately prepare for trial, the Court Rules do not require judges to decide motions *in limine* before the start of trial. In fact, the Court Rules expressly contemplate the scenario in which a motion *in limine* is decided after trial begins.

See R. 4:25-8(a)(4). As this Court knows (and any prosecutor with trial experience should be aware), judges often reserve decisions on motions *in limine* until after trial begins and relevant evidence has been presented. This important context was not presented to the grand jury. Had it been, the grand jurors would have realized that there was nothing improper—let alone criminal—about filing motions *in limine* on the eve of trial.

The AG grossly misrepresented to the grand jury the legal standards regarding the filing of motions *in limine*. It does not matter whether this was done intentionally or negligently; "inaccurate" and "inartful" descriptions of law to the grand jury warrant dismissal of an indictment. See Wade, 2022 WL 14177222, at *5. The prosecutors simply failed to "clearly and accurately explain the law" to the lay grand jurors. See Brady, 452 N.J. Super. at 166. Presenting misleading and inaccurate law, while undermining the independence of the Judiciary, severely compromised the grand jurors' ability to make an informed decision. See Hogan, 144 N.J. at 229.

* * *

The sum total of the AG's presentation was to make nefarious something that was not by "imping[ing] on [the] grand jury's independence and improperly influenc[ing] its determination." Tucker, 473 N.J. Super. at 348. The AG took advantage of the grand jurors' lack of knowledge and familiarity with the legal system, improperly "leav[ing] purely legal issues open to speculation by lay people who are simply performing their legal duty." See Brady, 452 N.J. Super at 166. By mispresenting Tambussi's work—calling it a condemnation action instead of a declaratory judgment action; disregarding Harveson's unequivocal testimony in favor of Johnson's uncertain memory; and not explaining the Court Rules around motions *in limine* to the grand jury, the AG made the routine blocking and tackling of the practice of law into a crime. This undermined the integrity of the grand jury process. The Indictment must be dismissed.

## POINT TWO

## THE INDICTMENT IS LEGALLY DEFECTIVE AND MUST BE DISMISSED.

### A. The AG Cannot Criminalize the Routine Practice of Law.

#### 1. The AG's Criminalization of the Practice of Law Violates Due Process because a Reasonable Person Is without Sufficient Notice that Such Professional Conduct Is Criminal.

The touchstone of due process is notice. Both the federal and state constitutions guarantee that a person cannot be charged criminally for conduct unless there is sufficient advanced notice that the conduct has been criminalized. Because no reasonable person, nor any reasonable attorney, could know that contemplating a declaratory judgment action or filing motions *in limine* is criminal conduct, the current prosecution violates federal and state due process principles.

The fundamental problem with the AG's use of Tambussi's practice of law as the actus reus in the Indictment is that this approach "do[es] not draw clear lines separating criminal from lawful conduct." See State v. Pomianek, 221 N.J. 66, 85 (2015). The AG is prosecuting a standardless crime, which inherently cannot provide advanced notice.

What makes this potential declaratory judgment action criminal activity? And what makes these motions *in limine* criminal conduct? That is, what is the defining line so other attorneys are on notice not to cross it? It is not frivolity, as defined by Rule 1:4-8, as there is no allegation that Tambussi's actions were frivolous.[2] It is not a violation of the Rules of Professional Conduct, because there is no allegation the Rules were violated.

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[2] In fact, not only does the Indictment fail to allege that the declaratory judgment action was frivolous, but the Indictment specifically alleges that the CRA had "a very strong argument" for obtaining a declaratory judgment. (Indictment ¶145.) With respect to the motions *in limine*, Judge Polansky stated during the pretrial conference that they were not "a surprise" and acknowledged they were permissible. (Vartan Cert., Ex. P at 48:20-49:2.)

Further, why is Tambussi charged for his involvement in the declaratory judgment research and motions *in limine* but not any of his colleagues, many of whom spent considerably more time working on these matters than Tambussi did? Where is the line—and who sets it—determining which attorney faces criminal charges?

Absent a "clear line[] separating criminal from lawful conduct," there is a due process violation. See Pomianek, 221 N.J. at 85. The AG has unconstitutionally created "a trap for the unwary." See id. Because the AG has not—and cannot—identify these required "clear lines," no attorney can ever be on notice when the practice of law would lead to criminal charges.[3]

"The guarantee of procedural due process in criminal law requires that the defendant receive notice of illegality in a clear and understandable fashion." State v. Thompson, 402 N.J. Super. 177, 203 (App. Div. 2008). "A person should be on notice that he is engaged in wrongdoing before he 'is brought to the bar of justice for condemnation in a criminal case.'" Pomianek, 221 N.J. at 85 (quoting Lambert v. California, 355 U.S. 225, 228 (1957)). Due process protects the enduring constitutional principle that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Bouie v. City of Columbia, 378 U.S. 347, 351 (1964) (quotation omitted). See also Lanzetta v. State of N.J., 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

[3] Due process violations may arise on an "as-applied" basis, meaning the application to a particular defendant may render the prosecution unconstitutional even if there are constitutional ways to apply it to other defendants. Thus, Tambussi need not show a lack of constitutional notice "in all conceivable contexts." Rather, he must show the application of criminal law to his conduct to "be unclear in the context of the particular case." See State v. Cameron, 100 N.J. 586, 594 (1985).

