Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1472-23T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Leave to Appeal Granted from an Interlocutory Order of the Superior
v.	:	Court of New Jersey, Law Division, Somerset County.
SUDHAN THOMAS, JOHN CESARO, JOHN S. WINDISH.	:	Sat Below:
Defendants-Respondents.	:	Hon. Peter J. Tober, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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April 22, 2024

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PRELIMINARY STATEMENT

This case involves a public corruption prosecution where the motion court issued an order that would force the State to turn over a privileged prosecution memorandum and all case files of investigations involving the same cooperating witness—in direct conflict with New Jersey Supreme Court precedent. It would also force the State to identify documents considered in authorizing a consensual intercept—discovery to which they are not entitled under the Wiretap Act and which is irrelevant at best. This Court should vacate this order.

Defendants are three former elected officials who have been indicted for bribery, official misconduct, and other criminal charges stemming from alleged acceptance of cash payments from a cooperating witness, Matthew O'Donnell, in exchange for agreeing to provide him public contracts. During discovery, the State produced voluminous discovery to the defense—including the cooperating witness's case file, which contained proffer agreements and interview reports, plea agreements, and a privilege log. But defendants demanded, and the motion court granted, sweeping discovery far outside the scope of the discovery rules, against precedent, and in disregard of their privileged nature.

Three distinct portions of the order on appeal are error. First, the motion court ordered the State to produce "a list of crimes" the State believes Matthew O'Donnell committed, including those crimes the State declined to prosecute,

associated victims, and the amounts of any restitution owed. The court issued that order even though the State already explained that the only even potentially responsive document would be an internal memorandum protected by the work-product and deliberative-process privileges. Notwithstanding these privileges, the court required disclosure anyway—without identifying a single case or other authority permitting disclosure of an internal prosecution memorandum that has predecisional mental impressions of prosecutors. And defendants offer little to overcome these privileges either, instead merely asserting that the memorandum could contain relevant information. That is wholly insufficient.

Second, the court ordered the State turn over all documentation related to any other investigations involving O'Donnell, including cases not resulting in criminal charges. This broad discovery order directly contravenes recent New Jersey Supreme Court precedent that squarely bars discovery of unrelated case files involving the same cooperating witness in cases where, as here, defendants' arguments rest only on speculation. Defendants come nowhere close to meeting their burden to show that these investigatory files—which include individuals never prosecuted—will lead to relevant or admissible evidence.

Third, the order's requirement that the State identify documents reviewed prior to authorizing certain consensual intercepts was also error. The motion court accepted defendants' argument that this extraordinary discovery demand

was justified by a hypothetical future challenge to the intercept authorizations. But the intercepts were part of a good faith investigation into campaign finance and related criminal violations, and defendants have provided nothing to show otherwise.

STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

Defendants have received voluminous discovery from the State, including discovery relating to a confidential witness. These discovery materials include the plea agreement of that confidential witness, Matthew O'Donnell. They also include a proffer agreement and reports of four interviews the State conducted with O'Donnell, who was part of a straw donor scheme to make illegal campaign contributions in exchange for public contracts from various municipalities. After his own criminal activity came to light, O'Donnell met with police and provided them the names of several individuals who had steered him official positions and public contracts in exchange for illegal campaign contributions. (Cpsa1 to 5).[2]

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[1] Because the facts and procedural history are intertwined, they are presented together for the Court's convenience.

[2] The following citation form is adopted:
"Psa" refers to the State's appendix.
"Cpsa" refers to the State's confidential appendix.
"1T" refers to the January 20, 2021, grand jury transcript (Windish).
"2T" refers to the January 20, 2021, grand jury transcript (Cesaro).
"3T" refers to the January 27, 2021, grand jury transcript (Cesaro continued).
"4T" refers to the January 27, 2021, grand jury transcript (Thomas).
"5T" refers to the July 13, 2023, motion transcript.
"6T" refers to the September 19, 2023, motion transcript.
"7T" refers to the November 1, 2023, motion for stay transcript.
"TMb" refers to Thomas' motion-opposition brief in this Court.
"WMb" refers to Windish's motion-opposition brief in this Court.
"CMb" refers to Cesaro's motion-opposition brief in this Court.

A. The State's Allegations Regarding Defendant John Windish.

At that first proffer, documented at length in a report dated February 2, 2018, O'Donnell told police about a January 23, 2018 political fundraiser. Ibid. At that fundraiser, O'Donnell came into contact with defendant John Windish (then a Borough Councilman in Mount Arlington, New Jersey). (Cpsa4). Windish was up for re-election. Ibid. Windish approached O'Donnell, told him about financial troubles, and asked him for help with his re-election bid. (Cpsa4; 1T35-16 to 18). Shortly thereafter, on February 12, 2018, Windish and O'Donnell met again, this time at the Swiss Chalet in Morristown. (1T36-18 to 21). At that meeting, Windish told O'Donnell that he needed $7,000 to help his campaign. (1T36-22 to 37-1).

On a subsequent call between the two (recorded pursuant to a consensual intercept), Windish told O'Donnell that he "didn't know how I am ever going to repay you ... for this." (1T52-8 to 9). O'Donnell responded by asking Windish to pledge that he would "always be [Windish's] Borough Attorney[;]" according to O'Donnell, that was "the only quid pro quo I'm asking you. Just you know I just. I need the job." (1T52-10 to 21). Windish agreed and told O'Donnell that he would "always have my support." Ibid.

On May 14, 2018, at the Courtyard Marriott in Hanover, O'Donnell gave Windish the $7,000 he had requested. (1T54-24 to 55-7; 1T62-7 to 12). When O'Donnell reminded him about his promise to re-appoint O'Donnell as Borough Attorney, Windish replied "[y]ou got it." (1T62-10 to 12). This meeting, including this exchange, were recorded with audio and video. (1T55-15 to 17).

On January 20, 2021, Windish was indicted for second-degree official misconduct under N.J.S.A. 2C:30-2 (Count One); second-degree bribery in official and political matters under N.J.S.A. 2C:27-2 (Count Two); and second-degree acceptance or receipt of an unlawful benefit by a public servant for official behavior under N.J.S.A. 2C:27-10(a) (Count Three). (Cpsa24 to 28). The State alleged that, between January 1, 2018, and May 14, 2018, Windish—while serving as an elected councilman—solicited or accepted an unlawful payment totaling roughly $7,000.00 in exchange for a promise to funnel public contracts and work to O'Donnell. Ibid.

B. The State's Allegations Regarding Defendant John Cesaro.

Defendant John Cesaro (then Morris County Deputy Freeholder Director) came to law enforcement's attention at the same time as Windish. (Cpsa4). At O'Donnell's first proffer, he told law enforcement that he came into contact with Cesaro at the same January 23, 2018, fundraiser. Ibid. At the event, Cesaro, who was at that time running for re-election, asked O'Donnell for help with his

fundraising. (2T20-16 to 21-9; 2T34-24 to 35-3). In return, Cesaro offered to steer O'Donnell contracts in Morris County. (2T21-3 to 9).

O'Donnell met Cesaro again on April 20, 2018; this time, the meeting was recorded via consensual intercept. (2T21-13 to 25). Cesaro reiterated that he needed "a lot of money." (2T23-12 to 14; 2T28-11 to 12). He promised that he would "never forget" O'Donnell. (2T33-7 to 8). In response, O'Donnell stated that he wanted to be Cesaro's "tax guy." (2T33-9 to 21). Cesaro quickly agreed and told O'Donnell "[d]one, done." (2T33-22).

On May 8, 2018, at the Grand Café in Morristown, O'Donnell gave Cesaro $10,000 in cash and five checks totaling $2,350. (2T53-13 to 24; 2T54-3 to 17; 2T55-18 to 21; 2T63-1 to 3). O'Donnell again emphasized that he "need[ed] [Cesaro] to open those doors for [him]." (2T61-3 to 4). He told Cesaro that "I need you to talk to [then County Counsel] Napolitano. I need some work." (2T61-5 to 7). For his part, Cesaro agreed to "talk to him right now." (2T61-8 to 9). Like at the April 20 meeting, this encounter was recorded pursuant to a consensual intercept. (2T54-18 to 21).

On May 11, 2018, Cesaro returned the specific $10,000 cash payment to O'Donnell, but did not return the checks. (2T71-15 to 72-6). Cesaro explained that his preferred payment method was not a lump sum payment in cash, but rather by straw donor checks. (2T72-13 to 20; 3T17-1 to 24). O'Donnell agreed

to get additional straw checks later that month. (3T17-20 to 24). On May 19, 2018, O'Donnell gave Cesaro another $10,150 ($4,800 of it in cash; $5,350 in the form of three checks). (3T21-20 to 22-6; 3T22-25 to 23-3). When O'Donnell informed Cesaro that these checks were drawn from straw donors, he replied—"[o]kay." (3T46-2 to 10). This exchange was also recorded. Ibid. Moreover, Cesaro filed a Report of Campaign Contributions with the New Jersey Election Law Enforcement Commission that listed false information about the identities of campaign contributors. (3T43-6 to 46-10).

On January 27, 2021, Cesaro was indicted for second-degree official misconduct under N.J.S.A. 2C:30-2 (Count One); second-degree bribery in official and political matters under N.J.S.A. 2C:27-2 (Count Two); second-degree acceptance or receipt of an unlawful benefit by a public servant for official behavior under N.J.S.A. 2C:27-10(a) (Count Three); third-degree tampering with public records under N.J.S.A. 2C:28-7(a)(2) (Count Four); fourth-degree falsifying or tampering with records under N.J.S.A. 2C:21-4(a) (Count Five); and fourth-degree concealment or misrepresentation of contributions or expenditures under N.J.S.A. 19:44A-21b (Count Six). (Cpsa17 to 23). In sum, the State alleged that between April 20, 2018, and May 19, 2018, Cesaro—while serving as Morris County Freeholder—solicited or accepted a

bribe of $7,700.00 in exchange for a promise to funnel public contracts and work to O'Donnell. (Cpsa17 to 20).

C. The State's Allegations Regarding Defendant Sudhan Thomas.

After O'Donnell proffered information about multiple public officials who solicited illegal gifts/contributions in the past (including both Windish and Cesaro), O'Donnell was outfitted with an on-body recording device pursuant to a signed consensual intercept form before he attended an event held on February 27, 2019. (Psa36 to 38).

At that event, O'Donnell ran into Thomas, who O'Donnell had not yet discussed in his proffer sessions. (Cpsa1 to 16; Psa37 to 38). At the time, Thomas was the President of the Jersey City Board of Education and was running for re-election. (4T4-10 to 14; Psa39). The two briefly discussed upcoming elections and resolved, in Thomas's words, to "build[] a war chest." (Psa38). The discussion was recorded via consensual intercept. (Psa37 to 38).

A police report memorializing Thomas's encounter with O'Donnell was prepared the next day. (Psa42). After that encounter, O'Donnell reported to investigators that in 2016, Thomas—while campaigning for a seat on the Jersey City Board of Education—had requested $10,000 in cash (far in excess of a legal campaign contribution) from O'Donnell. (4T21-2 to 22-11). O'Donnell stated that he did not comply with Thomas's request at the time. Ibid.

On April 26, 2019, O'Donnell forwarded investigators a text message chain with Thomas (which the State provided in discovery, along with a report concerning these text messages). (Psa51 to 61). In the text message exchanges, O'Donnell and Thomas confirmed that they intended to meet at the Brownstone Diner on May 1, 2019. Ibid. In a message sent on April 25, 2019, Thomas wrote: "[t]hat will be my re-election kick off breakfast just like in 2016." (Psa57) (emphasis added).[3]

O'Donnell and Thomas met as planned on May 1, 2019, and the meeting was again recorded by authorized consensual intercept. (Psa64 to 99). During that meeting, O'Donnell told Thomas, "this is where it all started" in 2016, and Thomas confirmed, "[y]eah it all started here." (Psa66). Thomas asked O'Donnell for support totaling between $110,000 and $120,000 between one race for the Board of Education and another race for City Council. (Psa84 to 85). The two also discussed Thomas's 2016 campaign for Board of Education, and Thomas confirmed that he had requested $10,000 at the time. (Psa85).

At their next meeting, on June 3, 2019, also recorded via consensual intercept, O'Donnell told Thomas he would have $10,000 available within a week. (Psa108 to 110). In return, O'Donnell asked Thomas "to consider

[3] Separately, on April 29, 2019, the Jersey City Board of Education—of which Thomas was then-President—filed a lawsuit against the State regarding school funding. (Pa209 to 210).

[O'Donnell] as Special Counsel to the Board," to which Thomas answered, "okay[,]" shortly followed by "[w]e can do that not a problem[.]" (Psa108). Thomas then offered, "I'll bring you in as special counsel for real estate advisor." Ibid. Days later, on June 17, 2019, O'Donnell gave Thomas a plain white envelope containing $10,000 in cash, which Thomas accepted. (Psa127; Psa139; Psa151 to 154; Psa209). Separately, O'Donnell told Thomas that he could secure an additional $20,000 by July. (Psa151).

On July 29, 2019, O'Donnell and Thomas met for the final time at the Grand Café in Morristown. (4T69-3 to 10). This meeting, like the prior ones between O'Donnell and Thomas, was recorded via consensual intercept. (Psa131). The State has produced all of the consensual recordings, intercept authorization forms, and investigative reports regarding the recordings to defendant in discovery.

In the parking lot, O'Donnell handed Thomas a manila envelope containing $25,000 in cash. (Psa142; Psa209). Thomas accepted it. (Psa142). Shortly after Thomas took that money, two detectives approached. (Psa134 to 135; Psa178). In a recorded statement after police read him his rights, Thomas admitted he had taken $35,000 in cash from O'Donnell. (Psa142; Psa178 to 179). He made no representation that he had any sort of attorney-client relationship with O'Donnell. (See Psa138-139 (Thomas stating that he "reached

out" to O'Donnell because he had been having "some personal difficulty" financially); Psa143 (describing prior relationship with O'Donnell and confirming "we don't have any business relationships"); Psa150 ("I didn't see him connected in any which way to Jersey City or any other stuff.").)

On August 23, 2023, O'Donnell was interviewed about whether he had an attorney-client relationship with Thomas and Cesaro; O'Donnell denied that any such relationships existed. (Psa203 to 204). He asserted that neither Thomas nor Cesaro had ever asked him to represent them in any personal capacity, nor in relation to any political campaign. Ibid. Nor had Thomas and Cesaro, or any of their campaigns, signed retainer agreements with his firm. Ibid. During that interview, O'Donnell disclosed that he did have an attorney-client relationship with Windish in a real estate matter, and with one of Windish's family members to settle an estate. Ibid. That report was provided in discovery.

On January 27, 2021, Thomas was indicted for second-degree official misconduct under N.J.S.A. 2C:30-2 (Count One); second-degree pattern of official misconduct under N.J.S.A. 2C:30-7(a) (Count Two); second-degree bribery in official and political matters under N.J.S.A. 2C:27-2 (Count Three); and second-degree acceptance or receipt of unlawful benefit by public servant

for official behavior under N.J.S.A. 2C:27-10(a) (Count Four).[4] (Cpsa29 to 34). The indictment alleges that Thomas had accepted $35,000 from O'Donnell as consideration for agreeing to use his position as the President of the Jersey City Board of Education to provide public contracts or work to O'Donnell. Ibid.

D. Defendant Thomas's Omnibus Motion.

After the three defendants were indicted, the parties engaged in substantial discovery, during which the State produced all discoverable material that it had identified within O'Donnell's investigatory file, including plea agreements, consensual intercept forms, transcripts of consensual intercepts, and information related to the proffers. (5T47-17 to 22). On June 12, 2023, Thomas filed an omnibus motion (which Windish and Cesaro later joined (Psa201 to 202)) seeking additional discovery. As relevant here, that motion sought discovery of: (1) a list of the specific crimes subject to O'Donnell's non-prosecution agreement, identification of the associated victims, and the amounts of any restitution owed; (2) all documentation related to other investigations involving O'Donnell; and (3) all documents presented for review by Deputy Chief Jeffrey Manis regarding certain consensual intercept authorizations. (5T8-19 to 10-7).

[4] After the indictment's return, the State noticed a clerical error in Count Four, inadvertently referring to a third-degree crime when the grand jury found all elements of a second-degree crime. The State will address this in due course.

The State opposed. Regarding the first request, the State argued that the only responsive document (other than O'Donnell's plea, which had already been produced) was privileged work product. (Psa222 to 224). Indeed, after lengthy correspondence on Thomas's request for this putative "list of crimes," (Psa181 to 200), the State made plain that it had provided all discovery identifying the crimes forming the basis of the State's promise not to prosecute O'Donnell—including his plea and O'Donnell's entire case file—and that "no nonprivileged documents responsive to" the request existed. (Psa186; Psa192). The only even potentially responsive document was a privileged memo. (5T48-12 to 22; Psa192 to 194).[5] On the second request, the State argued that documentation of other investigations in which O'Donnell may be assisting was not relevant and that Thomas was not entitled to them under prevailing case law. (5T32-11 to 33-9; Psa220 to 222). On the final request, the State argued that defendant lacked any legal basis to scour through all documents presented for review in the consensual intercept authorization process, and regardless, that all such documents had already been provided. (5T20-3 to 20; Psa219 to 220).

[5] The State's privilege log initially identified two such memoranda. (Psa194). At argument below, the State explained that on further review, only one of the internal memoranda was responsive. (5T48-12 to 22). The other "discusse[d] investigations that the cooperator was involved in" but still "[did] not contain a list of crimes that were committed by . . . the cooperator." Ibid.

On July 24, 2023, the motion court granted that motion in part and denied it in part. (Psa232 to 233). Three parts of that order are relevant to this appeal. First, Part (c) of the judge's order required the State to provide information about all crimes O'Donnell had committed, the identities of victims, and the amounts of agreed-on restitution. (Psa230; Psa233). While the court acknowledged the State's argument that the only responsive document is a privileged internal prosecution memo, it nonetheless ordered this discovery without explanation or further discussion of privilege. (Psa222 to 224; Psa230).

Second, Part (b) of the order required the State to turn over files related to any investigations involving O'Donnell, including those that did not result in criminal charges, either through in camera review or under a protective order. (Psa229; Psa233). The court believed that these files were discoverable based on the possibility that the documents could support Thomas's case. (Psa229). The court stated that work product, internal reports, and memoranda for this part of the order would not be subject to discovery. Ibid.

Third, Part (a) obligated the State to produce "all documentation and information that were reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of the Consensual Intercept Forms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019, and August 26, 2019." (Psa232). The motion court reasoned that all documents and

materials mentioning Thomas prior to May 1, 2019, "may shed light on whether [he] was unfairly targeted for investigation solely due to the Jersey City Board of Education's lawsuit against the State." (Psa228).

Finally, the order required O'Donnell and his law firm to produce billing records to the defense. (Psa233). The motion court recognized that this part of the order did not pertain to the State. Ibid. That billing material has now been turned over to Thomas.[6] (Psa261).

E. Subsequent Developments And Order Applying Thomas Discovery Order To Defendants Windish And Cesaro.

On August 25, 2023, the State filed a motion for both reconsideration and clarification of this order. (6T). The court denied the State's motion. (6T48-22 to 49-3; Psa234). The court noted that "[i]t's going to issue an order so that the State can appeal it if it wishes[.]" (6T48-23 to 24).

The State notified the court that it would file a motion for leave to appeal the court's July 24, 2023, order and requested a stay of the order pending the resolution of that appeal. (Psa238). On November 1, 2023, the judge agreed to stay the portions of its July 24, 2023, order that required discovery of other

[6] In the firm's production to Thomas, attorneys for the firm represented that it has now fully complied with Paragraph (d) of the judge's order. (Psa261). They noted that both the State and Thomas were "capable of sharing access to those records" with Cesaro and Windish and did not object to such action. (Psa262). It is unclear whether Thomas has shared this production with Cesaro and Windish.

investigations and a list of crimes, victims, and restitution (Parts (b) and (c)), but modified the order as to Part (a) by further requiring that the State review all discovery it had produced and specifically identify which documents were relied on by Deputy Chief Manis in issuing the consensual intercept forms on certain dates. (7T25-17 to 27-14; Psa239 to 240).[7]

Moreover, despite previously limiting its discovery order to Thomas, see supra at 14-15, the court also expanded its order to include Windish and Cesaro, (Psa239), but did not provide any explanation of why this order should apply to them. Aside from each involving O'Donnell as a cooperating witness and being joined for case management purposes, the State's pending cases against Windish and Cesaro are unrelated to its case against Thomas.