**a. No reasonable attorney would be on notice that this practice of law could give rise to criminal liability.**

The practice of law in New Jersey has always been regulated civilly or administratively. This would be the first case where a court has criminalized the routine practice of law. But "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 259, 266 (1997). Applying criminal statutes to an attorney's professional work when there is no alleged violation of ethical or professional norms would be "a novel construction" of the New Jersey Criminal Code that violates due process. See id.

Notice requires "fair warning," that is, a warning issued "in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931). No reasonable person or reasonable attorney would have been on notice that this conduct—the routine practice of law—could be criminal.

In fact, advanced notice would lead a reasonable person to believe that such conduct was lawful. The Supreme Court has blessed the conduct here through its rule-making powers. Declaratory judgment actions are governed by Rule 4:42-3. Motions *in limine* are approved by Rule 4:25-8. RPC 1.3 requires an attorney to advocate for a client diligently and zealously. If the Supreme Court approves the filing of actions for declaratory judgment and motions *in limine*, but the AG says those actions can be criminal conduct, no attorney is on notice how to comport themselves.

Our Supreme Court has also afforded a broad litigation privilege protecting statements and actions taken during judicial proceedings, such as filing actions and arguing motions. Yet the AG now seeks an abrupt retreat from these principles that date back to the "fourteenth century" by

revoking this longstanding and embedded privilege and immunity without any advanced notice.[4] See Hawkins v. Harris, 141 N.J. 207, 221–22 (1995). "A statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability." Id. at 213 (quotation omitted). The litigation privilege exists to ensure that lawyers and litigants can "speak and write freely without the restraint of fear of an ensuing . . . action." Loigman v. Township Committee of Township of Middletown, 185 N.J. 566, 585 (2006) (quotation omitted). Consequently, the privilege protects "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relationship to the action." Hawkins, 141 N.J. at 216 (quotation omitted). The privilege extends beyond pending litigation and covers communications occurring in preparation for proposed judicial proceedings. Id. at 214. Moreover, the privilege encompasses written and oral communications. Loigman, 185 N.J. at 585.

Our Supreme Court has noted that the broad immunity is "granted to good and bad alike," even if that extends to "immunity from prosecution." Hawkins, 141 N.J. at 213-14 (noting such broad privilege is "accept[ed]" because it is "more important" to allow individuals to speak freely

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[4] The litigation privilege, more generally, highlights that the conduct alleged in the Indictment does not comport with the statutory language of the crimes charged, such as extortion. See Defendants' Omnibus Motion to Dismiss at Section I.B.4, pages 22-27 and pages 40-41 (setting forth numerous constitutional and statutory reasons that "using legal tools does not violate the law").

The fact that the practice of law (the sole conduct the Indictment alleges against Tambussi) falls outside the text of the criminal statutes provides alternative and independent grounds for this Court to dismiss the Indictment against Tambussi. See Facebook v. State, 254 N.J. 329, 362 (2023) (noting that under principle of constitutional avoidance, courts may resolve a case on narrow statutory grounds "to avoid constitutional questions unless required to consider them" (quotation omitted)).

in proceedings than it is to "punish" the speaker). The privilege "protects lawyers," who notwithstanding the privilege, are subject to other repercussions such as sanctions and professional responsibility actions. Id. at 221-22.[5]

Furthermore, the practice of law has always been regulated through the Judiciary or through the legal profession itself. There are existing sanctions for attorneys who engage in frivolous litigation. See Rule 1:4-8. Additionally, attorneys are subject to discipline for unethical conduct and violations of their professional responsibility. See R. 1:20-1; RPC 8.5. No advanced notice exists that the routine practice of law could ever result in criminal liability, rather than merely subjecting an attorney to potential sanction or disciplinary action.

Courts must restrict prosecutions as exceeding constitutional limits where "the underlying conduct is so passive, so unworthy of blame, that the persons violating the proscription would have no notice that they were breaking the law." State v. Maldonado, 137 N.J. 536, 555 (1994) (citing Lambert, 355 U. S. at 228–30). That is the precise prosecution the AG has brought here against Tambussi, criminalizing his practice of law—conduct "so passive, so unworthy of blame" that no attorney would be on notice that the conduct was criminal.

**b. Ethical and professional standards cannot form the basis of criminal conduct.**

Giving the Indictment every favorable inference, as must be done on a motion to dismiss, it appears that the AG's main theory of criminal liability is that Tambussi was irreparably torn

[5] "In applying the privilege, [courts] consider neither the justness of the lawyers' motives nor the sincerity of their communications." Loigman, 185 N.J. at 586. As a result, the privilege sweeps in conduct to "protect the few unethical and negligent attorneys." Id. at 587. But courts repeatedly explain that such misconduct can be appropriately addressed through disciplinary sanctions under the Rules of Professional Conduct. Id.

between his client, George Norcross, and his other clients, the City of Camden and the CRA. In essence, the Indictment seems to contend that Tambussi had divided loyalties between clients in apparent breach of RPC 1.7.

Even accepting the AG's intimations of a conflict of interest as true, violations of ethical and professional standards cannot form the basis for criminal liability. In State v. Thompson, the Appellate Division specifically affirmed the dismissal of an indictment that alleged criminality arising from conduct that violated conflict of interest laws because those ethical violations did not provide sufficient constitutional notice that such misconduct could lead to criminal liability. 402 N.J. Super. 177, 197–204 (App. Div. 2008).

Here, the AG goes further than the prosecution rejected in Thompson. The AG does not even allege an ethical violation or violation of the Rules of Professional Conduct, but rather obliquely hints at a conflict of interest. Even with the specific allegations of ethical misconduct, Thompson was not on constitutional notice that his conduct was criminal, and the charges were dismissed. Likewise, Tambussi was not on constitutional notice that his conduct was criminal, and the charges must be dismissed.

The Appellate Division affirmed dismissal of numerous counts in the Thompson indictment where "the judge was of the view that the commission of an ethical violation, standing alone, could not provide the factual basis for a criminal prosecution." Id. at 189. In so ruling, the court held that ethical standards "do[] not provide the criminal defendant with the necessary constitutional protections." Id. at 203. Specifically, the prosecution of these ethical and professional violations violated the "guarantee of procedural due process in criminal law [which] requires that the defendant receive notice of illegality in a clear and understandable fashion." Id. (citing State v. Clarksburg Inn, 375 N.J. Super. 624, 632 (App. Div. 2005)).

There is no practical difference between the AG's prosecution in Thompson and the AG's prosecution here. Both prosecutions involved the attempted criminalization of professional and ethical standards. As such, the prosecution against Tambussi must fail for the same reasons outlined by the trial court and Appellate Division in Thompson.

**c. Due process requires uniform enforcement of criminal law and prohibits arbitrary enforcement.**

The constitutional problem with undefined criminal laws is that they create the substantial risk of arbitrary enforcement. Criminal laws must "be objectively reasonable and be objectively, reasonably, and uniformly enforced." State v. Ivory, 124 N.J. 582, 591 (1991). "An offense must be defined 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" State v. Dalal, 467 N.J. Super. 261, 283 (App. Div. 2021) (quoting Kolender v. Lawson, 461 U. S. 352, 357 (1983)).

One of the inherent problems with failure to provide notice to the citizenry regarding criminal conduct is arbitrary enforcement by prosecutors applying criminal laws with no clear boundaries. That is this case. The AG attempts to single-handedly police the legal profession and all litigation in New Jersey. This runs the serious risk of arbitrary enforcement of the criminal laws; the AG seeks the power to pick and choose which attorneys it wishes to prosecute.

This is not a hypothetical situation. The AG has landed on using its power here to prosecute an attorney who represented a client the AG does not like. Tambussi is the lone attorney who worked on the declaratory judgment action and motions *in limine* that was charged with a crime. No other Brown & Connery attorney, who combined billed 86 hours on the declaratory judgment work, was charged. (See Indictment ¶135.) No attorney for the CRA was charged. The AG has decided to criminalize the practice of law as to Tambussi only. This Court cannot allow the AG's

selective prosecution to stand and open the door to further arbitrary action against the legal profession.

**2. The AG's Prosecution of the Practice of Law Would Chill the Attorney-Client Relationship, and, in Criminal Cases, Deprive Defendants of Their Constitutional Guarantee to Counsel.**

Criminalizing the practice of law risks chilling attorneys' obligations to zealously advocate for their clients. Attorneys should not be forced to compromise representation of their clients because of fear of prosecution. Criminalizing the practice of law will give prosecutors an extremely unfair and dangerous tool in their toolbox. Rather than focusing on acting in their clients' best interests, attorneys instead would be looking over their shoulders for an ambitious AG trying to score political points.

The Supreme Court and the rest of the Judiciary already adequately police the bar. The Rules of Professional Conduct and the attorney discipline system serve as an effective check on attorney conduct. There is no need to create a new check, under the expansive criminal power of the AG, especially for conduct that does not veer into allegations of ethical violations.