This Court granted the State's motions for leave to appeal and its motion to consolidate these appeals on January 16, 2024. (Psa241 to 244). Thereafter, on February 5, 2024, Thomas moved for a summary remand, arguing that certain materials had not been provided in discovery and arguing that the motion court should be given an opportunity to make factual findings regarding the materials.

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[7] On January 9, 2024, the State responded to Thomas's demand for discovery pursuant to Part (a). (Psa245 to 246). The State informed the defense that the information before Deputy Chief Manis when he authorized these intercepts was reflected in investigative reports already produced to the defense in discovery. Ibid. In addition to the information contained within those reports, Deputy Chief Manis also relied on information that he had been given in verbal updates and conversations, all of which is reflected in those reports. (Psa246).

Following this motion, the State performed an extensive record search. (Psa252). The State performed this search not because it believed discoverable material had been omitted, but to ensure that the State, this Court, and these defendants had a full record before this appeal was decided. The State searched emails between the State and attorneys representing O'Donnell and O'Donnell McCord between January 1, 2018, and October 27, 2021 (the day that O'Donnell pleaded guilty), for emails containing the key words "plea," "plea agreement," "cooperation," or "cooperation agreement." Ibid.

The State's search revealed additional documents, most of which was not discoverable in the first instance, including unsigned, draft plea agreements and related discussions between the State's attorneys and O'Donnell and attorneys for O'Donnell's law firm between March 2018 and October 2021. Ibid. Despite not being discoverable in the first instance, the State provided all such materials to the defense. (Psa258 to 259). As part of this production, the State also produced certain materials that had been produced to a related, but unjoined, defendant. (Psa248 to 250; Psa253 to 254; Psa257). On March 21, 2024, this Court denied Thomas's motion for a summary remand. (Psa260).

LEGAL ARGUMENT

POINT I

ORDERING THE STATE TO PRODUCE AN INTERNAL PROSECUTION MEMORANDUM VIOLATES BOTH THE WORK-PRODUCT AND DELIBERATIVE-PROCESS PRIVILEGES. (Raised below at Psa230, 233).

Part (c) of the motion court's order improperly requires the State to turn over privileged information. It orders the State to turn over a list of all crimes committed by O'Donnell, but the only responsive document that has not already been produced to defendants is an internal prosecution memorandum protected by both the work-product and deliberative-process privileges. (Psa222 to 224; Psa232 to 233). This Court should reverse.

The sole potentially responsive document—an internal memorandum dated March 16, 2018—is protected by both the work-product and deliberative-process privileges. First, it is protected work product because it was prepared by the prosecuting attorneys in the investigation and prosecution of O'Donnell. Rule 3:13-3(d) prohibits the "discovery of a party's work product consisting of internal reports, memoranda or documents made by ... the party's attorney ... in connection with the investigation [or] prosecution." See State v. DeMarco, 275 N.J. Super. 311, 317 (App. Div. 1994) (noting that privilege includes materials

prepared by attorney); accord State v. Mingo, 77 N.J. 576, 584-85 (1978) (such memoranda are "true work product [that] is inherently inadmissible").

This privilege has special force in criminal cases, where the "interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." United States v. Nobles, 422 U.S. 225, 238 (1975) (noting the privilege's "vital" "role in assuring the proper functioning of the criminal justice system"). Thus, "documents such as internal reports and memoranda prepared by the prosecution in connection with the investigation or prosecution of a criminal action are generally not subject to discovery." State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978).

The March 16, 2018 internal memorandum constitutes textbook attorney work product under the Rule. It is an "internal … memorand[um]," written by the State's "attorney" (drafted by prosecutors, submitted to a supervising Deputy Attorney General), made "in connection with the investigation [or] prosecution" of O'Donnell, for the purpose of discussing opinions and recommendations in that matter. R. 3:13-3(d). This memorandum—which contains legal opinions written by prosecutors, for prosecutors, to guide the exercise of prosecutorial discretion—is opinion work product protected from discovery under Rule 3:13-3(d). See, e.g., Wood v. F.B.I., 432 F.3d 78, 80-81, 83-85 (2d Cir. 2005)

(Sotomayor, J.) (affirming district court's holding that U.S. Department of Justice memorandum was protected by work-product privilege); United States v. Robinson, 439 F.3d 777, 779-80 (8th Cir. 2006) (affirming district court's holding that government's reports, memoranda, and internal documents in tax evasion prosecution were protected work product); Nat'l Pub. Radio v. Bell, 431 F. Supp. 509, 511-12 (D.D.C. 1977) (DOJ memoranda and notes protected by work-product privilege). Indeed, defendants did not identify a single opinion from the New Jersey Supreme Court or this Court requiring the State to produce an internal prosecution memorandum in a criminal case.

The circumstances of the memorandum confirm its privileged nature. As no one disputes, the memorandum relates to a potential plea agreement that had not at that time been finalized—instead, it contained internal recommendations. (See Psa194 (privilege log listing item as "Memorandum regarding proposed plea agreement – State v. [O'Donnell]; State v. O'Donnell McCord, P.C.")). To be sure, the plea agreement itself and any promise of immunity may not be shielded by the work-product privilege, State v. Satkin, 127 N.J. Super. 306, 310 (App. Div. 1974); see also Pressler & Verniero, 2019 N.J. Court Rules, Comment Rule 3:13-3 paragraph (d) (discussing Satkin), but that is not at issue; the State produced that plea agreement. An internal prosecution memorandum created prior to a plea agreement, by contrast, is a different document entirely,

as it is not the final agreement between two parties but instead covers the mental impressions of one party's attorneys instead.

That defendants claim they merely want the "list of crimes" from this internal memorandum only underscores the conflict with the privilege. Though defendants portray the list of crimes as "factual" information, that runs into two problems. For one, precedent instructs that even in making factual recitations, "an attorney often focuses on those facts that she deems legally significant" and thus divulges work product. Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000); see Upjohn Co. v. United States, 449 U.S. 383, 399 (1981) (agreeing "disclos[ing] notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"). But more fundamentally, a request for a list of crimes is not "raw factual information"; it is instead "[o]pinion work product" in the form of the particular individual prosecutor's "mental impressions, conclusions, opinions or legal theories" regarding which laws O'Donnell had violated. Baker, 209 F.3d at 1054. If even factual recitations improperly divulge attorney impressions, then a memorandum that contains legal conclusions and facts in support of those conclusions is all the more privileged from discovery.

Second, the memorandum is protected from disclosure for a separate and independent reason: the deliberative-process privilege "permits the government

to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). It is "rooted in the notion that the sovereign has an interest in protecting the integrity of its deliberations," ibid., and in "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." United States Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 267 (2021); see also, e.g., Integrity, 165 N.J. at 85-86 (in determining whether privilege has been overcome, court should consider "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions"). As such, for this privilege to apply, a document both (1) must be pre-decisional, that is, "it must have been generated before the adoption of an agency's policy or decision"; and (2) must be "deliberative in nature, containing opinions, recommendations, or advice about agency policies." Integrity, 165 N.J. at 84-85.

The March 16, 2018 internal prosecution memorandum easily satisfies both requirements. First, it is pre-decisional because it pertains to the then-ongoing O'Donnell investigation and involves the State's forthcoming decisions regarding O'Donnell's prosecution, including a potential plea agreement. Second, it is deliberative because it contains recommendations regarding that

proposed plea agreement. Those recommendations, which were also subject to supervisory review, were subject to change pending the State's ongoing deliberative process. That distinguishes a "predecisional, deliberative document[]," which is "exempt from disclosure," and the actual final plea—a document "that embod[ies] a final decision" where "the deliberations are done." Sierra Club, 592 U.S. at 268. Courts have thus repeatedly deemed prosecution memoranda to be shielded by deliberative-process privilege. See, e.g., United States v. Fernandez, 231 F.3d 1240, 1247-48 (9th Cir. 2000) (defendant not entitled to prosecution memoranda "because these documents are protected by the deliberative process and work product privileges"); Nadler v. U.S. Dep't of Just., 955 F.2d 1479, 1491-92 (11th Cir. 1992) (holding prosecution memoranda recommending how the government should proceed was protected by the deliberative-process privilege and was work product), abrogated on other grounds by U.S. Dep't of Just. v. Landano, 508 U.S. 165 (1993).

Indeed, requiring the production of this internal prosecution memorandum implicates all the concerns that undergird the privilege. After all, if prosecutors' memoranda recommending particular pleas or prosecutions and the factual and legal justifications for that recommendation were disclosed, that would chill the State's ability to freely discuss such decisions—particularly in matters involving public-corruption investigations against public officials. Allowing the adverse

party to "[e]xamin[e] the basis of a prosecution" by disclosing such a document "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry" and broadly could "undermine prosecutorial effectiveness by revealing the Government's enforcement policy." Wayte v. United States, 470 U.S. 598, 607 (1985). In short, a court order like the one issued below risks interfering with "the frank exchange of ideas and opinions" and thus "the quality of administrative decisions." Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 854 (3d Cir. 1995).

That defendants are seeking the "list of crimes" one prosecutor identified in an otherwise deliberative document again only highlights the problem. After all, an internal memorandum that contains recommendations does not "lose [its] protection … merely because [it] may [also] contain ... information used in the development of, or deliberation on, a possible governmental course of action." Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 139 (App. Div. 2012) (quoting Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 295 (2009)). Even if "[p]urely factual material" does not itself "reflect deliberative processes," Integrity, 165 N.J. at 85, a record that "contains or involves factual components, is entitled to deliberative-process protection when it was used in the decision-making process and its disclosure would reveal deliberations that occurred during that process[.]" Educ. Law Ctr., 198 N.J. at 280. A list of

crimes is a mental conclusion not a fact, see supra at 22; but even were it a fact, it was included in the internal prosecution memorandum for the purpose of evaluating any plea with O'Donnell. It is "so interwoven with the deliberative material that it is not severable" and is instead protected by the deliberative-process privilege. Fernandez, 231 F.3d at 1247.

The motion court provided no proper basis for overcoming these bedrock privileges. While the court acknowledged the State's privilege claims (Psa222 to 224), it never substantively addressed them, concluding that a "list" of crimes must be produced because it is relevant to "possible bias that O'Donnell may have for assisting the State with their investigations." (Psa230). And like the motion court, defendant only insists that discovery is warranted because "there may be more details that would be important to the defense in this particular case." (5T30-18 to 31-7). But merely arguing, or even establishing, that the mental impressions in a privileged document may be relevant does not overcome the privilege. To the contrary, "[r]elevance is the touchstone of discovery" for all materials, State v. Hernandez, 225 N.J. 451, 468 (2016), and the work-product and deliberative-process privileges would serve little purpose if they were simply coextensive with that threshold showing. Simply suggesting that production of privileged material might be relevant to the defense thus conflates these two distinct inquiries and renders the privilege a nullity.

Instead, overcoming privilege requires a heightened showing far beyond the ordinary relevance standard. Initially, because defendants' demands extend to work product in the form of the prosecutor's mental impressions, the material "enjoys a nearly absolute immunity" and could be discovered "only in very rare and extraordinary circumstances." In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 174 (4th Cir. 2019); see also Baker, 209 F.3d at 1054 (agreeing "opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct"); In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (same). Indeed, Rule 3:13-3(d) is clear: New Jersey criminal law "does not require discovery" of the prosecutor's "work product consisting of internal reports, memoranda or documents … in connection with the investigation [or] prosecution … of the matter." The Rule includes no exceptions. Compare Rule 4:10-2(c) (in civil cases, allowing partial discovery of work product if a party establishes a "substantial need" for those materials and cannot obtain them "by other means" "without undue hardship"—although still affording complete protection to mental impressions). The motion court never found the plain language of Rule 3:13-3(d) satisfied, nor explained what made this the rare and extraordinary case to pierce the privilege.

Even if Rule 3:13-3(d) did permit some exception, defendants cannot meet it. After all, they cannot even prove "a substantial or compelling need" for the document. While defendants claim they need a "list of crimes" to bolster their ability to cross-examine O'Donnell by showing he had incentives to cooperate with the prosecution, (see TMb16, WMb14, CMb16), defendants have ample other bases on which to support such a cross-examination. See Integrity, 165 N.J. at 85-86 (including "availability of other evidence" among factors for court to consider in determining whether privilege overcome); Hannan v. St. Joseph's Hosp. & Med. Ctr., 318 N.J. Super. 22, 32 (App. Div. 1999) (reasoning in part that notes prepared by plaintiff at attorney's direction need not be disclosed where Court found information could be secured from a "less intrusive source"). Here, the State has produced voluminous other documents reflecting the benefit of the bargain O'Donnell received—including O'Donnell's plea. The State produced to defendants a copy of the entire case file against O'Donnell, which included all of O'Donnell's proffer materials. (5T47-12 to 22). Even Thomas's counsel agreed that he had "a lot to work with on cross-examination" from the discoverable materials that the State provided. (5T30-18 to 31-7). That is fatal: these are the sorts of materials on which defense counsel regularly rely to cross-examine cooperators. Defendants offer no support for the notion that evidence

of the cooperating witness's benefits from the prosecution team's own internal memoranda must also be produced to the defense.

Perhaps recognizing that internal prosecution memoranda are privileged twice over, defendants pivot to arguing that the State should simply generate a list of crimes committed by O'Donnell. (TMb17, WMb15, CMb16-17). That response gets them no further. For one, that reading contradicts the motion court's explict ruling, which instructed the State not to "invent new things to produce[.]" (6T22-10 to 11). For another, compelling the State to affirmatively create a "list of crimes" is simply a command for the State to generate and then turn over work product. See Rule 3:13-3(d) (prohibiting "discovery of a party's work product consisting of internal . . . documents made by . . . the party's attorney . . . in connection with the investigation [or] prosecution"). After all, to comply with this hypothetical demand, prosecutors would have to pore over O'Donnell's file to consider what, if any, uncharged crimes could be applicable. That legal analysis would involve "mental processes of the attorney" that the doctrine "shelters" from disclosure. Nobles, 422 U.S. at 238. It is thus barred by that same doctrine. Instead, defense counsel in this case, as in any other, can assess the evidence produced in discovery, draw their own mental impressions, and base their cross-examination on that.

No on-point authority suggests that a prosecutor's internal memorandum is discoverable in a criminal prosecution—and neither defendants nor the motion court cited any. Instead, such materials are privileged, and the mere possibility that materials might contain some details relevant to the defense is never enough to overcome the work-product and deliberative-process privileges. This Court should reverse Part (c) of the motion court's order.

POINT II

ORDERING PRODUCTION OF CASE FILES OF UNRELATED INVESTIGATIONS FOR IN CAMERA REVIEW CONFLICTS WITH NEW JERSEY SUPREME COURT PRECEDENT. (Raised below at Psa229, 233).

Part (b) of the order, which compels the State to produce "all documents relating to their criminal investigations involving Matthew O'Donnell, whether or not resulting in criminal charges," (Psa233), likewise requires reversal. Such an order directly conflicts with Supreme Court precedent in State v. Hernandez, 225 N.J. 451 (2016), and none of defendants' proffered justifications overcome either this precedent or warrant such burdensome discovery.

1. Begin with Hernandez, which rejected a remarkably similar discovery demand. That case, like this one, involved a cooperating witness who assisted in several criminal investigations. Id. at 453. Just as in this case, the defendants argued they were entitled to "open-file discovery of unrelated cases because the present case and the unrelated cases share a common thread—the same cooperating witness." Id. at 464. Again as here, the defendants suggested that these otherwise-unrelated files involving an overlapping cooperating witnesses might contain false or inconsistent statements or admissions of other crimes. Id. at 465-66 (noting that defendants wished to identify any "false and contradictory

statements" in "[w]itness[] statements, investigative reports, and emails . . . and recorded conversations" contained in other investigative subjects' case files).

Our Supreme Court flatly rejected the request. The Court of course noted that the defense was entitled to the cooperating witness's plea and cooperation agreements, to any information concerning violations of such agreements, and to any materially false statements. Id. at 464-66. But beyond those established discoverable materials, the Court made clear that a criminal defendant has no right to "sift through the files" in unrelated criminal investigations involving the same cooperating witness "hoping to snare some morsel of information that may be helpful to the defense" in his effort to discredit that cooperating witness. Id. at 466. Rather, the standard is far higher: the defendant has to show "how the disclosure of documents in the unrelated investigations will lead to relevant or admissible evidence." Id. at 466, 468 (emphasis in original).

The motion court in this case ordered the exact discovery that Hernandez prohibits. As explained above, the State already provided defendants with the cooperating witness's own case file—including his plea agreement and any false statements. And to the extent that Brady/Giglio material existed, the State has already produced it to the defense under Rule 3:13-1(b)(1). The motion court did not suggest otherwise, yet mandated the disclosure of all documents relating to every unrelated criminal investigation tied to the same cooperating witness.

And it did so without identifying any particular showing by defendants as to how these unrelated case files "will lead to relevant or admissible evidence" as Hernandez required. Id. at 466. While defendants expressed their desire "to scour through ... unrelated investigations in which [O'Donnell] has cooperated" for material that they could later use to challenge his credibility, Hernandez was clear that that is insufficient: "[a]n open-ended search of unrelated investigative files in the hope that something may turn up that has impeachment value is not sanctioned by our discovery rule or jurisprudence." Id. at 467. Part (b) of the order cannot be squared with the Supreme Court's instructions.

That the motion court required the State to produce these documents for in camera review does not change this analysis. Before a defendant may obtain in camera review, he must still make a threshold showing that the information he seeks would be relevant. See State v. Higgs, 253 N.J. 333, 358 (2023) ("An allegation that the information, if present, is relevant to the case is necessary for a defendant to obtain the trial court's in camera review of the file."). Otherwise, the request would distill yet again to the same "unfocused, haphazard search for evidence" prohibited by Hernandez, 225 N.J. at 463 (citation omitted), but now employing the trial court's limited resources in the process. After all, even in camera review "may jeopardize the legitimate interests of the government, or of the parties sought to be protected by the privilege, in the confidentiality of the

withheld documents," Loigman v. Kimmelman, 102 N.J. 98, 108 (1986), especially since the unrelated investigation files contain information about other individuals—including witnesses and public officials who were not ultimately indicted. Cf. Nero v. Hyland, 76 N.J. 213, 226-27 (1978) (reversing decision ordering in camera inspection of Attorney General's background investigation into potential nominee for state position); Wilson v. Brown, 404 N.J. Super. 557, 563 (App. Div. 2009) (reversing order granting in camera inspection of privileged e-mails between Governor and president of local union). Before imposing on the State and on the court the significant burden to review, log, and produce these unrelated documents for in camera review, a defendant has to satisfy Hernandez. Defendants in this case have never done so.

2. None of defendants' responses surmount Hernandez. Besides advancing arguments contrary to Hernandez, Thomas (joined by Windish and Cesaro where applicable) also have argued that disclosure of these documents is justified by: (1) the supposed existence of an attorney-client relationship between O'Donnell and Thomas; (2) a selective prosecution theory—that this investigation began in retaliation for a lawsuit against the State; and (3) an entitlement to any false and inconsistent statements made by O'Donnell because such material is admissible under N.J.R.E. 608. (TMb21, WMb20-21, CMb20). None of these theories holds water.

First, Thomas cannot prevail by speculating that there may be information within the unrelated case files relevant to his unsupported theory that O'Donnell abused an attorney-client relationship that they had. Initially, there is nothing in the record to make such a claim plausible—let alone to supply the rare basis to overcome Hernandez's clear rule. Indeed, there is simply no evidence of an attorney-client relationship at all. The recorded conversations between Thomas and O'Donnell contain no mention of either a past or present attorney-client relationship. (Psa36 to 38; Psa53 to 61; Psa63 to 131). Instead, the evidence shows that Thomas's relationship with O'Donnell was limited to him soliciting O'Donnell for illegal contributions in 2016, and receiving illegal contributions in exchange for promising O'Donnell public work in 2019. And O'Donnell has denied the existence of any attorney-client relationship with Thomas. (Psa203 to 204). The record also lacks any evidence of an attorney-client relationship between O'Donnell and Cesaro—indeed, Cesaro has not even alleged one, and O'Donnell has denied the existence of any such relationship. Ibid.

Windish likewise offers nothing to indicate that O'Donnell abused their attorney-client relationship, as would be necessary to justify discovery on this subject. Although no one disputes the existence of a previous attorney-client relationship between O'Donnell and Windish—O'Donnell admitted as much in an interview documented via a police report produced to the defense in 2023—

that relationship solely concerned a real estate matter, not a political campaign. Ibid. Thus, this attorney-client relationship on an unrelated real estate matter is not relevant to whether O'Donnell abused his attorney-client relationships to assist in investigations of political corruption.