Ultimately, those harmed will be clients who do not receive full-throated advocacy from their attorneys. "The lawyer's principal responsibility is to serve the undivided interests of his client … If there is any constraint on counsel's complete and exuberant presentation, our system will fail because the basic ingredient of the adversary system will be missing." United States v. DeFalco, 644 F. 2d 132, 136 (3d Cir. 1979). Criminal defendants may be the clients who suffer the most. The Sixth Amendment provides criminal defendants with the right to counsel. This fundamental right requires that a lawyer advance the client's interests and be independent of outside influences. But a prosecutor who could wield criminal sanction over an attorney and client jeopardizes the client's right to full and effective legal advice. Given these fundamental constitutional rights at stake, the Supreme Court and Judiciary must be the exclusive regulators of

overseeing an attorney's practice of law.

**B. The Supreme Court Has the Sole Constitutional Authority to Regulate the Legal Profession, Including the Filing of Declaratory Judgment Actions and Motions *in Limine*.**

The AG's criminal prosecution of Tambussi's professional legal conduct exceeds the constitutional powers of the Executive Branch. The New Jersey Constitution, and numerous cases applying it, unambiguously declare that the Supreme Court has sole authority over the practice of law in the state.

The Supreme Court has "plenary constitutional authority" over the practice of law. Application of LiVolsi, 85 N.J. 576, 584 (1981). This includes the "exclusive constitutional responsibility" to oversee "admission to the bar," "the practice of law," "the conduct of attorneys," and "the attorney-client relationship." Taylor v. Bd. of Educ., 187 N.J. Super. 546, 553 (App. Div. 1983) (emphasis added). Accord State v. Andujar, 247 N.J. 275, 306 (2021) (declaring that "the area of practice and procedure is exclusively within the Court's rulemaking power").

The AG infringes upon the Supreme Court's "exclusive" authority over the practice of law by attempting to criminalize it. "The separation of powers clause of the Constitution directs that one branch of government may not exercise powers that properly belong to another." State v. Buckner, 223 N.J. 1, 37 (2015) (citing N.J. Const. art. III, ¶1). The "aim" of the constitutional separation-of-powers provision is "to guarantee a system of checks and balances." State v. Leonardis, 73 N.J. 360, 370 (1977). Here, the separation-of-powers doctrine requires a check on the AG's encroachment into the Supreme Court's "exclusive" authority over the practice of law.

The Indictment is unambiguous in specifying Tambussi's criminal actions as "the practice of law," "the conduct of attorneys," and "the attorney-client relationship." See Taylor, 187 N.J. Super. at 553. Specifically, the Indictment identifies Tambussi's alleged participation in the "Norcross Enterprise" to be that of an attorney representing clients by researching whether a

declaratory judgment was a viable option and filing motions *in limine*.

The Court Rules governing declaratory judgments (Rule 4:42-3) and motions *in limine* (Rule 4:25-8) are firmly under the Supreme Court's purview to regulate legal practice. In addition, numerous Rules of Professional Conduct govern attorney conduct generally and with respect to filings before the court, such as motions and initiating pleadings. (RPCs 3.1, 3.3, and 8.4). Using its exclusive constitutional authority, the Supreme Court has also specifically provided for remedies when an attorney violates these rules. The Supreme Court adopted Rule 1:4-8 to allow for the penalization and sanction of attorneys who engage in frivolous litigation. Additionally, Rules 1:20-1 et seq. govern the discipline of attorneys who are alleged to have violated their ethical duties and professional responsibilities.

The AG has ignored this constitutional structure and the Supreme Court's exercise of authority. Instead, the AG believes that he, not the Supreme Court, is the constitutional officer that regulates the practice of law. The AG attempts to define the permissible scope of "the practice of law," "the conduct of attorneys," and "the attorney-client relationship." Taylor, 187 N.J. Super. at 553. This amounts to de facto rulemaking that supersedes the Court Rules on declaratory judgments and motions *in limine*, as well as the Rules of Professional Conduct.

The AG's encroachment onto the Supreme Court's exclusive supervision of the practice of law undermines the "require[d] . . . cooperative accommodation among the three branches." See Buckner, 223 N.J. at 38 (citing Commc'ns Workers of Am. v. Florio, 130 N.J. 439, 449 (1992)). Judicial authority would be "frustrated by any such dual exercise of rule-making power" across the Judiciary and another branch. See Winberry v. Salisburry, 5 N.J. 240, 246 (1950).

Because the AG's allegations against Tambussi unconstitutionally veer into the Supreme Court's "plenary constitutional authority" over the practice of law, the Indictment must be

dismissed.

### C. Any Prosecution Criminalizing Professional Legal Services Must Include a *Mens Rea* Requirement that the Attorney Failed to Act in Good Faith in Providing Those Services.