Even more fundamentally, however, defendants offer no basis to think that documents from unrelated criminal investigations would support the claim that O'Donnell had and then abused an attorney-client relationship with any of them. Importantly, Thomas has obtained O'Donnell McCord's billing records pursuant to Part (d) of the order. (Psa261 to 262). Yet Thomas has never suggested that these records substantiate his claim that he had an attorney-client relationship. Moreover, Thomas, Windish, and Cesaro have each received the names of many other investigatory targets because the State already produced both O'Donnell's proffers and related police reports in discovery. And yet Thomas, Windish, and Cesaro have identified no instances of overlap between the billing records (that is, the individuals who had an attorney-client relationship with O'Donnell) and the other investigatory targets (i.e., the individuals regarding whom O'Donnell was cooperating). Defendants thus offer no basis to believe that Part (b) of the order and its sweeping inquiry into those unrelated files will turn up any other evidence relevant to their unsupported attorney-client argument.

Second, Thomas has failed to establish a colorable claim in advancing his specious theory of selective prosecution—that he was prosecuted in retaliation for his involvement in an unrelated civil action against the State—to support an entitlement to these files. A claim of selective prosecution "is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." United States v. Armstrong, 517 U.S. 456, 463 (1996). A defendant must meet a "demanding" burden to show the decision to prosecute was based on an unjustifiable standard. Id. at 463-64 (citation omitted). "Thus, the defendant must show that similarly situated individuals of a different class were not prosecuted for similar crimes." State v. Ballard, 331 N.J. Super. 529, 540 (App. Div. 2000). As a result, to obtain discovery based on a claim of selective prosecution, "a defendant must establish a colorable basis for a claim of selective enforcement" by presenting "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." Id. at 541 (citation omitted).

Thomas falls far short of satisfying this threshold showing. At the outset, Thomas has not identified a "similarly situated individual[]" who was captured on a consensual intercept agreeing to exchange straw-donor checks for promises

of public employment and yet was not prosecuted. Id. at 540. Nor is it remotely plausible that career prosecutors would embark on this investigation simply because Thomas, as the then-President of the Jersey City Board of Education, authorized an entirely separate civil suit involving state funding for schools. But more fundamentally, Thomas's selective prosecution theory is contrary to the materials that have already been produced.

The record makes clear the investigation into Thomas began not because of his alleged role in a civil lawsuit but because—prior to that lawsuit—Thomas had a run-in with O'Donnell that O'Donnell was already recording based on an unrelated consensual intercept. After seeing Thomas, O'Donnell recalled that Thomas previously requested an illegal campaign contribution of $10,000 in a prior campaign in 2016. (4T21-2 to 22-11). Moreover, Thomas messaged O'Donnell to arrange a meeting to discuss his upcoming campaign contributions on April 25, stating that the meeting "will be my re-election kick off breakfast just like in 2016," and O'Donnell shared that message with investigators the next day—three days prior to the April 29, 2019 suit. (Psa51 to 61) (emphasis added). Thus, any claim that this investigation stemmed from Thomas's suit

rather than his recorded attempts to solicit illegal campaign contributions is contradicted by the record evidence and the factual timeline.[8]

Third, defendants are simply incorrect to assert that N.J.R.E. 608 supports the motion court's order. Thomas argued at the motion for leave to appeal stage that documents from unrelated investigations involving O'Donnell as a witness "must be examined" since "they are relevant to . . . support Defendant's claim of entitlement to false and inconsistent statements pursuant to Evidence Rule 608." (TMb21). But N.J.R.E. 608 says the opposite: it explains that "extrinsic evidence is not admissible to prove specific instances of a witness' conduct in order to attack or support the witness' character for truthfulness." N.J.R.E. 608(c); see also Hernandez, 225 N.J. at 466 (confirming that using "'evidence of specific instances of conduct—other than a prior conviction—to prove the character trait of untruthfulness is prohibited'") (citation omitted). And while N.J.R.E. 608(b)(1) provides an exception that "character for truthfulness may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged," that is

[8] Finally, even assuming (incorrectly) that Thomas were entitled to discovery on this theory, neither Windish nor Cesaro has raised or referenced a selective prosecution claim, and thus cannot justify obtaining materials contained in the State's investigatory files on this basis. That is especially true where the motion court has indicated a desire to sever even case management of the three cases following this appeal. (7T7-7 to 8-2; 7T27-15 to 18; 7T30-14 to 17).

a far cry from defendants' broader request to hunt through files for "false and inconsistent statements" more generally.

In any event, even if defendants had sought prior false accusations rather than false and inconsistent statements generally, their demand would still fail in light of Hernandez. After all, defendants here "have not made any showing that" O'Donnell in fact "has made false criminal accusations against others that would entitle them to scour through . . . unrelated investigations in which [O'Donnell] has cooperated." Hernandez, 225 N.J. at 467 (emphasizing that absent a reason to believe a witness had previously made false criminal accusations against others, such an "open-ended search of unrelated investigative files in the hope that something may turn up that has impeachment value is not sanctioned by our discovery rule or jurisprudence"). And the court did not find that defendants had done so. Moreover, while N.J.R.E. 608(b)'s exemption was formally added after Hernandez, that makes no difference. For one, N.J.R.E. 608(b) is a rule of admissibility, not discovery, and thus cannot overrule Hernandez. For another, N.J.R.E. 608(b) merely codified the "narrow exception" that already existed that "in limited circumstances and under very strict controls a defendant has the right to show that a victim-witness has made a prior false criminal accusation." State v. Guenther, 181 N.J. 129, 154 (2004). Hernandez itself cited and relied on

Guenther, confirming the two principles are entirely consistent. Defendants, however, cannot satisfy Hernandez's preconditions.

Defendants have failed to established entitlement to the files of unrelated prosecutions involving O'Donnell. Not only is this discovery foreclosed by Hernandez, but defendants' theories in support of this discovery are belied by the record. This Court should vacate Part (b) of the order.

POINT III

DEFENDANTS HAVE NO BASIS TO OBTAIN FURTHER DISCOVERY REGARDING THE CONSENSUAL INTERCEPTS. (Raised below at Psa228, 232).

In Part (a) of its order, the motion court required the State to produce "all documentation and information that [was] . . . reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of Consensual Intercept Forms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019, and August 26, 2019." (Psa232). The court's sole justification was that this documentation could "shed light on whether defendant Thomas was unfairly targeted for investigation solely due to the Jersey City Board of Education's lawsuit against the State." (Psa228). As an initial matter, the State has already produced all such documentation. But to the degree defendants demand more, any such request is both legally and factually unsupported.

Initially, the State has already complied with this portion of the order. On January 9, 2024, the State filed a letter informing both the motion court and all three defendants that the information Deputy Chief Manis "had when he issued the consensual intercept forms is reflected in the investigation reports already produced to the defense," and delineating that series of police reports with their bates numbers (many of which are included in the State's appendix and cited above). (Psa245). The letter explains "Deputy Chief Manis also relied upon

information he received through verbal updates and conversations. Any factual information learned by Deputy Chief Manis through those verbal updates and conversations is reflected in the investigation reports noted above, which have already produced to the defense." (Psa246). The State noted compliance with Part (a) was complete, and no further proceedings have occurred regarding this demand since this Court granted the State's motion for leave to appeal.

Nor are defendants entitled to an accounting of which documents or pieces of information went to Deputy Chief Manis at which times. Importantly, such an accounting has no bearing on the validity of the underlying consensual intercepts. Although the Wiretap Act carefully regulates the State's interception of electronic communications, consensual intercepts are one of the "exceptions to the rigorous requirements under the Act," and are subject to substantially less "strict" conditions for approval. State v. Toth, 354 N.J. Super. 13, 21, 22 (App. Div. 2002). Indeed, to justify a consensual intercept "under the Act, the only express statutory requirements" are that the State must first obtain "(1) consent by [the informant], and (2) prior approval by an authorized person." State v. Martinez, 461 N.J. Super. 249, 269-70, 275 (App. Div. 2019) (explaining that "a showing of reasonable suspicion is not required" for a consensual intercept, which can be used so long as "they are expected to yield relevant information"). In other words, all that a consensual intercept needs is the consent of one party

and the "prior approval of the Attorney General or his designee or a county prosecutor or his designee[.]" N.J.S.A. 2A:156A-4(c). The evidence confirms, and no defendant disputes, that O'Donnell consented (the first condition) and that Deputy Chief Manis gave approval (the second) to the intercepts. Whether defendants believe Deputy Chief Manis had sufficient cause approve them has no bearing on their validity—and thus is no basis for discovery.

Thomas's desire to explore his unsupported assertion that he was "unfairly targeted for investigation solely due to the Jersey City Board of Education's [April 29, 2019] lawsuit against the State," (Psa228), again gets no further. Even assuming a consensual intercept could ever be rendered invalid on this basis, to obtain discovery to support this theory, "a defendant must establish a colorable basis for a claim of selective enforcement." Ballard, 331 N.J. Super. at 541 (citation omitted); see generally Hernandez, 225 N.J. at 463 (noting "defendants cannot transform the discovery process into an unfocused, haphazard search for evidence") (citation omitted). As detailed above, supra at 37-38, Thomas comes nowhere near meeting his burden. Even beyond the sheer implausibility that career prosecutors would investigate Thomas as retaliation for the Board of Education's civil suit over funding, the record establishes the prosecution began investigating Thomas before the civil action. As record evidence shows—including an earlier consensual intercept and a contemporaneous police report,

both already produced—O'Donnell told the State months prior that Thomas had solicited illegal campaign contributions (totaling $10,000) from him in 2016 and was looking to build a "war chest[]" again. (Psa38; Psa62). And O'Donnell shared text messages confirming his upcoming meeting with Thomas on April 26, 2019—again, days before the civil suit. (Psa51 to 61). These already-produced materials establish why the consensual intercept was needed: because Thomas had previously solicited illegal campaign contributions and indicated a potential plan to do so again. And their timeline devastates Thomas's claim of selective prosecution in retaliation for a civil complaint. Thomas offers nothing to make his claim plausible. Absent any colorable claim, however, the order is an impermissible fishing expedition.

That the motion court required the State to also provide the materials from Part (a) of its Order to Cesaro and Windish is even stranger. The motion court justified Part (a) by suggesting the information could theoretically help Thomas show that he was "unfairly targeted for investigation." (Psa228). As groundless as Thomas's theory is, however, the theory has no bearing whatsoever on Cesaro and Windish; they did not raise a selective-prosecution claim at all. Instead, the bases for the consensual intercepts against Cesaro and Windish were apparent: O'Donnell named them in his proffers with law enforcement as individuals who he had previously "dealt with," and who had previously approached O'Donnell

to request unlawful contributions to their campaigns. See (Cpsa4). And neither Cesaro and Windish were involved in the civil action over school funding, the only even purported basis for a selective prosecution. The court's decision to nevertheless extend Part (a) of its order to Cesaro and Windish demonstrates how far the order strays from traditional discovery principles.[9]

The basis for the authorization of these consensual intercepts is clear from the record and establishes that they were indeed likely to yield relevant evidence of corruption. The State already provided all the documentation and information that was presented to Deputy Chief Jeffrey Manis. But to the degree defendants demand more, such discovery has no bearing on any challenge to the consensual intercepts or any colorable selection-prosecution claim. This Court should thus vacate this provision of the motion court's order as well.

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[9] Strangely, although the motion court required the same production be made in Cesaro and Windish's cases as in Thomas's prosecution, the specific consensual intercepts covered by Part (a) relate to Thomas alone. See (Psa228) (ordering discovery relating to intercepts on February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019, and August 26, 2019). None of the dates of the consensual intercepts in the order correspond to the consensual intercepts involving Windish or Cesaro—which occurred a year before, in 2018. (Psa232). In other words, the court oddly required the State make the same productions in Cesaro and Windish's cases, but all the information relates to Thomas and could not be useful to them. (And given that defendants Windish and Cesaro did not file a cross-appeal, they cannot now argue that the order was mistakenly limited, especially when its underlying reasoning related to Thomas alone.) That merely adds to the unusual and unprecedented nature of this order.

CONCLUSION

This Court should vacate the motion court's discovery orders.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

DATED: April 22, 2024

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-001472-23T1

STATE OF NEW JERSEY,	:	On Leave to Appeal Granted from
Plaintiff-Movant,	:	an Interlocutory Order of the
v.	:	Superior Court of New Jersey,
	:	Law Division, Somerset County
JOHN CESARO,	:	
Defendant-Respondent.	:	Indictment No. 21-01-00008-S
	:	Sat Below:
		Honorable Peter J. Tober, J.S.C.

BRIEF ON BEHALF OF DEFENDANT, JOHN CESARO,

IN OPPOSITION TO THE STATE'S INTERLOCUTORY APPEAL

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PRELIMINARY STATEMENT

This case involves a prosecution by the Office of Public Integrity and Accountability against one defendant whose case is venued in Hudson County and three defendants whose cases were venued in Morris County, however, recently transferred to Somerset County before the Honorable Peter J. Tober, J.S.C. The three defendants are Sudhan Thomas, John Windish and John Cesaro. A Motion for Leave to Appeal has been filed in all three defendant's cases. Leave to Appeal has been granted.

Although a voluminous amount of discovery has been provided to defense counsel, it became apparent that important discovery was not provided. As a result, an Omnibus Motion was filed by counsel for Sudhan Thomas. This motion was filed on June 12, 2023. The motion sought: (1) a list of specific crimes subject to the cooperating witness agreement of MOD's non-prosecution agreement, identification of the associated victims, and the amounts of restitution owed; (2) all documentation related to other investigations involving MOD; and (3) all documents presented for review by Deputy Chief Jeffrey Manis regarding certain consensual intercept authorizations. The State opposed the motion. Counsel for Windish and counsel for Cesaro joined in the motion in that all information and discovery requested was relevant to their defense of their respective clients.

On July 24, 2023, the Trial Court granted the motion in part and denied it in part. (Psa205 to Psa206). The Court also provided a detailed explanation of the Order. (Psa207 to Psa231).

At the time the Order was entered, it only applied to Sudhan Thomas which was surprising since the reasoning applied to all three defendants and both counsel for Windish and Cesaro had joined in the motion and provided a letter brief.

On August 25, 2023, the State filed a motion for reconsideration which was quickly denied by the Trial Court. At the same time, a request was made by counsel for Windish and Cesaro that the Order be made applicable to their defendants as well. The Court granted that request.

The State argues that "aside from involving O'Donnell as a cooperating witness, their investigations and indictments are unrelated to Thomas' case". With all due respect, this makes no sense. Other than a claim of selective prosecution and attorney/client privilege, all of the issues raised apply to Defendant Cesaro as well. They are discovery issues, needed for defense at the time of trial.

Defendant Cesaro is entitled to identification of associated victims, the amounts of restitution owed, documentation of other investigations of MOD and all documentation reviewed by Deputy Chief Jeffrey Manis before authorizing consensual intercepts.

This case involves an attorney, MOD, who was identified as deeply involved in a public corruption with numerous municipalities, numerous politicians, and millions of dollars over many years. In order for these defendants to properly defend their clients, discovery is needed regarding all of MOD's victims, the amounts owed, why they were not prosecuted and why consensual intercepts were authorized. Why did the State decide to go after John Cesaro, who had no prior criminal history, and forego prosecution of individuals who the State knew had committed crimes with MOD with both sides profiting at the expense of the public? This discovery is relevant to the defense of John Cesaro. Respectfully, it should be provided.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Sometime prior to January 2018, the State became aware of crimes committed by MOD involving a straw donor scheme to make illegal campaign contributions to elected officials in exchange for contracts to perform legal work from public entities. This scheme enabled MOD and his law firm to illegally obtain millions of dollars in legal fees from nearly twenty New Jersey municipalities and county governments for over a decade. Rather than imprison MOD, the State engaged in a series of proffer sessions over a three-month period wherein MOD and his attorneys detailed his extensive criminal conduct which also included cash payments made by MOD to elected officials in exchange for legal work and to

have his colleagues appointed as Superior Court Judges. MOD identified numerous public servants with whom he conspired to defraud taxpayers. At no time was Defendant Cesaro identified as being involved in any part of MOD's massive corruption enterprise. Defendant Cesaro was identified as someone he knew who was running for re-election. No mention was ever made of Defendant Cesaro being involved in any criminal activity. Despite the fact that Defendant Cesaro was not involved in any criminal activity, presently or in the past, the State gave MOD their blessing to see if he could entice Mr. Cesaro into committing a crime.

On January 31, 2018, MOD entered into a proffer agreement with the State . To the best of Defendant Cesaro's knowledge, proffer sessions occurred on January 31st, February 16th, February 21st, February 28th, and April 18th of 2018. (Cpsa1-Cpsa16). During these proffers, MOD admitted to, *inter alia*, a series of corrupt agreements with public officials which permitted him and his law firm to profit from illegally obtained public employment contracts over a substantial period of time. He discussed cash payments and the use of straw donors which were funneled to the politicians with the express understanding that it was in exchange for legal work for his firm. MOD also paid and conspired to pay bribes to a State Senator to secure judicial nominations for an individual close to him. Thereafter, MOD actively began working with law enforcement to entice several individuals to commit crimes the State was willing to prosecute. The broad criteria

to become MOD's target was anyone who sought "financial assistance from him in the past".

Defendant Cesaro was not identified as someone who sought "financial assistance from him in the past" or someone he had ever given financial assistance to in the past. Nor was Defendant Cesaro someone who he had previously committed crimes with before. Defendant Cesaro was an innocent individual who was running for re-election as a Morris County Freeholder. Mr. Cesaro, like any politician who runs for office, was looking for contributions to fund his re-election campaign. All politicians look for campaign funding and there is nothing illegal about doing so.

MOD as an attorney, who had committed numerous crimes for numerous years through illegal and unlawful political contributions, never had any interaction with Defendant Cesaro before the events which are the subject matter of the indictment. MOD also knew that Defendant Cesaro could not provide MOD with any benefit as a Morris County Freeholder. But, it did not matter to MOD nor did it matter to the State investigators. It is hard to imagine that the State investigators would give their blessing for MOD to target Defendant Cesaro - an innocent individual. It is also hard to believe that the State would give MOD a pass for all his prior crimes and allow him to continue to reap millions of dollars of income from his continued ability to commit crimes.

On June 29, 2018, MOD entered into a plea/cooperation agreement whereby MOD would plead guilty to one second degree crime and the State would recommend MOD be sentenced to an eight (8) year prison term. The State also indicated they would "***not prosecute defendant for any other heretofore disclosed activities in connection with any and all unlawful political contributions made by defendant or his coconspirators on behalf of defendant.***" However, MOD did not formally enter a plea of guilty at that time.

During his period of cooperation, the State permitted MOD to continue to provide legal service to the municipalities he previously victimized. As a result of this unorthodox arrangement, MOD took advantage of the State's graciousness and engaged in a series of additional crimes relating to overbilling and billing for services MOD never performed. This ultimately led to a lawsuit filed by one of his unwitting victims. See, Township of Holmdel v. Matthew O'Donnel and O'Donnel McCord, P.C. Docket No. A-2306-21.

On September 12, 2021, MOD and the State entered into a new plea/cooperation agreement requiring he and his law firm plead guilty to additional crimes including a new clause not to prosecute MOD for "***any heretofore disclosed activities in connection with his Firm's billing practices***." In exchange for the plea to offenses which occurred during his cooperation period and were a clear violation of the prior agreement, the State agreed to reduce MOD's recommended

prison sentence from eight (8) years to a flat three (3) year sentence. The State has refused to identify the crimes that are contemplated within these broad clauses of non-prosecution, leaving the Defendants no choice but to move to compel this information. Judge Tober agreed and now the State has appealed.

The Consensual Intercepts

In the State's Brief in support of the Motion for Leave to Appeal the Interlocutory Order of the Honorable Peter J. Tober, a Statement of Procedural History on Facts is provided.

In the first paragraph of their portion of the Brief, the following statement was made, "[a]fter his criminal history came to light, O'Donnell met with police and provided them with names of several politicians who had steered him work in exchange for illegal campaign contributions". (Cpsa1 to Cpsa5). Among them was defendant, John Cesaro (then, the Morris County Freeholder Director). This would appear to be the reason for the investigation and prosecution of Defendant Cesaro. However, the statement by the State is incorrect and untrue.

O'Donnell did not meet with the police. He met with three Deputy Attorney Generals and the FBI. More importantly, Defendant Cesaro never "steered him work in exchange for illegal campaign contribution." No such thing ever happened. MOD never said that Defendant Cesaro "steered him work" in exchange for

political contributions. MOD never said such a thing. MOD only said that he met Defendant Cesaro at a Lobster Dinner Fundraiser and that Defendant Cesaro was looking for contributions for his fundraising for his re-election campaign as Morris County Freeholder.