Because Tambussi's purported criminal conduct falls within his capacity as lawyer, the AG must show that Tambussi lacked a good faith basis in performing his legal duties. There must be a specific mens rea standard when prosecutors attempt to criminalize otherwise routine legal work. This is constitutionally required by the doctrine of fundamental fairness. And because the AG cannot show a lack of good faith (and did not present one to the grand jury), the Indictment must be dismissed as to Tambussi.

To establish that Tambussi was part of a racketeering enterprise, the AG must establish that he "act[ed] purposefully and knowingly in the affairs of the enterprise in the sense of engaging in activities that seek to further, assist, or help effectuate the goals of the enterprise." State v. Ball, 141 N.J. 142, 175 (1995). The AG must also demonstrate that Tambussi agreed to conduct or participate "in the conduct of the affairs of the enterprise by agreeing to commit or aid some other members of the conspiracy in the commission of at least two racketeering acts as charged in the indictment." Id. at 188.

The doctrine of fundamental fairness, which stems from the due process guarantee of Article I, Paragraph 1 of the New Jersey Constitution, protects citizens "against unjust and arbitrary governmental action." State v. Njango, 247 N.J. 533, 537 (2021). The doctrine applies "where the 'interests involved are especially compelling.'" Id. at 549 (quoting State v. Saavedra, 222 N.J. 39, 67 (2015)). "The 'one common denominator' in our fundamental fairness jurisprudence is 'that someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked.'" Id. at 548-49 (quoting Doe v. Poritz, 142 N.J. 1, 109 (1995)); see also State v. Melvin, 248 N.J. 321, 348 (2021) ("[E]ven in

circumstances not implicating violations of constitutional rights our courts have imposed limitations on governmental actions on grounds of fundamental fairness.").

Courts may utilize the fundamental fairness doctrine at multiple stages of the criminal justice process, "even when such procedures were not constitutionally compelled." Poritz, 142 N.J. at 108. Courts have applied the doctrine as the basis to dismiss an indictment. See Saavedra, 222 N.J. at 67–68 n.5. Courts have also applied the doctrine to fill in gaps in a statutory scheme. In Njango, for example, the Supreme Court applied the doctrine to require that the Parole Board calculate excess time Njango served in prison as credit towards the remaining time of parole supervision. 247 N.J. at 550. The Court explained that "notions of fundamental fairness compel" it to conform the statute at issue "in a way that the Legislature would likely have intended." Id.; see also Melvin, 248 N.J. at 348-53 (explaining that the fundamental fairness doctrine prohibited a sentencing court from considering acquitted conduct).

The AG's prosecution of Tambussi's practice of law is an especially compelling circumstance that mandates application of the fundamental fairness doctrine. The prosecution is a patently unfair regulation of attorney conduct, for which there is no statutory or constitutional protection. The fundamental fairness doctrine dictates that this Court fill in the gaps of the criminal mens rea standard to protect against the criminalization of an attorney's reasonable and ethical conduct while representing a client.

"[A] trial court has inherent power to fashion remedies in the interest of justice, which may include dismissal of an indictment for reasons of fundamental fairness even in circumstances where a defendant's constitutional rights are not implicated." State v. Ruffin, 371 N.J. Super. 371, 385 (App. Div. 2004). Critically, Tambussi had no warning that his conduct was criminal. As discussed, his purportedly criminal representation of the CRA and the City of Camden did not

violate any Rule of Professional Conduct, and was in accordance with the New Jersey Court Rules. Tambussi's otherwise lawful conduct is being criminalized solely because he is George Norcross's lawyer. This is a quintessential example of an unjust and arbitrary governmental action.

This Court must enforce a specific mens rea standard on the attempt to criminalize Tambussi's practice of law. The Appellate Division adopted this mens rea standard for RICO claims pertaining to attorney conduct.[6] In Mayo, Lynch & Associates, Inc. v. Pollack, the Appellate Division was tasked with determining whether there was sufficient evidence to establish that the attorney knowingly participated in a RICO enterprise. The attorney at issue gave improper legal advice on multiple occasions. 351 N.J. Super. 486, 503 (App. Div. 2002). 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. Consequently, the Appellate Division imposed a requirement that an attorney must have provided bad or improper advice to determine whether work product may establish an attorney's state of mind for violating the RICO statute. Moreover, the bad advice must not have been caused simply through negligence or even recklessness. Instead, the bad legal counsel must have been intentional. Id. at 497-98. The Mayo standard must be read into the RICO statute as a necessary element to allege criminality.

The Indictment does not suggest that Tambussi gave bad or improper legal advice, nor was there any suggestion to the grand jury that Tambussi's legal work was wrong. As a result, if this Indictment were to proceed against Tambussi as the AG intends it to, it would be easier to assert a criminal RICO claim against an attorney than it would be to assert a civil RICO claim. This cannot

[6] The prohibited activities and underlying requirements are the same for civil and criminal RICO claims. N.J.S.A. 2C:41-1, et seq.

be the case; criminal law must match or provide greater protections than a civil counterpart. New Jersey courts have routinely insisted on holding criminal laws to "sharper scrutiny" than civil laws and giving the criminal laws a "more exacting and critical" analysis than civil analogues. See, e.g., State v. Cameron, 100 N.J. 586, 592 (1985); Dalal, 467 N.J. Super. at 284.

Federal law similarly provides a guardrail to protect attorneys while representing clients that can serve as a model in this case. Specifically, federal law has a safe harbor for attorneys "providing … lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c). The federal safe harbor ensures that "a lawyer [does] not risk prosecution for conduct that is objectively within the bounds of the rules of professional responsibility." United States v. Gerace, --- F. Supp. 3d ---, 2024 WL 1793022, at *18 (W.D.N.Y. 2024). Accordingly, if there is an objectively bona fide reason for the strategic action at issue, the safe harbor applies. This includes allegedly mixed motive justifications. Id. at *10. Thus, "[w]hen an attorney takes some action on behalf of and for the benefit of a client in a pending case, then as long as there is an objectively lawful and legitimate purpose for that action, the attorney can take it without fear of personal prosecution." Id. at *14 (emphasis added). "Stated another way, the safe harbor prevents the government, this Court, or anyone else from inquiring into a lawyer's purported ulterior motives for an objectively legitimate decision." Id. The litigation privilege doctrine, discussed supra, and which is "the backbone to an effective and smoothly operating judicial system," further supports this concept. Hawkins, 141 N.J. at 222.

There are parameters in place to safeguard the routine practice of law in New Jersey. Criminal liability cannot attach where an attorney's services were "objectively within the bounds of the rules of professional responsibility." Gerace, 2024 WL 1793022, at *18. Mayo provides the mens rea standard to prove an attorney knowingly and intentionally violated the RICO statute.

Liability for an attorney providing legal services arises under the RICO statute only when the "advice was so egregiously wrong that a jury could find that it surpassed negligence or recklessness." Mayo, 351 N.J. Super. at 497. An attorney does not violate the law even when issuing "incorrect legal opinions," if those opinions "were unknowing and innocent." Id.

Tambussi's research on a potential declaratory judgment action and filing motions *in limine* would be protected under federal law and if this were a civil RICO matter. There is no suggestion that Tambussi's conduct did not have an objectively lawful, bona fide purpose. But New Jersey law does not have such a safe harbor, or any safe harbor for that matter. Because no safe harbor exists, this prosecution criminalizes lawful, ethical conduct. The doctrine of fundamental fairness must fill in the statutory gap and prevent this result. Tambussi represented his clients in good faith, and there is no allegation otherwise. The Indictment must be dismissed.

## POINT THREE

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

If this Court declines to dismiss the Indictment against Tambussi in its entirety based on the misleading grand jury presentation or the substantial constitutional problems, then this Court must at least dismiss the nine substantive counts, Counts 5-13, for failing to state a prima facie allegation of the crimes against Tambussi. Each substantive count is fatally deficient for two reasons: (1) it does not allege that Tambussi committed each element of the crime charged; and (2) any criminal conduct the AG alleges Tambussi committed occurred well outside the statute of limitations period.[7]

[7] As argued in the Omnibus Motion to Dismiss, the State's legal theory on every count in the Indictment is fatally flawed as a matter of law. Tambussi joins in those arguments to dismiss. In this section, Tambussi raises the specific factual deficiencies as it pertains to him alone.

## A. The Substantive Elements of Counts 5-13 Are Lacking.

Counts 5-13 are facially defective as to Tambussi. In short, the AG fails to make out a prima facie case as to Tambussi for each count. Counts 5-13, therefore, must be dismissed.

### 1. The Financial Facilitation Counts Must Be Dismissed (Counts 5-10).

In Count 5, which relates to Triad1828 Centre; Count 7, which relates to the L3 Complex; and Count 9, which relates to 11 Cooper, the AG alleges that Defendants possessed funds from the sale of Economic Redevelopment and Growth and Grow New Jersey tax credits related to each building in violation of N.J.S.A. 2C:21-25(a). A person is guilty of this offense if he "transports or possesses property known or which a reasonable person would believe to be derived from criminal activity." N.J.S.A. 2C:21-25(a); see also State v. Harris, 373 N.J. Super. 253, 263 (App. Div. 2004) ("Subsection (a) [of N.J.S.A. 2C:21-25] makes it a crime if the person possesses property known to be derived from a criminal activity.").