It is quite surprising that the State would begin their brief with such an incorrect statement of the facts. Defendant Cesaro was never involved in any criminal activity. Defendant Cesaro had no prior relationship with MOD. Defendant Cesaro never accepted money from MOD in the past and Defendant Cesaro never steered work to MOD for illegal campaign contributions. MOD stated himself that "only some of the politicians committed criminal activity within the past", and that "some of the politicians have not explicitly asked him to commit a crime". So, why would the State, involve the government in an effort to get these individuals to purposely commit a crime? And why would Deputy Chief Jeffrey Manis authorize those conceptual intercepts? And who would authorize this type of investigation in the first place? These are all questions which demand answers from the State.

On January 31, 2018, Deputy Attorney Generals Pearl Minato, Anthony Robinson, and John Nicodemo met with MOD and his defense counsel. A report from that meeting is attached to the State's Brief (as Cpsa1 to Cpsa5).

According to the report, "O'Donnell provided the names of approximately 12 politicians that he has dealt with in the past and believes he can assist us in charging for multiple crimes". O'Donnell went on to say that, "only some of the politicians he has committed criminal activity within the past". O'Donnell stated that some of the politicians have not explicitly asked him to commit a crime but rather expect it or it is implied.

Defendant Cesaro was the fifth politician described. According to the descriptions on page Cpsa4, he said the following:

> "O'Donnell stated John Cesaro is the Morris County Deputy Freeholder Director and it the municipal prosecutor for several towns such as North Caldwell. O'Donnell stated on 01/23/18 he saw Cesaro while in attendance at Bucco's annual Lobster Night fundraiser. While at the bar with a Florham Park attorney who specializes in campaign consulting named Alan Zakin, O'Donnell stated Cesaro told him he needs his help with fundraising and in return would give him more work in Morris County. O'Donnell stated he told Cesaro he would come see him on 02/08/18 to talk about setting up a fundraising event for him. I asked O'Donnell how much he himself would be expected to pay. O'Donnell stated he would probably spend approximately $5,000.00 - $15,000.00 for it to be held on the third floor of the Grand Café in Morristown." (Cpsa4).

As can be seen from the words of MOD, there was no history of prior criminal activity of any type. There was no history of present criminal activity.

MOD happened to meet Defendant Cesaro at Bucco's Lobster Night Fundraiser. MOD also met Defendant Windish at the Lobster Night along with many other politicians. Nothing criminal took place at the Lobster Dinner. Defendant Cesaro was looking for contributions towards his campaign for re-election.

For reasons unknown, the State agreed to allow MOD to pursue Defendant Cesaro as a target of their (the State and MOD) plan to ensnare and entice an innocent individual into criminal activity to spare a criminal (MOD) from jail for the multitude of crimes he committed. At the same time, he continued profiting from his illegal activity to which the State turned a blind eye. One has to ask, "Why would the State of New Jersey, OPIA, participate in this type of activity?" Yet, that is precisely what they did. A Rule 104 testimonial hearing is necessary to determine whether the recordings are admissible.

In preparation for the hearing and Manis' testimony, the Defendant Cesaro has requested the State identify the specific documents Manis reviewed to discern the basis for the interceptions and their approvals. This information is imperative to determine if the State complied with the standards required for Consensual Intercepts. That demand received repeated responses indicating "all discovery relating to your request has already been provided." The State, however, has continually refused to comply leaving Defendant to speculate prior to the hearing. Defendant Cesaro filed a Motion to Compel this information which was granted by

the Trial Court. To date, the State has yet to comply with this aspect of the Court's Order.

On June 12, 2023, after numerous attempts to obtain discovery relating to the State's motion to admit the recordings between Thomas and MOD and information relevant to the extent of the "deal" obtained by MOD, Defendant Thomas filed a motion to compel discovery. Defendants Windish and Cesaro jointed in the motion in that they were looking for the same information.

The relevant aspects of that motion for discovery related to the Defendants' demand that the State identify the documents reviewed by DAG Manis prior to authorizing the consensual intercepts. The State has refused to provide an identification of the documents repeating their mantra that the documents presented have "already been provided". After extensive oral argument on this issue, the Trial Court ruled that the State must identify what documents Manis reviewed and later, upon the State's reconsideration motion, refined exactly what the State needed to do to comply with the Court's Order.(Psa232 to Psa233). There are statutory obligations before a consensual intercept is authorized and the defendants are entitled to know what was reviewed by DAG Manis prior to approving the consensual intercepts. To simply state that it is provided in the discovery is of no use to counsel for the defendants. The State should be required to identify what was reviewed.

The Defendants also sought discovery relating to the vague clauses in the two plea/cooperative agreements compelling the State to identify what crimes they have agreed not to prosecute as part of their agreement with MOD, as well as the identification of victims and amounts of restitution contemplated in the plea agreement. Recognizing that this information, which directly relates to the extent of MOD's bias and possible intent to curry favor with the State, is pertinent to MOD's credibility, and therefore, the Trial Court ordered the State to turn over the information.

Finally, Defendants sought an *in camera* review of the related criminal investigations of others targeted by MOD and the State for very specific reasons relevant to the Defendants' defenses. First, the Court accepted Defendant Thomas' argument that an *in camera* review was necessary to determine if other instances relevant to the exploitation of MOD's client's confidences occurred to show a pattern. Second, these investigations were subject to court review to determine relevancy in light of the recent amendment to Evid. Rule 608. Third, review was necessary to determine whether during the course of the other related investigations, MOD made reference to other crimes he committed that are not referenced in his proffers with the State.

Judge Tober's Order stated as follows:

"... defendant's omnibus motion is hereby GRANTED in part, and DENIED, in part as it relates to work product, internal reports and memoranda not specifically held discoverable herein.

a) The State shall provide any and all documentation and information that were reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of the Consensual Intercept Forms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019 and August 26, 2019;

b) The State shall provide any and all documents relating to their criminal investigations involving Matthew O'Donnell, whether or not resulting in criminal charges, pursuant to a Protective Order;

c) The state shall provide a list of all the crimes committed by Matthew O'Donnell, the identification of the victims related thereto, and the amounts of restitution..." (Psa232-233).

The State subsequently requested "clarification" of the Court's Order which later became a Motion for Reconsideration which was denied. (Psa234) .The State obtained a stay of paragraphs B and C of the Order, but not as to A and D claiming no appeal was being taken relating to the latter rulings. (Psa238).

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY ORDERED THE STATE TO PRODUCE A LIST OF ALL CRIMES COMMITTED BY MOD AS

WELL AS AN IDENTIFICATION OF THE VICTIMS THEREOF AND THE AMOUNTS OF RESTITUTION.

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused to confront the witnesses against him. Pointer v. Texas, 300 U.S. 400 (1965). One way of discrediting a witness is to introduce evidence of a prior criminal conviction as a general attack on that witness' credibility. Davis v. Alaska, 415 U.S. 308, 316 (1974). Additionally, the bias of a witness is subject to further exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony". Id. (quoting 3A J. Wigmore, Evidence §940, p. 775 (Chadburn rev. 1970)). It is fundamental that a defendant has a right to explore any evidence which may show that the State has a "hold" of some kind over a witness, which may cause the witness to curry favor with the State. State v. Mazur, 158 N.J. Super. 89, 104-105 (App. Div.), *certif. denied*, 79 N.J. 399 (1978).

As stated "in an unbroken line of decisions, our courts have held that the pendency of charges or an investigation relating to a prosecution witness is an appropriate topic for cross-examination". State v. Landano, 271 N.J. Super. 1, 40 (App. Div. 1994). In fact, prosecutorial suppression of evidence relating to a witness' possible interest constitutes a violation of the defendant's right to due process. State v. Spano, 69 N.J. 231, 235 (1976). The test of propriety of questions affecting credibility is "the state of mind of the witness based on his subjective

reactions to the favorable treatment he may have received or may hope to receive in connection with his own criminal involvement". State v. Vaccaro, 142 N.J. Super. 167, 176 (App. Div.), *certif. denied,*71 N.J. 518(1976).

MOD's plea agreement with the State includes non-prosecution clauses "for any other heretofore disclosed activities in connection with any and all unlawful political contributions made by Defendant or his coconspirators on behalf of Defendant" and subsequently "any heretofore disclosed activities in connection with his Firm's billing practices." (Da81). Since receiving the initial plea agreement and the subsequent revised one, Defendant has been attempting to obtain an identification from the State of all crimes it believes are included within the above clauses. This is imperative for the defense to calculate the "benefit" of the bargain MOD was able to negotiate with the State, as his potential sentencing exposure without a deal has a direct bearing on his bias in favor of the State.

As the issue of bias serves an important function of the constitutionally protected right of cross-examination, Defendant Cesaro must be permitted to know what crimes comprise the non-prosecution agreement. For example, is the State foregoing prosecution of 2 crimes, 50 crimes or something in between? Defendant Cesaro has a right to know so he can explore the extent of the favorable treatment MOD received in exchange for pursing Mr. Cesaro. Defendant Cesaro has no other

way to secure this information since the wording of the plea agreements are vague and fail to delineate MOD's crimes for which he will not receive punishment.

The State harbors under the misguided notion that the Trial Court only ordered the production of one document they contend is privileged. To the contrary, the Order explicitly compels the State to "...***provide a list of all the crimes committed by Matthew O'Donnell, the identification of the victim related thereto, and the amounts of restitution.***" (Psa205). Thus, the document the State seeks to protect is only a subset of their obligation under the Order and the only part of said Order they apparently seek to overturn. Nonetheless, the State's argument that the document is protected from disclosure is incorrect.

Furthermore, the trial court's order is not limited to a single memorandum, as alleged by the State. The order clearly states that, "[t]he State shall provide a list of crimes committed by Matthew O'Donnell, the identification of the victims related thereto, and the amounts of restitution." (Psa233). Additionally, the State's claim that the memo is exempt from disclosure under the work product doctrine and deliberative process exemption is utterly devoid of merit.

The State claims the memo in question continues work product and is also protected under the "deliberative process" privilege. Work product protects "...internal reports, memoranda or documents made by...the party's attorney...in

connection with the investigation, prosecution or defense of the matter…" R. 3:13-3(d). While Defendant cannot comment on whether the memo even meets the definition as the contents are unknown, work product does not protect documents which relate to a material witness' promise of leniency by the State. State v. Satkin, 127 N.J. Super. 306 (App. Div. 1974). As the comments to the court rule indicate, "[t]his information has been specifically deemed not to come within the work-product exception of paragraph (d) of this rule." (citations omitted) See Pressler & Verniero, Current N.J. Court Rules (GANN), Comment 3.2.6 to R. 3:13-3 (2023). Since this document relates directly to MOD's cooperation agreement, the State cannot not hide it from Defendant Cesaro under the guise of work product.

Likewise, the deliberative process privilege is a narrow exception that does not provide a blanket protection to any possible decision or exchange of information among members of the OPIA. As the Trial Court was aware, the deliberative process privilege only applies to the formulation of policy or changes in policy by policymakers. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). The privilege does not apply to factual information which directly bears on the benefit conferred on a cooperating defendant which will be the subject matter of cross-examination at trial.

In Correctional Medical Servs. Inc. v. Department of Corrections, 426 N.J. Super. 106, 122, 125-26 (App. Div. 2012), the Appellate Division discussed at length the concept of the deliberative process privilege. The Court state that there is a "profound distinction" between "analysis leading to the formulation of policy positions" and tasks that are administrative in nature. Id. at 122-23. The privilege protects the "governmental analysis leading to the formulation of policy positions and other decisions of comparable weight[.]" Id. at 122. Thus, the issue is not whether a government agency is making a "decision", the issue is whether the decision that is being made relates to the formulation of or recommended change to "policy" or "other decisions of comparable weight[.]" The subject memo the State refuses to produce does not relate to policy or changes in policy.

II. THE TRIAL JUDGE PROPERLY ORDERED THE STATE TO TURN OVER OTHER RELATED INVESTIGATIONS INVOLVING MOD FOR AN IN CAMERA REVIEW AS DEFENDANT ESTABLISHED THEIR RELEVANCE.

"In New Jersey, an accused has the right to broad discovery after the return of an indictment in a criminal case." State v. Desir, 245 N.J. 179, 192, 244 A.3d 737 (2021) (quoting State v. Hernandez, 225 N.J. 451, 461, 139 A.3d 46 (2016)). Rule 3:13-3(b)(1) explains that right and "obligates the State to provide full discovery…when an indictment is returned." State v. Robinson, 229 N.J. 44, 72,

160 A.3d 1 (2017). Under Rule 3:13-3(b)(1), the State must turn over relevant materials including:

> [B]ooks, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, in necessary, into readable useable form[.][R. 3:13-3(b)(1)(E).]

Criminal discovery "is appropriate if it will lead to relevant information." Stein, 225 N.J. at 582, 596 (2016). "Relevant evidence is 'evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.'" Rodriquez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57-58 (2019) (quoting N.J.R.E. 401). "Relevance is measured in terms of the opportunity of the defendant to present a complete defense." Desir, 245 N.J. at 193 (quoting Pressler & Verniero, Current N.J. Court Rules, comment 3.2 on R. 3:13-3 (2023)).

Discovery is also appropriate for "material evidence affecting [the] credibility' of a state's witness whose testimony may be determinative of guilt or innocence." Hernandez, 225 N.J. at 463 (quoting State v. Carter, 69 N.J. 420, 433

(1976)). Moreover, our courts have "the inherent power to order discovery when justice so requires." State in the Int. of A.B., 219 N.J. 542,555 (2014).

Lastly, Defendant Cesaro shall mount a significant attack on MOD's credibility in light of the unorthodox plea agreement he received where the State provided MOD the opportunity to engage in further crimes while cooperating, and then, when caught, shockingly permitted him to plead guilty and receive a much lighter sentence than previously agreed. Defendant Cesaro is, therefore, entitled to examine the other investigations to determine what other crimes MOD admitted to have been engaging in, whether MOD made false or inconsistent statements in those investigations, and whether MOD identified additional criminal conduct as to which the State agreed to give him a pass.

III. THE TRIAL COURT CORRECTLY RULED THAT THE STATE MUST IDENTIFY WHAT SPECIFIC DOCUMENTS, IF ANY, DEPUTY BUREAU CHIEF MANIS REVIEWED IN AUTHORZING THE INTERCEPTS

The State is also taking the position that the Order requiring the State to identify which documents were relied on by Deputy Chief Manis in issuing the consensual intercept forms should not apply to defendants Windish and Cesaro.

This completely ignores the following as stated by Judge Tober in his decision (Psa 207):

> "Under the New Jersey Wiretapping and Electronic Surveillance Control Act, it is not unlawful for a person acting at the direction of an investigative or law enforcement officer to intercept a wire, electronic, or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interpretation; provided, however, that no such interception shall be made without the prior approval of the Attorney General or his designee. N.J.S.A. 2A:156A-4(c).
>
> N.J.S.A. 2A:156A-23(d) provides that:
>
> [T]he Attorney General…shall maintain records of all interceptions authorized by the Attorney General. Such records shall include the name of the person requesting the authorization, the reasons for the request, and the results of any authorized interception." (Psa 207)

Although Counsel for Defendant Thomas has within his pleading identified additional reasons for the request, the statutory requirements remain the same and justify the request by counsel for Defendants Windish and Cesaro.

It must be emphasized that the documents there were presented to Deputy Chief Manis when he issued the intercept forms for Mr. Cesaro are highly relevant to his defense. We do not know if any documents were provided or any

justification was given for the intercepts. It is possible that all that was given was a form to sign without any justification. If that is what occurred, Mr. Cesaro would have a viable motion to exclude any of the recordings that the State intends to admit into evidence. Mr. Cesaro is entitled to this information and Judge Tober agreed as part of his decision.

In light of the above, it is beyond question that the information presented to Deputy Chief Manis is critical to the defense of Mr. Cesaro so he can effectively challenge the issuance of the intercept forms and seek to exclude any evidence that was improperly obtained by the State.

The State also argued that applying the order to Mr. Cesaro is improper because the dates that are referenced in the order specifically relate to the intercept requests that were authorized in the Thomas case which occurred in 2019, and Mr. Cesaro's conduct occurred in 2018. However, this appears to have been an oversight at the trial court level and the Order can be revised to include the correct dates that relate to Mr. Cesaro. By way of background, at the September 19, 2023 hearing regarding the State's Motion for Reconsideration, counsel for Mr. Cesaro expressly requested any documents or information that were reviewed by Deputy Chief Manis in connection with the "consensual intercepts that relate to Mr. Cesaro." 6T:54:18-21. Because it is uncontroverted that the Order was subsequently amended to include Mr. Cesaro (Psa239), it should be clear to the

State that he is seeking the documents/information that Deputy Chief Manis reviewed in connection with the intercepts that related to his case and not Mr. Thomas's investigation.

Accordingly, we submit that the trial court properly concluded that Mr. Cesaro is entitled to the production of information that indicates why he was investigated by the State.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Court deny the State's appeal. Judge Tober's decision was well reasoned and legally justified.

Respectfully submitted,
HANLON DUNN ROBERTSON
Attorneys for Defendant/Respondent
John Cesaro

By: Robert E. Dunn, Esq.

Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-001472-23T1

Criminal Action

Plaintiff-Appellant, :

STATE OF NEW JERSEY :

vs. :

Defendant-Respondent, :

SUDHAN THOMAS :

On Leave to Appeal Granted from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Somerset County

Indictment No. 21-01-00009-S
Sat Below:
Honorable Peter J. Tober, J.S.C.

BRIEF ON BEHALF OF DEFENDANT, SUDHAN THOMAS, IN OPPOSITION TO THE STATE'S APPEAL

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Dated: June 20, 2024

Defendant is not confined

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PRELIMINARY STATEMENT

The trial court in this matter properly ordered the State to produce relevant discovery to the Defendants who were charged in a political corruption sting orchestrated by a cooperating witness looking to curry favor with the State for a multitude of crimes he committed. This operation utilized an attorney, who had previously represented Defendants, Sudhan Thomas ("Defendant" or "Thomas"), John Windish ("Windish") and likely others, to surreptitiously record meetings with his clients to secretly solicit them to engage in bribery. In the case of Thomas, the Consensual Intercept Authorizations issued by the Attorney General Office of Public Integrity and Accountability ("OPIA") came over a year after this cooperator supposedly "came clean" with investigators and told them about every individual who committed crimes with him or tried to do so. Thomas' name was not mentioned once over the course of three months of proffers.

In the trial court, the State filed a motion to admit the secret recordings seeking a Rule 104 hearing. In advance of the hearing, the Defendant Thomas, later joined by Windish and John Cesaro ("Cesaro"), filed an omnibus motion for discovery, relevant to the hearing and other motions, that the State refused to provide. After extensive briefing and oral argument, the Honorable Peter J. Tober, P.J.Cr., entered an order granting the motion in part and denying in part.

The State has appealed this order erroneously claiming a New Jersey Supreme court decision provides them the sword to prevent all requests for discovery of investigations engaged in by their cooperating witness. They further incorrectly argue they do not have to provide information which elucidates the vague non-prosecution agreement with their cooperator or the amount of restitution this man will have to pay at his sentencing, averring that Defendant can use his own "mental impressions" to figure it out.

Lastly, the State seeks to vacate the trial court's order, or more precisely bar any hypothetical future requests, which required the State to identify the documents they relied on in issuing the intercepts asserting that precedent does not permit Defendants a hearing to challenge their power to grant authorizations under the New Jersey Wiretap Act. The State is grossly mistaken about the law on this issue.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant Thomas concedes that the State provided him with voluminous discovery, including discovery relating to their cooperating witness, attorney Matthew O'Donnell ("MOD"). What the State fails to disclose is that many of the items produced came after persistent prodding by Defendant about missing relevant documents believed to be in the State's possession. Often, the State would respond "Please be advised that all discovery relating to your request has already been provided," only to reverse course months later after locating the responsive documents "after a diligent search." (Psa182-200; Dsa1-2; Psa39-50)[1] On one occasion, defense counsel for Thomas fortuitously learned of the existence of repeatedly requested discovery only because it had been provided to an attorney for a defendant in a related matter involving MOD as the cooperator. (Psa251-259)

This delayed discovery, including critical impeachment material relating to MOD's "deal," consisting of emails and related correspondence between counsel for MOD and State representatives, had been specifically requested on numerous occasions by Thomas' counsel only to be told that all responsive documents had been provided. (Psa182-196) After being confronted with

[1] Defendant adopted the State's references as outlined in the footnote 2, pg.4 of its brief. Dsa refers to Defendants appendix.

counsel's knowledge that the materials existed and that they were provided to other counsel, the State had no choice but to turn over same which occurred in two separate productions. (Psa251-259) Concerning other discovery demands by the defendants, the parties tried to resolve disputes relating to relevancy under R. 3:13-3(b). After reaching an impasse as to specific items that Thomas believed were necessary to his defense, Defendant filed a motion to compel the pertinent discovery after being so directed by the Honorable Peter J. Tober, P.J. (Psa205-233; 239-240)

The MOD Cooperation and Deal with the State

On January 26, 2018, MOD entered into a proffer agreement with the State. (Dsa3-5) To the best of Defendant's knowledge, proffer sessions occurred on January 31st, February 16th, February 21st, February 27th, and April 18th, 2018. During these proffers, MOD admitted to, *inter alia*, a series of corrupt agreements with numerous public officials which permitted him and his law firm to profit from illegally obtained public employment contracts over a substantial period. MOD was able to unlawfully obtain millions of dollars in legal fees because of his criminal enterprise victimizing at least eighteen municipalities. He described his scheme as utilizing cash payments as well as checks through straw donors which were funneled to the politicians with the express understanding that it was in exchange for legal work for his firm. He then falsified reporting documents to cover up his

crimes. MOD also admitted he paid and conspired to pay bribes to a State Senator to secure judicial nominations for individuals close to him. Facing substantial jail time, MOD devised a plan to help himself by cooperating with the State. Despite identifying dozens of corrupt individuals, many of whom were in high levels of government, Thomas' name was never mentioned as a person involved in this wide-spread criminal enterprise. (Dsa6-64)

During the month that MOD was proffering, and thereafter, he actively began working with law enforcement to entice several individuals to commit crimes the State was willing to prosecute. The broad criteria to become MOD's target was anyone who sought "financial assistance from him in the past.," (4T 32:18-24) and anyone who was "desperate for money." (Dsa13) This wide net cast by the State appears to include those who allegedly were previously engaged in crimes with MOD, as well as those who sought legitimate campaign contributions from MOD who might be susceptible to commission of a crime because they were in dire financial straits. In any event, its clear MOD's cooperation began while his attorneys were still negotiating a cooperation/plea agreement on his behalf and unrecorded meetings were conducted by MOD with people he wished to groom for later targeting. (Dsa11;21)

On June 29, 2018, MOD entered into a plea/cooperation agreement whereby MOD would plead guilty to one second degree crime and the State would

recommend MOD be sentenced to an eight (8) year prison term. The State also indicated they would "***not prosecute defendant for any other heretofore disclosed activities in connection with any and all unlawful political contributions made by defendant or his coconspirators on behalf of defendant.***" MOD also agreed to ***"pay full restitution to any and all victims who sustained a loss as a result of the scheme to which the Defendant is pleading guilty, whether by Defendant's own actions or those of his coconspirators.***" The agreement also contemplates that a restitution "plan" will be submitted to the Court in advance of sentencing. MOD did not formally enter a plea of guilty at that time. (Dsa65-69)

During his period of cooperation, the State permitted MOD to continue to provide legal services to the municipalities he previously victimized. In other words, the State did not notify the public entities that they were victims of a fraud, and allowed MOD to continue to operate under the criminally obtained contracts. As a result of this unorthodox arrangement, MOD was able to engage in a series of additional crimes by overbilling and billing for services never performed, thereby victimizing these entities anew. This ultimately led to a lawsuit filed by one of his unwitting victims. See, Township of Holmdel v. Matthew O'Donnell and O'Donnell McCord, P.C. Docket No. A-2306-21. A synopsis of the allegations against MOD are set forth in the Appellate Division decision affirming the denial of the defendant's motion to stay the proceeding (Dsa70-78). The State, for some

yet unknown reason, did only a minimal investigation into these additional crimes which allowed MOD to unlawfully pocket additional millions of ill-gotten gains. (Dsa79-80)

The defense was left with the task of attempting to determine the breadth of MOD's thefts of services during his cooperation period. Although the State filed a Motion to Quash to prevent the defendants from obtaining the billing records maintained by MOD and his law firm, the trial court denied the motion and ordered MOD to provide the documents. (Psa205-206) MOD's attorneys have since complied with the court's order. Oddly however, while the State has resisted all attempts by Thomas to gain access to any information contained in the files of others MOD has cooperated against, they have at least provided the dates on which MOD was working with State investigators in those unknown investigations in the case involving Jason O'Donnell. It is unclear by what rationale the State agreed to provide this information in that case but has refused to do so in this one, but Thomas has learned that the information proved critical in partially demonstrating MOD's massive billing fraud. On numerous occasions when MOD was likely spending hours wearing a wire and meeting with other targets, he was also bilking municipalities out of public funds. In a document publicly filed in the Jason O'Donnell matter, that defense attorney demonstrated that MOD often billed over

15 hours and sometimes over 34 hours in a single day to these public entities while spending time actively cooperating. (Dsa81-175)

On September 12, 2021, MOD and the State entered into a new plea/cooperation agreement requiring he and his law firm to plead guilty to additional crimes including a new clause agreeing not to prosecute defendant for "***any heretofore disclosed activities in connection with his Firm's billing practices***." In exchange for the plea to additional offenses which were committed during his cooperation period and were a clear violation of the prior agreement, the State agreed to ***reduce*** their recommended prison sentence from eight (8) years to a flat three (3) year sentence. (Dsa176-182).

The Attorney/Client relationship Between MOD and Defendant

More than a year ago, in response to the State's motion for a 104 hearing to admit the recordings surreptitiously made by the State between MOD and Thomas at trial, Thomas proffered facts relating to his prior attorney/client relationship with MOD. Thomas intends to argue in opposition to the State's motion that MOD, as an agent of the State, exploited the confidential nature of their relationship by utilizing privileged information to unlawfully target Thomas. Thereafter, MOD lured Thomas to a meeting knowing Thomas would believe he was speaking confidentially with his lawyer about his new campaign for the Board of Education.

The attorney/client relationship began in 2016. On several occasions, Defendant met with the MOD at the Brownstone restaurant in Jersey City seeking MOD's counsel as Thomas was a neophyte when it came to the legalities of running a campaign. During one of those meetings, with others in attendance, MOD offered his legal services, and those of his law firm, to Thomas in connection with his campaign for the Jersey City Board of Education. Thomas had been seeking legal counsel for matters relating to his campaign, including ELEC compliance issues. MOD agreed to be Thomas' counsel. For more than a year thereafter, Thomas communicated with MOD and an associate from his firm, who provided legal advice. Thomas also shared privileged material regarding various personal legal matters including a family matter Thomas was dealing with involving his son's mother that MOD counselled him on. As a result of this confidential relationship, MOD learned significant personal information about Thomas that he later exploited during the investigation. (5T 26-24 to 28-24)

The existence of the prior attorney/client relationship, which Thomas will testify to at the 104 hearing, is corroborated in the first secretly recorded meeting between MOD and Thomas on May 1, 2019. The entire purpose of that meeting from Thomas' perspective was that it was to be a "kickoff" to his upcoming campaign and the discussion centered around issues that would arise for which, as in 2016, he sought MOD's counsel as an expert in campaign law and strategy.

(Psa65-66) Thomas told MOD, referring to the 2016 race, "you gave me the confidence to get started and rolling" and told MOD that the meeting "was both personal and business" for me." (Psa66-67) After discussing financial needs for his upcoming campaigns, MOD began to discuss the issues Thomas was facing in the races. MOD asked about "timing," "ground operations" and discussed his "ELEC" and "tax returns" wanting to make sure that Thomas' were clean. (Psa70-71; Psa80) MOD even advised Thomas that he had already reviewed his ELEC reports and felt "they were pretty clean." (Psa87) MOD gave Thomas instructions that he wanted him "to put pen to paper" and start formulating "a business plan." (Psa87) The lawyer continued to provide Thomas advice relating to his campaign and recalled that when he met him in 2016, "you were freaking out about how to do this, how to do that." (Psa87) Thomas even indicated how grateful he was for the counsel provided by MOD during the 2016 campaign stating, "you helped me, you gave me the confidence...the whole thing and now we've gotten far in three years..." (Psa89)

Further proof of the attorney/client arrangement between the two is evident from Thomas' post arrest statement. There, Thomas repeatedly referenced the trust he placed in MOD as his attorney stating, "he's a lawyer, he knows what he's doing so you know I trusted his judgment so." (Psa141) Thomas went on to state, he was "one of the first people I met to get counsel on wanting to run for office...I look up

to him because the counsel he has given me. So I opened up..." (Psa143) Most definitively, and conveniently absent from the State's brief, is Thomas' statement to investigators relating to his prior relationship with MOD, "I was looking for a lawyer for the campaign...an attorney friend of mine...when I told him I planned to run, he said I am going to introduce you to somebody who is really good managing campaigns." (Psa149-150)

MOD also provided counsel to Thomas on a personal family court matter where MOD learned private details about Thomas' personal life that MOD used to target Thomas. MOD opaquely referred to this prior representation of Thomas on his family matter acknowledging difficulties Thomas had with his son's mother. (Psa55) Further facts supporting the prior attorney/client relationship will be established at an upcoming Rule 104 hearing.

The Attorney/Client relationship Between Windish and MOD

After several companion cases were consolidated for case management reasons, defense counsel for Thomas learned from counsel for Windish, another defendant targeted by MOD and the State, that Windish also had an attorney/client relationship with MOD that the State exploited to make a case against him. This is borne out in MOD's first proffer with the State on January 31, 2018, where he specifically identifies Windish's vulnerability as a potential target due to financial issues that MOD learned about only through his legal representation. Specifically,

MOD learned of Windish's need for money (making him a prime target) via MOD's "legal services" in handling Windish's outstanding tax liens. (Cpsa4; Dsa9; Dsa29)

Using this privileged information, the State was able to obtain approval for consensual intercepts against Windish. Thomas claims the same holds true for him. Curiously, knowing their cooperating witness was an attorney, the State never vetted the information MOD had about potential targets that were based on information he learned from his prior representation of clients during any of his proffers in early 2018. For over a year, the State was aware of Thomas' proffer that he was a client of MOD. Yet, they did not interview MOD about Thomas or Windish on this issue until August 23, 2023 nearly six weeks after Defendants filed their Motion to Compel discovery and four weeks ***after*** the trial judge granted the motion. (Psa203-204) The State now seeks to have this Court utilize these unchallenged, self-serving statements by MOD as conclusive proof that no relationship existed when this information was never before the trial court when it granted Defendants access to relevant materials.

Defendants moved before the trial court to obtain discovery from other investigations in which the State utilized MOD as their cooperating witness to further support their theory that the State utilized privileged information obtained by MOD from his clients to establish a pattern of exploitation of MOD's attorney/client relationships. Contrary to the State's position, Defendants had made

a threshold showing that Thomas and Windish were prior clients and confidential information was used by the State to target them. Thomas (and Windish) argued this information concerning other targets who may have been clients of MOD is directly relevant to Defendant's claims of misconduct by the State in how they conducted their investigation, obtained authorization to permit MOD to record said clients, and, thereafter, secure an indictment. Defendants have argued this evidence will not only form the basis of the challenge to the admissibility of the recordings but will likely support a subsequent motion to dismiss the indictment based on prosecutorial misconduct. (5T 8:12 to 18;26:24 to 28-24)

The Consensual Intercepts

On February 27, 2019, MOD happened upon Defendant at a party celebrating the birthday of Jersey City Mayor Steven Fulop. This event was held at the Chandelier restaurant in Bayonne – Hudson County. MOD recorded this interaction pursuant to an authorized consensual intercept while targeting some unknown individual(s). (Psa36-50) Nothing that occurred during MOD's brief interaction with Thomas suggested possible criminality. The State has highlighted Thomas statement that he was building a "war chest" for his upcoming campaign as something nefarious, which it certainly is not. The brief conversation did, however, plainly reveal an obvious familiarity between the two, including Thomas' minor son, who was in attendance, and who MOD commented "got big." (Psa37)

Aside from the recording from the February 27, 2019 event, the circumstances surrounding this incident have always been extremely vague. This is so, because there were no reports provided in discovery related to this event as the State had repeated its mantra that all discovery has previously been provided. Then, on January 18, 2023, some two years after discovery was initially produced and after numerous unsuccessful attempts to obtain this documentation, the State located an Investigation Report after a "diligent search." (Psa39) It is unknown what files were searched or where this document (and others associated with it) detailing the first interaction between Thomas and MOD were located. The report, dated February 28, 2019, concerned MOD's surreptitious recordings of various individuals, including Thomas, at Mayor Fulop's birthday party the previous evening. (Psa42) The State also produced a redacted Consensual Interception Authorization form ostensibly permitting the recording of all of MOD's interactions at the Chandelier event. (Psa36) Neither the Investigation Report nor the Consensual form were Bates stamped, which was inconsistent with other discovery materials previously provided that referenced Thomas. (Psa41-50)

Two months later, on April 25, 2019, MOD initiated a text exchange with Thomas confirming a call they had the week earlier to arrange an in-person meeting. (Psa52-55) No report has been provided to Thomas in discovery detailing the facts surrounding MOD's prior call to Thomas to arrange this meeting or other topics

discussed during that call. This meeting took place on May 1, 2019 at the Brownstone diner where Thomas and MOD met years earlier to initiate their prior relationship as attorney/client. On April 30, 2019, the State obtained authorization from Deputy Chief Jeffrey Manis ("Manis"), to conduct a consensual intercept (Psa63). The Consensual Form targets "Sudhan Thomas and as yet unidentified individuals." It further lists "Initial Crimes/Offenses (If any)" as Official Misconduct and Bribery. This Consensual Intercept authorization forms the basis of the State's motion to admit the recordings between MOD and Thomas at trial. A Rule 104 testimonial hearing is pending as a result of the State's motion to admit the recordings.

In preparation for the hearing and Manis' testimony, the Defendant moved for the State to identify the specific documents Manis reviewed so as to discern the basis for the intercepts and their approvals. The trial court ordered the State to identify said documents. The State complied via production on January 9, 2024 satisfying Part (a) of the Court's Order. (Psa245-246)

The Civil Lawsuit By the Board of Education Against the State

On April 29, 2019, the Jersey City Board of Education ("JCBOE") filed a lawsuit against the State of New Jersey seeking over a billion dollars in damages resulting from many years of underfunding by the State. (5T 30:9-17) The lawsuit was the culmination of research and other work done by Defendant as President of

the JCBOE and it was well known that he was the principal architect behind the action.

Thomas proffered the following facts in support of the Motion to Compel Discovery which were summarized for the court at oral argument. (5T 35:11-21) Thomas will show that in the six months leading up to the suit's filing, after it became known the lawsuit was in the planning stages, Defendant was approached on several occasions by a senior member of Governor Murphy's staff and threatened with repercussions if he were to follow through and file the action. Specifically, Defendant was told his political career would come to an end and he would become a "political pariah" in the Democratic Party. Notwithstanding these threats, the lawsuit was filed the morning of April 29, 2019 and became a matter of significant public concern.

By the time MOD and Thomas met on May 1, 2019, MOD was aware of and had already read the 133-page lawsuit. MOD initiated discussion on the topic and stated he was impressed with it and acknowledged Thomas' significant role in its filing. MOD conceded there was public opposition to it and specifically mentioned one State Senator by name who criticized it. Thomas made clear he received a lot of pressure from the Governor's "staffers" not to file it. As the conversation progressed, MOD encouraged Thomas to resolve the litigation as it was not wise to leave it up to "the guy in the black robe..."(Psa75-76; Psa92-93) .

On the same day this contentious lawsuit was filed, unbeknownst to Defendant, the State opened its investigation into him. This is reflected in a two-line Investigation Report dated April 29, 2019 entitled "Case Opening of Sudhan Thomas." (Psa62). It appears from this report that the inception of the criminal investigation into Thomas for the crimes of Bribery and Official Misconduct was based solely on an unsubstantiated claim by MOD, allegedly made several months earlier, that Thomas requested a $10,000 cash campaign contribution in 2016.[2] The discovery received to date contained multiple investigation reports, most of which were prepared contemporaneously with information obtained. Curiously, this report was prepared two months after MOD supposedly made this revelation to investigators and no contemporaneous notes of this amorphous conversation in February 2019 exist. Yet, on April 30th, five days after MOD arranged a meeting with Thomas, and one day after the two-month-old allegation was reported and Thomas' lawsuit was filed, the State authorized a Consensual Interception to record MOD's attempt entice his client to commit a crime.

[2] Thomas will be challenging the veracity of this statement by MOD at the 104 hearing as it served as the only basis for the Consensual Intercept. There is significant evidence that no such request was made by Thomas. For example, the topic was discussed in the first recorded meeting on May, 1 2019. Thomas and MOD were talking about the ***budgets*** for the upcoming campaigns when MOD stated that in the 2016 campaign he was "looking for 10." Thomas acknowledged that in the 2016 campaign he was "planning for 10" as his budget and his opponent had spent "484". Notably absent from this conversation is any reference that Thomas was seeking that, or any amount, directly from MOD as opposed to collectively from his donors, and, more importantly, that he had requested it in cash. (Psa85) Certainly, had that been the case, MOD would have brought that up. The State's assertion that this conversation was an affirmation that Thomas requested $10,000 in cash from MOD (Pb10) is a gross distortion of fact. Thomas later made it clear to investigators that he never sought financial support from MOD in 2016. (Psa149)

Defendants Motion to Compel Discovery

On June 12, 2023, after numerous attempts to obtain discovery relating to the State's motion to admit the recordings between Thomas and MOD and information relevant to the extent of the "deal" obtained by MOD, Defendant Thomas filed a motion to compel discovery. Defendants Windish and Cesaro jointed in the motion.

The relevant aspects of that motion related to the Defendants' demand that the State identify the documents reviewed by DAG Manis prior to authorizing the consensual intercepts. These documents were directly relevant to the trial court's review of the State's actions pursuant to State v. Martinez, 461 N.J. Super. 249 (2019). The State had refused to provide an identification of the documents repeating their mantra that the documents had "already been provided." After extensive oral argument on this issue, the trial court ruled that the State must identify what documents Manis reviewed, and later, upon the State's reconsideration motion, refined exactly what the State needed to do to comply with the Court's Order. (7T 26-13 to 27-14). The State has now complied with the Order as of January 9, 2024. (Psa245-246) The State has acknowledged they have fully complied with part (a) of the trial judge's order, yet are still pursuing their appeal, "to the degree defendants demand more…" It is unclear what the State is referring to by the defendants "demanding more" when all responsive documents supposedly have been supplied.

The Defendants also sought discovery relating to the vague clauses in the two plea/cooperative agreements compelling the State to identify what crimes they have agreed not to prosecute as part of their agreement with MOD, as well as the identification of victims and amounts of restitution contemplated in the plea agreement. Recognizing that this information, which directly relates to the extent of MOD's bias and possible intent to curry favor with the State, is pertinent to MOD's credibility, the Court ordered the State to turn over the information. (Psa229-230).

Finally, Defendants sought an *in camera* review of the related criminal investigations of others targeted by MOD and the State for very specific reasons relevant to the Defendants' defenses. First, the Court accepted Defendant Thomas' argument that an *in camera* review was necessary to determine if other instances relevant to the exploitation of MOD's client's confidences occurred to show a pattern. Second, these investigations were subject to court review to determine relevancy in light of the recent amendment to Evid. Rule 608. Third, review was necessary to determine whether during the other related investigations, MOD made reference to other crimes he committed that are not referenced in his proffers with the State. (Psa207-231) There is now a fourth reason, as it has been established that the State has been providing discovery to a similarly situated defendant but not to these defendants in matters relating to MOD's cooperation. (Psa255-259)

The trial court entered an order on July 24, 2023, granting in part and denying in part Defendants motion. (Psa232-233) The State subsequently requested "clarification" of the Court's Order which later morphed into a Motion for Reconsideration which was denied. (Psa234) The State then obtained a stay of paragraphs B and C of the Order, but not as to A and D representing that no appeal was being taken relating to the latter rulings. (7T 9-3 to 10-5).

The State filed its Motion for Leave to appeal on October 23, 2023. Opposition was filed by Thomas on November 27, 2023. On November 28, 2023 the State also filed a motion to consolidate the appeals of Thomas, Windish and Cesaro. On January 18, 2024, this Court entered Orders granting both the State's motion for leave to appeal and consolidation. (Psa241-244)

On February 5, 2024 a Motion for Remand to Supplement the Record to include newly discovered evidence was filed by Defendant. The State filed its opposition on February 29, 2024. This Court denied the remand and entered its Order on March 21, 2024. (Psa260) During that motion practice, the State conceded they had provided documents to one defendant, Jason O'Donnell, relating to MOD's cooperation agreement, that they had not provided to Thomas. It was only after being confronted with Thomas' counsel serendipitous discovery of what had occurred, that the State turned over numerous critical documents albeit without any explanation as to why they were initially withheld. (Psa246)

The State filed its Amended Brief and Appendix on April 22, 2024. The Defendant filed a motion seeking an extension to file its opposition which was granted by Order dated May 24, 2024.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY ORDERED THE STATE TO PRODUCE A LIST OF ALL CRIMES COMMITTED BY MOD AS WELL AS AN IDENTIFICATION OF THE VICTIMS THEREOF AND THE AMOUNTS OF RESTITUTION.