In Count 6, which relates to Triad1828 Centre; Count 8, which relates to the L3 Complex; and Count 10, which relates to 11 Cooper, the AG alleges that Defendants directed, organized, financed, planned, managed, supervised, or controlled the Economic Redevelopment and Growth and Grow New Jersey tax credits, in violation of N.J.S.A. 2C:21-25(c). N.J.S.A. 2C:21-25(c) "makes it a crime to direct, organize, finance, plan, manage, supervise, or control 'the transportation of or transactions in property known or which a reasonable person would believe to be derived from criminal activity.'" State v. Salami, No. A-2958-21, 2023 WL 8177054, at *4 (App. Div. Nov. 27, 2023).

Not a single paragraph in the Indictment alleges that Tambussi was involved in the application process for the Economic Redevelopment and Growth or Grow New Jersey tax credits for Triad1828 Centre, the L3 Complex, or 11 Cooper. Not a single paragraph in the Indictment alleges that Tambussi managed, directed, or was involved in the sale of any tax credits. And not a

single paragraph in the Indictment alleges that Tambussi actually or constructively possessed any tax credits related to the Triad1828 Centre, the L3 Complex, or 11 Cooper, or any funds from the sale of any related tax credits. Accordingly, the Indictment fails to allege that Tambussi engaged in the necessary elements of a N.J.S.A. 2C:21-25(a) or (c).

The AG, however, attempts to tie Tambussi to his co-Defendants as an accomplice, through N.J.S.A. 2C:2-6, for each of the financial facilitation counts. A person may be an accomplice pursuant to N.J.S.A. 2C:2-6(c) if he "aids or agrees or attempts to aid such other person in planning or committing" the offense. N.J.S.A. 2C:2-6(c)(1)(b). But again, none of Tambussi's alleged criminal conduct—i.e., his involvement in the declaratory judgment action and the motions *in limine*—was related to or impacted any tax credit application or the receipt or sale of any tax credits. In short, Tambussi is not an accomplice to any N.J.S.A. 2C:21-25(a) or (c) conduct, nor is he a principal. Counts 5-10 must be dismissed.

**2. The Corporate Misconduct Counts Must Be Dismissed (Counts 11-12).**

In Counts 11-12, the AG asserts corporate misconduct claims as to corporate officials for Cooper Health (Count 11) and Conner Strong, NFI, Michaels, CP Residential GSGZ, and CPT Equities (Count 12) in violation of N.J.S.A. 2C:21-9(c). N.J.S.A. 2C:21-9(c) "is directed against use of a corporation as part of a criminal enterprise." Cannel, New Jersey Criminal Code Annotated, comment on N.J.S.A. 2C:21-9(c). It makes criminal "purposely or knowingly us[ing], control[ling] or operat[ing] a corporation for the furtherance or promotion of any criminal object." N.J.S.A. 2C:21-9(c). Therefore, subsection (c) applies to "all persons, such as owners and majority shareholders in a position to use, control or operate the corporation." State v. Malik, 365 N.J. Super. 267, 278 (App. Div. 2003) (emphasis added). There is nothing in the Indictment demonstrating that Tambussi had the ability to use or control Cooper Health, Connor Strong, NFI, Michaels, CP Residential GSGZ, or CPT Equities. The Indictment, therefore, fails to allege that

Tambussi committed essential elements under N.J.S.A. 2C:21-9(c), specifically that he did—or even could—use, control, or operate any of the listed corporations.

Once again, the AG attempts to link Tambussi to his co-Defendants as an accomplice pursuant to N.J.S.A. 2C:2-6(c). But none of Tambussi's alleged criminal conduct is related to Cooper Health, Connor Strong, NFI, Michaels, CP Residential GSGZ, or CPT Equities. Tambussi is not alleged to have acted as their attorney for purposes of any conduct in the Indictment; his alleged criminal conduct pertains solely to his representation of the City of Camden and the CRA. The Indictment simply fails to allege any conduct connecting Tambussi to a single one of these corporate entities. Because Tambussi is neither an accomplice to any conduct in violation of N.J.S.C. 2C:21-9(c), nor a principal, Counts 11-12 must be dismissed.

**3. The Official Misconduct Count Must Be Dismissed (Count 13).**

In Count 13, the AG asserts an official misconduct claim pursuant to N.J.S.A. 2C:30-2 against all Defendants. To establish a prima facie case pursuant to N.J.S.A. 2C:30-2, the AG must present evidence that: (1) defendant was a "public servant" within the meaning of the statute, (2) who, with the purpose to obtain a benefit or deprive another of a benefit, (3) committed an act relating to but constituting an unauthorized exercise of her office, (4) knowing that such act was unauthorized or that she was committing such act in an unauthorized manner. Saavedra, 222 N.J. at 58. A public servant is "any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function." N.J.S.A. 2C:27-1(g). But there is a distinction between a public official, and a person who "merely performs services pursuant to a government contract." State v. Mason, 355 N.J. Super. 296, 301 (App. Div. 2002). Only the former can be charged with official misconduct. State v. Williams, 189 N.J. Super. 61, 66 (App. Div. 1983); Mason, 355 N.J. Super. at 301. "[T]he mere receipt of public funds" does not transform an individual into a public officer.

Williams, 189 N.J. Super. at 65. There is no question that Tambussi, a private practice attorney, is not a public servant. The fact that the City of Camden and the CRA were Tambussi's clients does not change that analysis.

The AG also alleges that Tambussi is an accomplice under N.J.S.A. 2C:2-6(c). Although the view easement declaratory judgment action and motions *in limine* involve Tambussi's work for the CRA and Camden, the Indictment does not allege that this conduct furthered the official misconduct of Dana Redd (the sole public official identified). As best Tambussi can discern, Redd's allegedly official misconduct is that she "told" an individual to meet with Philip Norcross during the L3 Complex negotiations.[8] (Indictment ¶77.) But the view easement declaratory judgment action and motions *in limine* (the sole conduct alleged against Tambussi) are wholly unrelated to L3. The Indictment also alleges that Redd refused to call Dranoff back when he reached out about certain zoning matters for the Radio Lofts building in 2016. (Id. ¶124.) Again, the view easement declaratory judgment action and motions *in limine* are totally unrelated to Dranoff and Redd's discussions, or lack thereof, regarding the Radio Lofts. Consequently, Count 13 must be dismissed as to Tambussi because he is not a public servant, nor does the Indictment allege that he aided a public servant in violation of N.J.S.A. 2C:27-1(g) and 2C:2-6(c).

**B. Counts 5-13 Are Barred by the Statute of Limitations.**

N.J.S.A. 2C:1-6(b)(1) sets a five-year limitations period for the conduct with which Tambussi was alleged to be personally involved.[9] As just discussed, the Indictment does not allege

[8] The Indictment does not make clear whether Redd did so in her capacity as mayor or in her capacity as co-chair of the Cooper's Ferry Partnership.

[9] Count 13, official misconduct, contains a seven-year statute of limitations period. But Tambussi is not, nor could he be, charged as a principal committing that offense; he is charged as an

that Tambussi committed any substantive financial facilitation, corporate misconduct, or official misconduct offense. That said, even granting the State every reasonable (and unreasonable) inference imaginable, any conduct that the State alleges constitutes an element of any of those offenses occurred before June 14, 2019 (or June 14, 2017 in the case of official misconduct)—outside the five-year (and seven-years) limitations period.

An offense is "committed" for purposes of the statute of limitations "when every element occurs." N.J.S.A. 2C:1-6(c).[10] Thus, to be held liable for committing each of the alleged counts of financial facilitation, corporate misconduct, and official misconduct, the Indictment must allege that Tambussi committed the elements of each of the individual offenses on or after June 14, 2019 (or June 14, 2017). The Indictment falls woefully short of doing so.

Put differently, the State does not allege that sitting in on a media interview in 2022 and filing motions in 2023 are conduct making up elements of financial facilitation, corporate misconduct, or official misconduct. Instead, the Indictment explicitly alleges that these acts are some form of cover-up related to the conspiracy and racketeering charges, and not related to the substantive counts. First, the AG maintains that Tambussi made purportedly false statements about the L3 Complex in a media interview "in order to conceal the true facts surrounding the L3 acquisition." (Indictment ¶¶ 91, 91(c).) Second, the Indictment explicitly maintains that Tambussi

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accomplice. See supra.

[10] Financial facilitation, corporate misconduct, and official misconduct do not qualify as statutes where "a legislative purpose to prohibit a continuing course of conduct plainly appears." N.J.S.A. 2C:1-6(c). But, even so, the statute of limitations for a continuing-course-of-conduct crime would run when Tambussi's "complicity" in the crime ended. Id. Giving an interview to the media and filing motions *in limine* are not "complicity" in financial facilitation, corporate misconduct, or official misconduct; nor does the Indictment allege them to be. Under any formulation of the statute of limitations, Tambussi cannot be charged for conduct that occurred well before June 2019.

filed and argued motions *in limine* to "conceal the Norcross Enterprise's Plot." (Id. ¶¶91, 155-57.) The AG alleges that Tambussi attempted to hide the proposed declaratory judgment action and George Norcross's disparaging statements about Dranoff during the view easement negotiations in October 2016. (Id. ¶156.) Thus, by the AG's own pleading, Tambussi's only post-2017 conduct does not constitute elements of any of the crimes charged in Counts 5-13.

The AG seeks to reach well beyond the five-year (and seven-year) statute of limitations based on Tambussi participating in a media interview in 2022 and filing motions *in limine* in 2023. These allegations are insufficient to resurrect the otherwise untimely claims against Tambussi. Counts 5-13 are barred by the statute of limitations and must be dismissed.

## CONCLUSION

For the foregoing reasons, this Court should dismiss the Indictment against William Tambussi, Esq.

Respectfully submitted,

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