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused to confront the witnesses against him. Pointer v. Texas, 300 U.S. 400 (1965). One way of discrediting a witness is to introduce evidence of a prior criminal conviction as a general attack on that witness' credibility. Davis v. Alaska, 415 U.S. 308, 316 (1974). Additionally, the bias of a witness is subject to further exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony". Id. (quoting 3A J. Wigmore, Evidence §940, p.775 (Chadburn rev. 1970)). It is fundamental that a defendant has a right to explore any evidence which may show that the State has a "hold" of some kind over a witness, which may cause the witness to curry favor with the State. State v. Mazur, 158 N.J. Super. 89, 104-105 (App. Div.), *certif. denied*, 79 N.J. 399 (1978).

As stated "in an unbroken line of decisions, our courts have held that the pendency of charges or an investigation relating to a prosecution witness is an

appropriate topic for cross-examination". State v. Landano, 271 N.J. Super. 1, 40 (App. Div. 1994). In fact, prosecutorial suppression of evidence relating to a witness' possible interest constitutes a violation of the defendant's right to due process. State v. Spano, 69 N.J. 231, 235 (1976). The test of propriety of questions affecting credibility is "the state of mind of the witness based on his subjective reactions to the favorable treatment he may have received or may hope to receive in connection with his own criminal involvement". State v. Vaccaro, 142 N.J. Super. 167, 176 (App. Div.), *certif. denied*, 71 N.J. 518 (1976).

MOD's plea agreement with the State includes non-prosecution clauses ***"for any other heretofore disclosed activities in connection with any and all unlawful political contributions made by Defendant or his coconspirators on behalf of Defendant"*** and subsequently, ***"any heretofore disclosed activities in connection with his Firm's billing practices."*** (Dsa65-69; 176-182). Since receiving both the initial plea agreement and the subsequently revised one, Defendant has been attempting to obtain identification from the State of all crimes it believes are included within the above clauses. This is imperative to allow the defense to calculate and demonstrate the "benefit" of the bargain MOD was able to negotiate with the State, as his potential sentencing exposure without this deal has a direct bearing on his bias in favor of the State.

As the issue of bias serves an important function of the constitutionally protected right of cross-examination, the Defendant must be permitted to know what crimes are included within the non-prosecution agreement. Is the State foregoing prosecution of 2 crimes, 50 crimes or something in between? Defendant is entitled to this information so he can effectively explore the extent of the favorable treatment MOD received in exchange for pursuing Thomas. Defendant has no other way to secure this information since the wording of the plea agreements are vague and fail to delineate MOD's crimes for which he will not receive punishment.[3]

The State argued below that they do not have to produce what the parties contemplated under the non-prosecution clause of their agreement as to the crimes for which they have foregone prosecution because they do not decide what is or is not a crime, the Grand Jury does. (6T31-17-21) This is a preposterous position to take. First, the State has promised MOD they will not prosecute him for all unlawful political contributions made by him or his coconspirators or any crimes in connection with his firm's billing practices. They must have known what crimes they were referring to (as well as MOD and his attorneys) to have made that representation and include it in their agreement. If they do not know what crimes

[3] This will also serve to flush out issues of what constitutes crimes for which MOD will not be prosecuted prior to trial. For example, the State took the position at a prior motion that the MOD's payment of $10,000 cash to a politician as a "thank you" for procuring a judgeship for a friend was not a criminal act. If the State has a similar attitude for other admitted conduct of the MOD, Defendant is entitled to know this prior to trial.

they are including in that clause, how is MOD protected from being charged in the future? It is a very simple request made by Defendants with a very simple answer; simply identify what crimes the State has decided not to prosecute against MOD in exchange for his cooperation and testimony against the Defendants. They cannot respond by saying only the Grand Jury can decide what a crime is because the State ***is*** the initial charging entity. They determine what crimes they believe people committed every day of the week. The State argues defense counsel can "draw their own mental impressions" about what crimes MOD may have committed "and base their cross-examination on that." (Pb29) The Defendants should not have to speculate what the State and MOD specifically meant by the non-prosecution clause because they are the ones who created it. This should not be such a difficult task nor should it remain in a shroud of secrecy as the State's "hold" on a witness is a matter of constitutional consequence.

The State labors under the misguided notion that the trial court only ordered the production of one document they contend is privileged. To the contrary, the Order, in part C, explicitly compels the State to "...***provide a list of all the crimes committed by Matthew O'Donnell, the identification of the victims related thereto, and the amounts of restitution.***" (Psa233) Thus, the document they seek to protect is only a subset of their obligation under the Order and the only part of said Order

they apparently seek to overturn. Nonetheless, their argument that the document is protected from disclosure is incorrect.

The State claims the memo in question constitutes work product and is also protected under the "deliberative process" privilege. Work product protects "...internal reports, memoranda or documents made by...the party's attorney...in connection with the investigation, prosecution or defense of the matter..." R. 3:13-3(d). While Defendant cannot comment on whether the memo satisfies that definition, as its contents are unknown, work product does not protect documents which relate to a material witness' promise of leniency by the State. State v Satkin, 127 N.J. Super. 306 (App. Div. 1974). As the comments to the court rule indicate, "[t]his information has been specifically deemed not to come within the work-product exception of paragraph (d) of this rule." (citations omitted) See Pressler & Verniero, Current N.J. Court Rules (GANN), Comment 3.2.6 to R. 3:13-3 (2023) Since this document relates directly to MOD's cooperation agreement, the State cannot not withhold from the Defendant under a claim of work product.

Likewise, the deliberative process privilege is a narrow exception that does not provide a blanket protection to any possible decision or exchange of information among members of the OPIA. As the trial court determined, the deliberative process privilege only applies to the formulation of policy or changes in policy by policymakers. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-85 (2000). The

privilege does not apply to factual information which directly bears on the benefit conferred on a cooperating defendant which will be the subject matter of cross-examination at trial.

In Correctional Medical Servs. Inc. v. Department of Corrections, 426 N.J. Super. 106, 122, 125-26 (App. Div. 2012), the Appellate Division discussed at length the concept of the deliberative process privilege. The Court stated that there is a "profound distinction" between "analysis leading to the formulation of policy positions" and tasks that are administrative in nature. Id. at 122-23. The privilege protects the "governmental analysis leading to the formulation of policy positions and other decisions of comparable weight[.]" Id. at 122. Thus, the issue is not whether a government agency is making a "decision;" the issue is whether the decision that is being made relates to the formulation of or recommended change to "policy" or "other decisions of comparable weight[.]" The subject memo the State refuses to produce does not relate to policy or changes in policy.

The Defendants are at a disadvantage in disputing what the State claims is included in the document they are refusing to produce because Defendants have not seen it. This is precisely why the trial judge ordered that it should be produced for an *in camera* review if privilege is claimed. (6T28-15 to 29-10) To be clear, Defendants are not interested in the prosecutor's mental impressions as to the reasons they were entering into an agreement with MOD as that is clear from the

discovery. The State wished to utilize this attorney, who had committed a bevy of crimes with others, to tempt other individuals into committing additional crimes the State could prosecute in exchange for which MOD would reduce his potential sentence. It appears to be a simple task for the Court to determine if the potential crimes that are referenced in this memo can be identified to Defendants without interfering with any valid claim of privilege. Payton v. N.J. Tpk. Auth., 148 N.J. 524, 551-552 (1997) (The Court should conduct an *in camera* review to determine if a document is covered by privilege. The privilege "may be pierced upon a showing of need, relevance and materiality, and the fact that the information could not be secured from any less intrusive source.")

Moreover, the State, in its brief, has not addressed the portion of the trial court's order compelling them to provide an identification of the victims of MOD's crimes and the amounts of restitution. (Psa206) Their own plea agreement contemplates that MOD will pay back the victims of his crimes and that the full amount will be submitted to the court pursuant to an agreed upon plan. (Dsa65-69; 176-182) In its opposition, the State argued that the defendants were provided with billing records and the names of municipalities and that should suffice for Defendants to identify the potential victim and restitution. (Psa224-225) The trial court rejected that argument however, and compelled the State to provide the relevant information that is part and parcel of their agreement with MOD. (Psa233)

As the State has not alleged any error in this portion of the court's order in its' brief, it is respectfully submitted that the ruling should not be disturbed, and the State compelled to comply with that portion of the order.

II. THE TRIAL JUDGE PROPERLY ORDERED THE STATE TO TURN OVER OTHER RELATED INVESTIGATIONS INVOLVING MOD FOR AN *IN CAMERA* REVIEW AS DEFENDANT ESTABLISHED THEIR RELEVANCE TO SPECIFIC ISSUES IN THE CASE

"In New Jersey, an accused has the right to broad discovery after the return of an indictment in a criminal case." State v. Desir, 245 N.J. 179, 192, (2021) (quoting State v. Hernandez, 225 N.J. 451, 461, (2016)). Rule 3:13-3(b)(1) explains that right and "obligates the State to provide full discovery... when an indictment is returned." State v. Robinson, 229 N.J. 44, 72, (2017). Under Rule 3:13-3(b)(1), the State must turn over relevant materials including:

> [B]ooks, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into readable useable form[.][R. 3:13-3(b)(1)(E).]

Criminal discovery "is appropriate if it will lead to relevant information." Stein, 225 N.J. at 582, 596 (2016). "Relevant evidence is 'evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.'" Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57-

58 (2019) (quoting N.J.R.E. 401). "Relevance is measured in terms of the opportunity of the defendant to present a complete defense." Desir, 245 N.J. at 193 (quoting Pressler & Verniero, Current N.J. Court Rules, comment 3.2 on R. 3:13-3 (2023)).

Discovery is also appropriate for "'material evidence affecting [the] credibility' of a state's witness whose testimony may be determinative of guilt or innocence." Hernandez, 225 N.J. at 463 (quoting State v. Carter, 69 N.J. 420, 433 (1976)). Moreover, our courts have "the inherent power to order discovery when justice so requires." State in the Int. of A.B., 219 N.J. 542, 555 (2014).

Defendant has requested that the State provide discovery relating to two separate categories of criminal investigations involving their cooperator. First, Defendant sought discovery as to investigations that had resulted in criminal charges. This would include the files pertaining to Defendants Windish, Cesaro and Jason O'Donnell, as well as any other charged individuals. Second, Defendant has requested discovery of investigations that did not result in criminal charges. Defendant submits these materials are relevant to his defense; specifically, to certain motions Defendant is currently engaged in and others he intends to file. The trial judge ordered, based on the record developed, that the State produce these filed for an in *camera* inspection to determine what materials, if any, are relevant to the defense or directly to Defendants pursuant to a Protective Order. (Psa229)

The State has objected to production of these files, arguing that State v. Hernandez, supra protects these files from disclosure. However, unlike the defendants in Hernandez, Thomas has demonstrated that the files in this case are relevant under the Hernandez analysis. Specifically, these files must be examined as they are relevant to (1) support Defendant's claim in opposition to the Rule 104 hearing that the State, in coordination with MOD, exploited the attorney/client relationship between MOD and Defendant to achieve their goal of creating a crime where one did not exist; (2) defense of the 104 motion as well as support of Defendant's claims of selective prosecution and prosecutorial misconduct/ vindictiveness to punish Defendant for exercising his legal right to file a civil action against the State; (3) support Defendant's claim of entitlement to false and inconsistent statements pursuant to Evidence Rule 608[4] and; (4) determine if MOD discussed other crimes he committed not referenced in his proffers contained in the discovery. A fifth reason exists now that Defendants have recently uncovered that the State has been providing specific discovery to counsel for Jason O'Donnell which are relevant to MOD's "deal" including information obtained directly from MOD's other investigations, such as dates he worked with investigators, so defense counsel in that case could investigate the extent of MOD's crimes. Thomas is still

[4] Since the time of the Hernandez decision, Evid. Rule 608 has been amended and now permits inquiry into specific instances of conduct that bears on the witness' character for truthfulness.

in the dark as to why these materials previously requested by him were not produced, yet, they were provided to another defendant.

First, Thomas has made a showing, by way of proffer, that MOD misused information from his attorney/client relationship with Thomas to target him in this case. To the extent the State claims their evidence, belatedly obtained, that no relationship existed is more persuasive, Defendant respectfully submits that factual determination should be made by the trial court and not this court. Defendant has also pointed out that in at least one other case, State v. John Windish, there was similar evidence of MOD's violation of the attorney/client privilege belonging to Windish. Thus, a pattern has emerged wherein MOD has violated the sanctity of prior confidential relationships, and, more concerning, the State has used that confidential information, whether knowingly or not, to embark on an investigation targeting MOD's former clients.

This evidence directly bears on the legality of the consensual intercepts which were authorized in this case. See, State v. Martinez, 461 N.J. Super. 249, 271 (App. Div. 2019) (Court acknowledged the Legislature's concern under the Wiretap Act about indiscriminate recording of conversations between attorneys and their clients). The questions the Defendant seeks an answer to is how many more investigations involved the same type of misconduct? Was this part of the MOD's *modus operandi:* to obtain maximum sentencing benefit, he intentionally utilized

information that he only became privy to as part of a prior legal representation and either shared it with the State (i.e. Windish) or secretly used it to target clients he knew "were desperate for money?" If so, Thomas and Windish are entitled to this discovery to establish if the consensual intercepts in their cases were proper or whether prosecutorial misconduct existed in the investigatory phase leading to the targeting of MOD's prior clients.

Second, Thomas argued he was targeted by the State because, in his position as President of the Jersey City Board of Education, he identified over a billion dollars that the State improperly withheld from Jersey City and subsequently filed a lawsuit on April 29, 2019 to recover the money. Prior to that filing, credible evidence exists that Thomas received warnings and threats from a member of the Governor's administration that his political career would be over if he pursued the legal action. Therefore, discovery from other investigations, reviewed *in camera*, will likely shed light on whether other people were targeted because they exercised their legal rights against the State. This would not only support Thomas' claim that the consensual intercepts were not authorized, it would also support a claim of prosecutorial vindictiveness and/or selective prosecution to be raised in a subsequent motion. See State v Martinez, supra, 461 N.J. Super. at 272 (judicial review of consensual wiretaps required to prevent authorizations based on "whim, bias or personal animus.") Thus, the materials are relevant.

Third, Defendant will mount a significant attack on MOD's credibility in light of the unorthodox plea agreement he received where the State provided him the opportunity to engage in further crimes while cooperating, and then, when caught, shockingly permitted him to plead guilty to additional crimes but yet received a much lighter sentence than previously agreed. Defendant is, therefore, entitled to examine the other investigations to determine what other crimes MOD admitted to have been engaging in, especially while cooperating; whether he made false or inconsistent statements in those investigations, and whether he identified additional criminal conduct as to which the State agreed to give him a pass.

Finally, as set forth above, the State has acknowledged they provided critical impeachment materials, including an unsigned cooperation agreement which had been forwarded to MOD's counsel during plea negotiations, to Jason O'Donnell, but not to these Defendants. If not inadvertently discovered by Thomas' counsel, it likely would not have been revealed until Judge Tober did his inspection of the files. There can be no valid explanation for the State's failure to provide these documents, discoverable by all Defendants, who have been charged as a result of MOD's cooperation.

Additionally, Thomas has learned that the State has provided the same attorney with information from the other related investigations ordered to be produced here, of all dates that MOD was actively working with State investigator's

and surreptitiously recording others. According to a document obtained from ecourts, this information was used by counsel to identify significant amounts of fictious legal fees billed to public entities by MOD on those dates in question. Specifically, the analysis shows that MOD often billed over 15 hours and sometimes over 34 hours in a single day to these public entities while spending time actively cooperating. (Dsa81-175) A review of the records from these other files will not only be able to identify those dates for Thomas to examine but will also pinpoint the amount of time actually spent by MOD in active cooperation while fleecing his other clients.

This is precisely the type of information that is relevant to these Defendants as well and could only be obtained, in this case at least, after a review by the trial judge. All of these arguments distinguish the instant matter from the factual record in Hernandez.

In Hernandez, the Court was presented with the discrete issue of the Defendant's entitlement to "open-file discovery" of unrelated cases simply based on a common thread between the cases, i.e. a cooperating witness. State v Hernandez, 225 N.J. 451at 464. The Supreme Court, after conducting an analysis of the reasons for the request, ultimately held that based on the trial court's determination, after an *in camera* review, that the materials did not have relevance to the case and, thus, were not discoverable. Id. at 468. In other words, the Court

determined that defendant's request to sift through unrelated investigations hoping to find something helpful to the defense was not permissible without a showing of relevance. Id. at 466-467. The State mistakenly interprets Hernandez as manifesting a complete ban on obtaining files in unrelated investigations because the information is somehow immune from discovery.

Here, the Defendants provided the trial court with much more then a request to haphazardly sift through unrelated investigations hoping to find something. Rather, they raised significant, credible reasons indicating why these other files would likely produce relevant evidence. For example, these files, especially Windish, would likely have more evidence explaining their attorney/client relationship and MOD's misuse of it for personal gain, which would bolster Thomas' arguments at the 104 hearing. The same holds true for Thomas' claim of animus based on his filing of a lawsuit on the very same day the State opened the investigation. The State resists this argument, again, asking this court to draw factual conclusions on the veracity of the claims before they can be developed at the hearing. The Defendant cannot and need not explain why "career prosecutors" would do such as a thing, as argued by the State, no more than Defendant can explain why certain prosecutors previously involved in this case would withhold exculpatory evidence in other prosecutions leading to reversal of convictions. (Psa188) The resolution of this dispute is for a trial court or a jury to decide.

Lastly, the State cannot credibly argue that the other related criminal files could not possibly yield relevant discoverable evidence when it has already been established in the Jason O'Donnell investigation that the State provided crucial documents to that attorney and withheld same here. For that reason alone, the trial court should be examining the discovery produced by the State in other cases associated with MOD.

III. THE DEFENDANT THOMAS HAS NOT REQUESTED ANY FURTHER DISCOVERY REGARDING THE CONSENSUAL INTERCEPTS AND SINCE THE STATE HAS FULLY COMPLIED WITH THE TRIAL COURT'S ORDER THEIR REQUEST FOR AN ANTICIPATORY RULING FROM THIS COURT ESSENTIALLY BARRING DEFENDANT FROM CONTESTING THE JUSTIFICATION FOR THE CONSENSUAL INTERCEPTS IS IMPROPER.

The State represents they have complied with Part (a) of the trial court's order compelling them to turn over all documentation and information reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of the Consensual Intercept Forms as to Thomas. (Pb42) Despite this, the State feels the need to lay out for the Court what they think the law should be as to the standard utilized in authorizing Consensual Intercepts, essentially asking this court to overrule State v. Martinez, 461 N.J. Super. 249 (2019). They are hopeful they can convince this Court to provide a ruling contrary to the clear dictates of Martinez so they can later use the opinion in the trial court. In the alternative, they seem to be seeking a form of a summary judgment ruling to prevent a hearing below on the

admissibility of the secretly recorded conversations. They are thus improperly putting the proverbial "cart before the horse." Their inventive way in seeking this Court's input is to raise the unsupported specter that someday in the future, despite having allegedly received all the responsive documents, defendants, to "some degree" may "demand more." (Pb42) This Court should reject this invitation out of hand as it is beyond speculative and amounts to requesting an anticipatory ruling which is not favored in this State.

Two doctrines of justiciability recognized by our courts include mootness and ripeness. The doctrine of mootness requires "that judicial power is to be exercised only when a party is immediately threatened with harm." Stop & Shop Supermarket Co. v. Cnty. of Bergen, 450 N.J. Super. 286, 291, 162 (App. Div. 2017) (quoting Betancourt v. Trinitas Hosp., 415 N.J. Super. 301, 311 (App. Div. 2010)). Thus, "controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." Ibid. (quoting N.J. Div. of Youth & Family Servs. v. W.F., 434 N.J. Super. 288, 297 (App. Div. 2014)).

Ripeness seeks "to avoid premature adjudication of abstract disagreements." Garden State Equal. v. Dow, 434 N.J. Super. 163, 188 (Law Div. 2013) (citing Abbott Labs v. Gardner, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). A "claim is not ripe for adjudication if the facts illustrate that the rights or status of the parties are 'future, contingent, and uncertain.'" Id. at 189

(quoting Indep. Realty Co. v. Twp. of N. Bergen, 376 N.J. Super. 295, 302 (App. Div. 2005))). To be clear, "courts should not render advisory opinions or exercise jurisdiction in the abstract." State v. Abeskaron, 326 N.J. Super. 110, 117 (App. Div. 1999)

Here, there is no justiciable issue before the Court as DAG Queen's January 9, 2024 letter has, by the State's admission, identified all the documentation reviewed by Manis. There is therefore nothing left for the Court to decide because the issue has been rendered moot. However, if this Court disagrees with the Defendant's position, the Court should rule that judicial review of the Consensual Authorizations in this case is required.

When it comes to consensual intercepts, the State does not possess unfettered discretion in the approval process under the Wiretap Act. State v. Martinez, 461 N.J. Super. 249 (2019). Moreover, the decision of the State to authorize such intrusions of privacy, ***requires judicial review to ensure the decision meets a relevancy standard and was not based on "whim, bias or personal animus."*** Id. at 272.(emphasis added) As the Court in Martinez stated:

> The Attorney General and county prosecutors must "maintain records of all interceptions authorized pursuant to [the consent provision of N.J.S.A. 2A:156A-4(c)] ... on forms prescribed by the Attorney General." N.J.S.A. 2A:156A-23. "Such records shall include the name of the person requesting the authorization, ***the reasons for the request***, and the results of any authorized interception." Ibid. Copies of the records must be "periodically" filed with the Attorney General, who "shall report annually to the Governor and Legislature

> on the operation of" the consent provision. Ibid. Id. at 267 (Emphasis added)

Our Supreme Court has "considered the prior authorization requirement [of N.J.S.A. 2A:156A-4(c)] to be vital, noting that, in cases of consensual interceptions, it was the 'sole protection' citizens had 'from overly zealous and completely discretionary law enforcement practices.'" Martinez, 461 N.J.Super. at 268; quoting State v. Worthy, 141 N.J. 368, 381 (1995). And the Supreme Court went further, noting that "it cannot be doubted that the Legislature viewed the requirement of supervisory approval as an ***indispensable protection for the privacy interests implicated even in consensual telephone wiretaps***." Worthy, 141 NJ. at 382. (emphasis added)

In Martinez, the State took the position, as it does here, that the prosecutor's authorization of a consensual wiretap is "not subject to judicial review." Martinez, 461 NJ.Super. at 272. The Appellate Division rejected the State's interpretation of the Wiretap Act. A unanimous court held:

> Interpreting the Wiretap Act to enable unfettered and unreviewable discretion by prosecutors could render the prior authorization requirement merely a perfunctory task. If an official can review a request for a consensual wiretap and approve it based on any reason - including, hypothetically, a whim, bias, or personal animus- then the approval process would serve no real purpose. This is particularly so if, as the State contends, the approval is never subject to judicial review. We decline to adopt that categorical position. Id. at 272.

The State intends to introduce several audio/video recordings of Defendant Thomas as well as telephone conversations at trial. The recordings were made by MOD at the direction and with the assistance of the State for the purpose of having MOD lure Thomas into committing the crimes of Bribery and Official Misconduct, according to the Authorizations. These recordings were made subject to the constraints of the Wiretap Act - and, specifically, N.J.S.A. 2A:156A-4(c) and N.J.S.A. 2A:156A-21. Ultimately, Defendant intends to challenge the legality and, thus, admissibility, of these recordings in advance of trial, and through an evidentiary hearing- as is his right. See, N.J.S.A. 2A:156A-21 (any "aggrieved person... may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that[] [t]he communications was unlawfully intercepted.")

The State has moved for a 104 hearing to admit these recordings. Thomas intends to present substantial evidence to the trial court challenging whether the State has met the relevance standard and otherwise complied with Martinez and the Wiretap statutes. The purpose of the motion below was not to decide the merits of the claims, as the State wishes to do here, rather, it was to determine if the Defendant was entitled to additional discovery based on the proffers made to the Court as to the relevancy of the documents needed for said hearing. Defendant, therefore, respectfully requests this Court to refuse the State's invitation to walk down the

perilous path of providing guidance on an issue not before it and which has been already been decided by this Court in Martinez.

CONCLUSION

Defendant Sudan Thomas respectfully requests that this Court deny the relief requested by State and affirm the Orders of the Honorable Peter J. Tober, P.J.Cr.

DATED: June 20, 2024

Respectfully submitted,

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Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-001472-23T1

Plaintiff-Appellant,	Criminal Action
STATE OF NEW JERSEY	On Leave to Appeal Granted from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Somerset County
vs.	
Defendant-Respondent,	Indictment No. 21-01-00003-S
JOHN S. WINDISH	Sat Below: Honorable Peter J. Tober, J.S.C.

BRIEF AND APPENDIX ON BEHALF OF DEFENDANT JOHN S.WINDISH IN OPPOSITION TO THE STATE'S APPEAL

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PROCEDURAL HISTORY AND COUNTER-STATEMENT OF FACTS

On or about January 20, 2021 Defendant-Respondent John Windish was indicted by State Grand Jury Number SGJ750-21-4 under Docket Number 21-1-3-S which charged second degree Official Misconduct in violation of N.J.S.A. 2C:30-2, second degree Bribery in violation of N.J.S.A. 2C:27-2 and second degree Acceptance or Receipt of Unlawful Benefit by Public Servant for Official Behavior in violation of N.J.S.A. 2C:27-10(a). (Cpsa24 to 28).

The charges resulted from information provided to the State from its cooperating witness, Matthew O'Donnell, Esq., who was a practicing attorney at the time, during a proffer that occurred on January 31, 2018. Most Significantly, during the initial proffer, the State was advised that an attorney-client relationship existed between Matthew O'Donnell and John Windish, who was a councilman in Mount Arlington at the time. Equally important, the State was advised that O'Donnell knew that Mr. Windish had financial issues due to the attorney-client relationship. In relevant part, the report states:

> O'DONNELL stated that John Windish is a councilman for Mount Arlington but has fallen out of favor with the Mayor and other council members. As per O'DONNELL, WINDISH also attended BUCCO's Lobster Night but sat separately from the rest of the Mount Arlington council. O'DONNELL stated WINDISH sat at his table and asked him for help getting a job and cash for his campaign. **O'DONNELL stated WINDISH has had some financial issues including a tax lien which O'DONNELL helped him with but WINDISH never**

> **paid him for it.** O'DONNELL state WINDISH asked him to help him with his re-election to which he gave him $300.00 for postage. (Cpsa4, **emphasis** added).

For unknown reasons, the State apparently chose not to delve further into the details of the attorney-client relationship between Mr. Windish and O'Donnell. Shockingly, the State permitted O'Donnell to exploit the confidential information he learned about his financial distress to attempt to entice Mr. Windish to accept his assistance in financing his campaign. Simply stated, the State improperly utilized confidential information obtained by O'Donnell as his personal attorney to target Mr. Windish as opposed to any other elected official in Mount Arlington.

Indeed, the State was able to unlawfully obtain approval for consensual intercepts against Mr. Windish through use of the privileged information that O'Donnell obtained because of his attorney-client relationship with Mr. Windish. Recorded phone conversations occurred on May 1, 2018, (1T:44-6 to 45-4), May 4, 2018 (1T:52-8 to 23), and May 10, 2018 (1T:54-15 to 55-7; 1T:61 to 62-14). [1]

Shortly thereafter, on June 29, 2018, O'Donnell entered into a plea agreement where he agreed to plead guilty to one second degree crime and receive an eight-year prison sentence. (Psa208). Surprisingly, O'Donnell was able to keep practicing as an attorney and cooperate with the State to entice individuals to commit crimes

[1] The transcript of the grand jury presentation was filed by the State and is referred to as "1T."

the State might be willing to prosecute. Id. Three years later, in September 2021, O'Donnell entered into another plea agreement where he was required to plead to the additional crimes that occurred during his cooperation period. Id. Interestingly, his recommended prison sentence was reduced to three years. Id. *See also* Da5 to 10.

Various other individuals, including but not limited to Sudhan Thomas and John Cesaro were also implicated by O'Donnell and were indicted on similar charges. Importantly, it appears that O'Donnell also had an attorney-client relationship with Sudhan Thomas. Curiously, even though the State was well aware that its cooperating witness was a licensed attorney, it apparently did not delve further into the information provided by O'Donnell in any of the proffers that occurred in 2018 and waited until August 23, 2023 to interview O'Donnell regarding the issue of whether he represented any of the State's targets.

During the interview, O'Donnell "said he did have an attorney client relationship with Windish and that Windish requested O'Donnell's firm [to] represent him in a real estate matter sometime in the past…" (Psa203). O'Donnell also explained that "Windish did sign a retainer agreement with O'Donnell's law firm, however not Windish's campaign. O'Donnell drafted legal documents for Windish, however, not for Windish's campaign." Id. O'Donnell made it abundantly

clear that "Windish sought legal advice from O'Donnell and legal advice was provided." Id.

The report of the interview goes on to note that "[a]t the end of the interview O'Donnell provided the following answers about John Windish's sister and stated the following. "O'Donnell's firm provided legal work for Windish's sister and said it was in regards to settling an estate, and occurred sometime between 2010 and 2014, although he could not recall anything more specific than that." (Psa203 to 204).

Critically, the attorney-client relationship between O'Donnell and Mr. Windish was further detailed in a follow-up interview that occurred the next day on August 24, 2023, which established that O'Donnell had actually represented Mr. Windish in three separate matters from 2012 through 2017 and had executed retainer agreements in some of the cases. The interview was memorialized in a report and stated in pertinent part:

> O'Donnell represented Windish for three separate matters. Between approximately February and May 2012, O'Donnell represented Windish in the settlement of an estate. Windish had been one of the executors of his relative's estate. O'Donnell did not recall whether a retainer agreement had been signed, however, he stated his representation of Windish in this matter has already been disclosed through publicly filed records. Between approximately March and May 2017, O'Donnell represented Windish in a real estate matter, wherein Windish sold real property to a third party. O'Donnell recalled a retainer agreement had been signed and that his

> representation of Windish in this matter has already been disclosed through publicly filed records. Lastly, O'Donnell represented Windish and his wife in an undisclosed matter. O'Donnell's law firm possessed an unsigned retainer agreement with the Windishes dated June 2017, however, no action was taken by the firm regarding this matter. Windish terminated the representation approximately one month later. It should be noted the undersigned did not ask further questions regarding this representation because the matter was confidential in nature and has not been previously disclosed through publicly filed records according to O'Donnell. (Dsa1).

Based on the above, it is uncontroverted that O'Donnell represented Mr. Windish in three separate legal matters from 2012 through 2017 and had executed retainer agreements in some of the cases. What is more troubling is that the State was already aware since the initial proffer in January 2018 that O'Donnell had represented Mr. Windish regarding a tax lien that had been filed on his property which resulted in O'Donnell obtaining privileged information regarding his financial situation. The State then improperly utilized this information to target Mr. Windish because it knew that he was in financial distress. Compounding the issue, O'Donnell was also the Borough Attorney for Mr. Windish while he was an elected official in Mount Arlington, and he had an attorney-client relationship with him during that time period as well. Crucially, none of this information was presented to the grand jury.

The instant appeal centers around the Omnibus Motion filed by Sudhan Thomas (Dsa2-4) which Mr. Windish later joined. (Psa201-202). Believing that the State utilized privileged information obtained by O'Donnell from his clients to establish a pattern of exploitation of O'Donnell's attorney-client relationships, the Defendants sought to obtain discovery from other investigations in which the State utilized O'Donnell as their cooperating witness.

Specifically, the Defendants requested the following discovery: (a) all documents reviewed by Deputy Chief Manis in connection with the wiretap authorizations; (b) an unredacted copy of the Grand Jury presentation; (c) discovery relating to the criminal investigations involving O'Donnell whether or not resulting in criminal charges; (d) a list of crimes the state has identified as committed by O'Donnell and for which it has foregone prosecution and the identification of victims, and the amounts of restitution contemplated by the plea agreement; and (e) O'Donnell's billing records between 2016 and 2019. Id. Pertinent to this appeal are the items referenced in subsections (a) (c) and (d).

The discovery sought regarding other targets who may have also been clients of O'Donnell is highly relevant to Defendants' claims of misconduct by the State regarding how it conducted its investigation and obtained authorizations to allow O'Donnell to record his clients and then entice them into committing criminal acts by utilizing confidential and privileged information. This discovery is not only

necessary to challenge the admissibility of the recordings, but it is also necessary for the defense to potentially file a motion to dismiss the indictment based on prosecutorial misconduct.

After hearing argument on the Omnibus Motion, the trial court entered an Order and accompanying written opinion on July 24, 2023, that granted the motion in part and denied the motion in part.[2] (Psa232-233). In relevant part, the Order stated:

> …defendant's omnibus motion is hereby GRANTED in part, and DENIED, in part as it relates to work product, internal reports and memoranda not specifically held discoverable herein.
>
> a) The State shall provide any and all documentation and information that were reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of the Consensual Intercept Forms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019 and August 26, 2019;
>
> b) the state shall provide any and all documents relating to their criminal investigations involving Matthew O'Donnell, whether or not resulting in criminal charges, pursuant to a Protective Order;
>
> c) The state shall provide a list of all the crimes committed by Matthew O'Donnell, the identification of the victims related thereto, and the amounts of restitution…Id.

[2] At the time the Order was filed, it only applied to Defendant Thomas as Mr. Windish subsequently joined in the motion with Defendant John Cesaro on August 2, 2023. *See* Psa201. The Order was subsequently amended to include Mr. Windish. *See* Psa239-40. However, that provision of the order was never revised to reference the relevant time frame for the investigation of Mr. Windish, which occurred prior to Defendant Thomas.

The Court expounded on its rulings in a well-reasoned 25-page decision. (Psa207-231). In the written opinion, the trial court found that the documents reviewed by Deputy Chief Manis were relevant under R. 3:13-3(b)(1)(J). (Psa228). In particular, the court stated that the defendant is "entitled to relevant 'records, including notes, reports and electronic recordings relating to an identification procedure, as well as identifications made or attempted to be made." Id. The trial court went on to explain that "the evidence requested by the defense, does not risk undue prejudice, confusion of issues, nor potentially misleading the jury. N.J.R.E. 403." Id. Ultimately, the trial court concluded that, "defense counsel seeks information on as to why Thomas was investigated to begin with, thus signifying its relevance. Receipt of this relevant discovery from the State will help accelerate this case, rather than causing undue delay by withholding discovery." Id. The same logic applies equally to Mr. Windish since he clearly has a right to know why O'Donnell set him up instead of any other member of the Mount Arlington Municipal Council.

The trial court also ruled that discovery relating to investigations that involved O'Donnell shall also be provided to the defense except for internal deliberative memoranda. (Psa229). In pertinent part it found that the discovery:

> is relevant to the case because there is a possibility that the documents could support (1) Thomas's claim that the state somehow exploited a purported attorney/client relationship between O'Donnell and Thomas; (2) Thomas's claim of entitlement to statements made by O'Donnell pursuant [to] N.J.R.E. 608; and, (3) to

> determine if O'Donnell discussed other crimes he committed not referenced in his statements contained in the discovery. Id.

Again, the Court's rationale would also apply to Mr. Windish, especially considering the extent of their longstanding ongoing attorney-client relationship, which also includes O'Donnell's role as Mr. Windish's municipal attorney. It cannot be overlooked that as Mr. Windish's municipal attorney, O'Donnell likely provided legal advice to him regarding political contributions. This is significant because all of the criminal charges against Mr. Windish are predicated on the allegation that he accepted a contribution in excess of the amount authorized by law. Had Mr. Windish simply reported the contribution from O'Donnell, there would have been no basis to charge him criminally.

Lastly, the trial court directed the State to provide information identifying the crimes O'Donnell committed and has forgone prosecution, and the identification of victims and the amount of restitution agreed upon in the proffer deal. (Psa230). In reaching this decision, the court offered the following rationale:

> Defendant Thomas is entitled to information concerning all of the crimes O'Donnell committed as to understand the result of O'Donnell's plea agreement with the State. It is argued that a 'list of crimes' does not exist. However, the information sought is relevant to both parties on possible bias that O'Donnell may have for assisting the state with their investigations. For the defense, it is a 'list' of determining O'Donnell['s] credibility as a cooperating witness for the State. N.J.R.E 608. Here, the identification

> of O'Donnell's 'other' crimes is relevant evidence, pursuant to New Jersey Rules of Evidence 401-402, because the evidence has a potentially reasonable tendency to prove or disprove any facts of consequence. N.J.R.E. 401-402.
>
> Under Rule 608(b), 'in a criminal case, a witnesses' character for truthfulness may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminary determines… that the witness knowingly made the prior false accusation. N.J.R.E 608. The discovery is needed from the state to best determine O'Donnell's position as a cooperating witness, in this case, because there were other entities targeted by prior State investigations that heavily involved O'Donnell's cooperation.
>
> Therefore, the state is to provide the defense counsel with the discovery materials identifying the crimes, victims, and restitution that allowed the State to determine an appropriate plea bargain with O'Donnell to initiate the subsequent investigations, including that of the defendant Thomas. (Psa230).

As with the other rulings, this provision of the decision clearly applies to Mr. Windish since he is entitled to cross-examine O'Donnell regarding his agreement with the State. Mr. Windish is also permitted to use the information to attack O'Donnell's credibility.

After the trial court entered its decision, the State filed a motion for reconsideration on or about August 25, 2023. *See* September 19, 2023 transcript filed by State which is identified as 6T. During the hearing, counsel for Mr. Windish argued that the defense is also entitled to anything that was reviewed by Deputy

Chief Manis in connection with the intercepts that related to Mr. Windish. 6T:54-18 to 21. The State's motion was denied for the reasons stated on the record on September 19, 2023 and contained in the Order dated October 2, 2023. (Psa234).

Thereafter, on October 18, 2023, the State wrote to the trial court and advised that it was going to file a motion for leave to appeal regarding Parts B and C of the July 24, 2023 Order. (Psa238). A hearing was then held on November 1, 2023. *See* transcript filed by the State entitled "7T." An Order was then entered on November 8, 2023, which indicated that "the State's discovery obligations set forth in the July 24 Order shall apply to defendants John Cesaro and John S. Windish in addition to defendant Sudhan M. Thomas." (Psa239-40). The trial court also stayed paragraphs (b) and (c) of the order pending appeal and directed the parties to comply with paragraphs (d) and (a) of the order, which relate to O'Donnell's billing records and the documents reviewed by Deputy Chief Manis. Id. Notably, it appears that the State is now also appealing paragraph (a) of the order since it is asking the Appellate Division to review that section of the Order as well. The State subsequently filed a motion for leave to appeal and a motion to consolidate the Thomas, Windish and Cesaro appeals, which were granted on or about January 16, 2024. (Psa241-244).

LEGAL ARGUMENT

POINT I. THE TRIAL COURT PROPERLY ORDERED THE STATE TO PRODUCE A LIST OF ALL CRIMES COMMITTED BY MATTHEW O'DONNELL, THE IDENTIFICATION OF THE VICTIMS RELATED THERETO, AND THE AMOUNTS OF RESITUTION.

The State has argued that subsection (c) of the trial court order improperly requires the State to turn over an internal prosecution memorandum that is exempt from disclosure under both the work-product and deliberative-process doctrines. We submit that the trial court properly rejected these arguments. As an initial matter, it must be emphasized that the trial court did not order the State to produce an internal prosecution memo as argued by the State. Rather, a plain reading of the order demonstrates that the trial court directed the State to produce a list of all crimes committed by O'Donnell, the identification of the victims related thereto, and the amounts of restitution.

In New Jersey, with regard to discovery issues, as in the present case, it is axiomatic that "appellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" State v. Brown, 236 N.J. 497, 521 (2019). The New Jersey Supreme Court recently reiterated that "[t]rial judges are given 'considerable latitude' when deciding whether to admit evidence." State v. Higgs, 253 N.J. 333, 354 (2023) (quotation omitted). "We do not substitute

our own judgment for the trial court's unless its ruling was so wide of the mark that a manifest denial of justice resulted." State v. Medina, 242 N.J. 397, (2020) (quotation omitted). In the instant matter, it is beyond question that the well-reasoned decision of the Hon. Peter J. Tober, P.J. Cr. was not based on a mistaken understanding of the applicable law nor did the Court abuse its discretion in entering the discovery order.

The trial court properly ruled that Mr. Windish is entitled to discovery concerning all crimes that O'Donnell committed to fully understand his plea agreement with the State. Significantly, the criminal acts committed by O'Donnell are relevant to Mr. Windish's defense and effective cross-examination of O'Donnell as it bears directly on the potential bias that he likely has due to his significant assistance to the State's numerous investigations that relate to public corruption. Mr. Windish has the right to examine O'Donnell as a witness and to examine any evidence that demonstrates O'Donnell's attempts to curry favor with the State. The identification of all his crimes is necessary to determine the benefit of the bargain that O'Donnell was able to negotiate with the State. The discovery is also relevant to attack O'Donnell's credibility in accordance with N.J.R. E. 608(b).

Consequently, the trial court properly concluded that the "discovery is needed from the State to best determine O'Donnell's position as a cooperating witness, in this case, because there were other entities targeted by prior State investigations that

heavily involved O'Donnell's cooperation." *See* Psa230. It applies with equal logic that the trial court correctly ruled that the discovery is relevant to demonstrate how the State determined an appropriate plea bargain with O'Donnell to initiate the subsequent investigations into the defendants in this appeal. Id.

It is a bedrock principle underlying the Confrontation Clause of both the United States Constitution and New Jersey Constitution that a defendant is guaranteed the right to confront the witnesses against him or her. The New Jersey Supreme Court has long held that "[t]he right to cross-examine and test for bias at a plenary trial of criminal charges is indispensable. State v. Pontery, 19 N.J. 457, 472, (1955). It is a right of constitutional dimensions. There can be no question that a defendant must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses." State v. Sugar, 100 N.J. 214, 230–31 (1985) (quotations omitted).

These longstanding principles were recently reiterated by the New Jersey Supreme Court in State v. Jackson, 243 N.J. 52 (2020). The Jackson Court reaffirmed that "[o]ur system permits exploration, through cross-examination, of a witness's motivation in testifying." Id. at 65. "Put plainly, the Confrontation Clause permits a defendant to explore, through cross-examination, the potential bias of a prosecution's witness." Id. In accordance with the forgoing principles, we submit that the trial court properly found that the discovery is relevant to establish a

"possible bias that O'Donnell may have for assisting the State with their investigations." *See* Psa230.

In State v. Bass, 224 N.J. 285(2016), the New Jersey Supreme Court held that, "[i]f a witness faces a pending investigation or unresolved charges when he or she gives a statement to law enforcement, cooperates with the prosecution in preparation for trial, or testifies on the State's behalf, that investigation or charge is an appropriate subject for cross-examination." Id.at 305. In Bass, the only eyewitness to a deadly shooting was charged in an unrelated matter with first-degree robbery and weapons offenses. Id. at 305-06. However, the eyewitness subsequently accepted a plea offer which permitted him to plead guilty to third-degree charges and receive a probationary sentence. Id. at 306. During the shooting trial, counsel for the defendant began cross-examining him on the plea bargain, but the trial court limited the questioning to the witness's guilty plea to charges of theft and burglary and the fact that he was on probation. Id. at 307. The trial court explained that the eyewitness had specifically agreed to testify against others, but not the defendant, as part of his plea deal. Id.

The New Jersey Supreme Court disagreed and held that the defendant's confrontation right had been violated. Id. The Court explained that, for his role in the unrelated first-degree robbery case, the cooperating witness could have received a life sentence, but instead received a probationary sentence. Id. at 306.

Significantly, the Court underscored that the prospect of a life sentence "may have served as a powerful incentive for [him] to cooperate with the State as it prepared for defendant's trial." Id. at 307. Ultimately, the Court concluded that it was error to inhibit defense counsel from probing the charges the eyewitness faced. Id.

The reasoning in Bass is consistent with the United States Supreme Court's decision in Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) which found that the trial court erred when it precluded cross-examination into a cooperating witness's sentencing reduction in, and with its further holding in Davis v. Alaska, 415 U.S. 308, 315-20 (1974) which held that a defendant's confrontation right was violated when the trial court precluded his counsel from exploring on cross-examination the bias of a witness who was on probation for an offense unrelated to the defendant's alleged offenses.

The principles espoused in Bass were upheld four years later in 2020 when the New Jersey Supreme Court decided State v. Jackson, *supra*. In pertinent part the Jackson Court stated: "the essential principles announced in Bass apply here as well. '[I]f a witness faces a pending investigation or unresolved charges when he or she gives a statement to law enforcement, cooperates with the prosecution in preparation for trial, or testifies on the State's behalf, that investigation or charge is an appropriate subject for cross-examination.'" Jackson, 243 N.J. at 70 (2020).

The Jackson Court concluded that "the trial court erred when it barred defense counsel from pursuing the line of questioning during cross-examination concerning Clarke's plea bargain and his sentencing exposure." Id. at 71. In reaching this conclusion, it noted that "[d]efense counsel had the right to explore potential bias on Clarke's part in his role as the prosecution's key witness. See State v. Sugar, supra, 100 N.J. at 230 (1985) ("[A] defendant must be afforded the opportunity through effective cross-examination to show bias on the part of adverse state witnesses."). Id.

In the case at bar, O'Donnell's plea agreement contains a non-prosecution clause which states in relevant part: "the State will not prosecute Defendant for any other heretofore disclosed activities in connection with any and all unlawful political contributions made by Defendant or his coconspirators on behalf of Defendant or any heretofore disclosed activities in connection with his Firm's billing practices…" (Dsa5). There can be no serious dispute that the defense is entitled to the identification of all the crimes the State believes is included in the above clauses. It cannot be overstated how critical this discovery is to the defense as it is necessary to calculate the benefit of the bargain that O'Donnell was able to negotiate with the State since his maximum exposure without a favorable agreement has direct bearing on his bias in favor of the State.

As set forth in the above cases, defense counsel must be provided with sufficient information to effectively cross-examine O'Donnell, who is the State's main cooperating witness. This includes being provided with information that provides the defense with sufficient knowledge as to what crimes are contained in the non-prosecution agreement. At this point, based on the State's steadfast refusal to comply with its discovery obligations, it is unknown how many criminal offenses the State is foregoing prosecution.

The New Jersey Supreme Court has repeatedly held that, "it is essential that [a defense attorney] be permitted full investigative latitude in developing a meritorious defense on his client's behalf." State v. Knight, 256 N.J. 404, 419 (2024) (quotation omitted). In this matter, the defense is entitled to know the details of all the crimes the State is foregoing prosecution so as to allow the defense to question O'Donnell regarding the favorable treatment that he received in exchange for enticing Mr. Windish, his longtime client, to accepting a bribe. Crucially, O'Donnell served as Mr. Windish's personal attorney in three separate matters from 2012 through 2017 and had executed retainer agreements in some of the cases. Most significantly, one of the matters involved a tax lien that had been filed on Mr. Windish's property which resulted in O'Donnell obtaining privileged information regarding his financial situation. O'Donnell then improperly provided this

information to the State which was then improperly utilized to target Mr. Windish due to his dire financial situation, which was well known to O'Donnell.

Adding insult to injury, O'Donnell was also the Borough Attorney for Mr. Windish while he was an elected official in Mount Arlington, and he had an attorney-client relationship with him during that time period as well. Because O'Donnell served as Mr. Windish's personal and Borough attorney, there can be no question that the defense is entitled to any discovery that relates to O'Donnell's decision to implicate his client in a public corruption scandal, as opposed to any of the other six elected officials in Mount Arlington. Therefore, contrary to the State's argument, the defense has established a substantial and compelling need for the discovery.

Furthermore, the trial court's order is not limited to a single memorandum, as alleged by the State. The order clearly states that "[t]he State shall provide a list of crimes committed by Matthew O'Donnell, the identification of the victims related thereto, and the amounts of restitution." *See* Psa233. Additionally, the State's claim that the memo is exempt from disclosure under the work product doctrine and deliberative process exemption is utterly devoid of merit.

The State's discovery obligations are set forth in New Jersey Court Rule 3:13-3. Subsection (d) identifies the documents that are not subject to discovery. In pertinent part, it states, "[t]his rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party

or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter…" Id. In the instant matter, the State cites a litany of case law in support of its argument that the memo constitutes textbook attorney work product. Although it is unclear if the memo can even be considered work product because it has not been submitted for an *in camera* review, it must be emphasized that the comments to paragraph (d) make clear that "[i]nformation in possession of the State relating to a material State's witness involved in the commission of the crime has specifically been deemed not to come within the work-product exception of this Rule." Pressler & Verniero, 2019 N.J. Court Rules, Comment Rule 3:13-3 paragraph (d)(GANN).

In State v. Taylor, 49 N.J. 440, 447–48 (1967) the New Jersey Supreme Court stated:

> This Court has declared it to be proper for a defendant on trial to inquire on cross-examination of an accomplice who is testifying for the State against him, as to whether he is doing so to curry favor in the matter of his own prosecution, or because of a promise or expectation of a lenient sentence for himself. Such matters go to the witness' interest in helping the State to achieve a conviction of the defendant on trial, and obviously are material to an evaluation of his credibility. Thus the State is under a duty when the matter is raised at trial not to conceal the existence of a promise of or agreement to recommend a specific sentence or leniency for an accomplice who is testifying for the State. Or, put affirmatively, it has the duty to disclose the arrangement when proper inquiry raises the question. Id. (citations omitted).

Importantly, the Appellate Division has concluded that a promise of leniency or agreement of testimonial immunity is not prosecutor's work product protected from disclosure. State v. Satkin, 127 N.J. Super. 306, 310 (App. Div. 1974). Similar to this matter, the Satkin case involved an interlocutory appeal which sought the reversal of an order compelling the State to disclose certain information regarding its cooperating witnesses prior to trial. Specifically, the discovery sought consisted of information related to an agreement of immunity or promise of leniency, plea bargaining negotiations, and payments made to the witnesses. The Appellate Panel rejected the State's argument that the disclosure of any agreement of immunity or promise of leniency is exempt from disclosure as work product and it affirmed the trial court's order which directed "the disclosure of any agreements respecting testimonial immunity or plea bargaining negotiations..." Id. at 310.

Likewise, any information that relates to all the crimes O'Donnell committed is not exempt from disclosure under the work product doctrine because the information demonstrates the favorable agreement that O'Donnell received from the DAG's office in exchange for assisting the State in its massive public corruption investigation.

The State's attempt to withhold the document pursuant to the deliberative process privilege should also be rejected. In support of its argument, the State cites

a series of civil cases that are factually distinguishable from the instant matter and have nothing to do with the State's obligation to produce discovery related to its cooperating witness. Moreover, the deliberative process privilege is not even referenced in R. 3:13-3(d) which sets forth the specific documents that are not subject to discovery in criminal matters. As such, we submit that the privilege does not apply to criminal matters in New Jersey and the State's reliance on criminal cases from other jurisdictions is misplaced.

Even if this Court elects to entertain the State's argument, it is beyond question that the State's reliance on the deliberative process privilege is devoid of merit. The New Jersey Supreme Court has explained that "[t]he deliberative process privilege is a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The Appellate Division, in Corr. Med. Servs., Inc. v. State, Dep't of Corr., 426 N.J. Super. 106, 122 (App. Div. 2012) stated that "[t]he deliberative process privilege ... is centrally concerned with protecting the process by which policy is formulated." Id.

The deliberative privilege does not apply in this matter because the memo does not relate to how the State formulates its policies. Rather, it directly relates to O'Donnell's cooperation agreement with the State and the benefit that he received

in exchange for his cooperation. As such, it must be produced to the defense in discovery. Alternatively, we submit that the State should be required to produce the memo to the Court for an *in camera* review.

POINT II. THE TRIAL COURT PROPERLY ORDERED THE STATE TO PROVIDE ANY AND ALL DOCUMENTS RELATING TO THEIR CRIMINAL INVESTIGATIONS INVOLVING O'DONNELL, WHETHER OR NOT RESULTING IN CRIMINAL CHARGES PURSUANT TO A PROTECTIVE ORDER OR AN *IN CAMERA* REVIEW.

The New Jersey Supreme Court recently reiterated the longstanding principle that "'an accused has a right to broad discovery after the return of an indictment in a criminal case.'" State v. Desir, 245 N.J. 179, 192 (2021) (citation omitted). "Our 'open-file approach to pretrial discovery in criminal matters post-indictment' aims '[t]o advance the goal of providing fair and just criminal trials.'" Id. at 192-93. (citation omitted). The Court then detailed the State's discovery obligations. In pertinent part it stated:

> Rule 3:13-3(b)(1) codifies the criminal defendant's 'right to automatic and broad discovery of the evidence the State has gathered in support of its charges.' That Rule 'obligates the State to provide full discovery ... when an indictment is returned or unsealed,' '[e]xcept for good cause shown,' R. 3:13-3(b)(1). Full discovery, under Rule 3:13-3(b)(1), 'shall include exculpatory information or material.' The Rule thus explicitly renders automatic the turnover of exculpatory evidence mandated by the United States Supreme Court's holding in Brady v. Maryland.

> Significantly, the Rule further provides that post-indictment discovery 'shall also include, but is not limited to, [a list of] relevant material[s].' R. 3:13-3(b)(1). 'Relevance is measured in terms of the opportunity of the defendant to present a complete defense.' 'To qualify as 'relevant material,' the evidence must have 'a tendency in reason to prove or disprove [a] fact of consequence to the determination of the action.' ' The kinds of items listed as discoverable include video and audio recordings, police reports, and lab reports. See R. 3:13-3(b)(1)(A), (C), (E), and (H).
>
> Further, a court's 'power to order discovery is not limited to the express terms of the automatic discovery provisions of Rule 3:13-3(b).' Indeed, 'courts have 'the inherent power to order discovery when justice so requires.'" Id. at 193–94. (citations omitted).

The discovery motion that is the subject of this appeal encompasses two categories of documents: (1) discovery related to investigations that resulted in criminal charges; and (2) discovery related to investigations that did not result in criminal charges. The discovery is relevant to establishing a defense against the charges since Mr. Windish is entitled to examine the other investigations to determine what other crimes O'Donnell committed while cooperating with the State and whether he made false or inconsistent statements in those investigations. The information is also relevant to motions that may be filed.

The State has refused to provide the requested discovery and has relied on State v. Hernandez, 225 N.J. 451 (2016) in support of its position. However, the trial court properly rejected the State's argument.

In State v. Hernandez, 225 N.J. 451(2016), the Court held that the State was not required to produce files in unrelated cases involving its cooperating witness. Importantly, the Court stated, "defendants have not articulated how the disclosure of documents in the unrelated investigations will lead to relevant or admissible evidence." Id. at 466. Equally significant, the Court rejected the defendants' claim that they were entitled to obtain any false and inconsistent statements made by the Witness in the unrelated investigations because such statements would not be admissible under N.J.R.E. 608 because 'evidence of specific instances of conduct—other than a prior conviction—to prove the character trait of untruthfulness is prohibited.'" Id. Id. at 466.

First, unlike the defendants in Hernandez, Mr. Windish has more than established that the files are relevant to his defense. Contrary to the State's argument, the documents may very well support Mr. Windish's claim that the State exploited O'Donnell's attorney-client relationships with his clients to entice them to commit criminal acts by utilizing confidential information. If true, the evidence could be utilized to file a motion to dismiss indictment based on prosecutorial misconduct. It cannot be ignored that O'Donnell also violated the attorney-client

privilege in the companion case that involves Sudhan Thomas, and it is unknown if he violated the privilege with any other clients. Thus, contrary to the State's argument, the other investigatory files are extremely relevant to the defense as there is clearly a pattern of O'Donnell exploiting his confidential relationships to obtain information which was then utilized by the State to pursue criminal investigations into his clients.

Because the defense has established the relevancy of the records, there can be no question that the trial court properly required the State to produce the documents for an *in camera* review. It must also be noted that the State has wrongly argued that O'Donnell represented Mr. Windish in one real estate matter and not in a political campaign. *See* State's brief, page 36. As argued at length above, O'Donnell represented Mr. Windish in three separate matters, and he even represented Mr. Windish's sister in a legal matter. The extent to which O'Donnell exploited the attorney-client relationship with Mr. Windish cannot be understated and it is certainly possible that he exploited relationships with other clients. Accordingly, the discovery is necessary to determine if O'Donnell abused his attorney-client relationships with his clients to minimize his own exposure at sentencing for the crimes he pled guilty to as well as to secure an agreement to not be charged in other crimes that he committed.

Moreover, as noted by the trial court, the files could also support Defendant's claim that he is entitled to statements made by O'Donnell in accordance with N.J.R.E. 608, and they could also be used to determine if O'Donnell discussed other crimes he committed that are not referenced in his statements contained in the discovery that was provided. Importantly, N.J.R.E. 608 was amended after the Hernandez decision was decided and it now allows a party to inquire into specific instances of conduct that bears on a witness' character for truthfulness. In addition, the State's claim that the defendants are not entitled to the documents because they have failed to demonstrate that O'Donnell made prior false criminal accusations against others ignores the fact that the defendants need to review the documents in the other investigations to make that determination.

For instance, O'Donnell's other illegal contributions were made through either cash or straw donors. It is very possible that he admitted giving cash or donating through straw donors to the council colleagues of Mr. Windish. It would be impossible to glean this information through public documents such as ELEC reports, or other documents produced in discovery such as proffers, police reports, and billing records as suggested by the State. Therefore, it is critical for the defense to know through the State whether O'Donnell was not prosecuted for giving cash donations or donations through straw donors to other similarly situated politicians that were not prosecuted, such as the other six elected officials in Mount Arlington.

In light of the above, the trial court correctly "determined that the requested evidence from the State is crucial to this case and to the defense's argument." *See* Psa229.

POINT III. THE TRIAL COURT PROPERLY ORDERED THE STATE TO PRODUCE ANY AND ALL DOCUMENTATION AND INFORMATION THAT WAS REVIEWED BY DEPUTY CHIEF MANIS.

The trial court properly ruled that the State is required to produce any and all documentation and information that was reviewed by Deputy Chief Manis. Mr. Windish is clearly entitled to know why he was a target of the State's public corruption investigation.

The State's argument that Mr. Windish is not entitled to the documents and/or information that was reviewed by Deputy Chief Manis because he did not assert a selective prosecution claim due to Sudhan Thomas' lawsuit against the State must be disregarded. Clearly, Mr. Windish is not asserting that he was selectively prosecuted because of a lawsuit that Mr. Thomas filed against the State. That argument applies to the specific facts and circumstances surrounding the prosecution of Mr. Thomas. It naturally follows that the State's claim that it already provided all of the documentation and information that was presented to Deputy Chief Manis

in connection with the intercept forms for Sudhan Thomas must also be rejected. It is evident that the January 29, 2024 letter referenced by the State (Psa245) relates solely to Sudhan Thomas and does not encompass the information that was presented to Deputy Chief Manis in connection with the intercept forms for Mr. Windish.

It must be emphasized that the documents that were presented to Deputy Chief Manis when he issued the intercept forms for Mr. Windish are highly relevant to his defense because he also intends to challenge the issuance of the intercept forms because it appears that all that was known to the State at the initial proffer was that O'Donnell represented Mr. Windish with regard to a tax lien that was filed against his property and that he was in financial distress. If that is all that was known to the State, Mr. Windish would have a viable motion to exclude any of the recordings that the State intends to admit into evidence. Mr. Windish is entitled to know if the State possessed any other information that resulted in the decision to target him for a public corruption investigation.

Mr. Windish is also entitled to know if the State deliberately sought to intrude on privileged communications with his longtime attorney, Matthew O'Donnell. It is well settled that "[t]he lawyer-client privilege is recognized as the oldest privilege for confidential communications known to the common law." State v. Ates, 426 N.J. Super. 614, 626 (Law. Div. 2009), aff'd, 426 N.J. Super. 521 (App. Div. 2012), aff'd, 217 N.J. 253 (2014). "The primary justification and dominant rationale for the

privilege is the encouragement of free and full disclosure of information from the client to the attorney." Id. The Ates Court explained how New Jersey's wiretap act incorporates the importance of the confidential communications between an attorney and his or her client. In pertinent part it stated:

> The degree to which state policy respects the importance of the confidentiality of attorney-client communications is reflected in New Jersey's wiretap law, which requires the State to show a 'special need' before the telephone of an attorney may be legally tapped. N.J.S.A. 2A:156A–11. There is no comparable special protection in the Federal wiretap statute. Id. (quotation omitted).

The remedy for infringing on privileged communications was discussed in State v. Martinez, 461 N.J. Super. 249 (App. Div. 2019). The Martinez Court observed that in certain circumstances, dismissal of an indictment is appropriate if either the attorney-client or work product privilege has been invaded by a prosecutor during a recorded conversation. Id. at 296. For instance, in United States v. Levy, 577 F.2d 200, 202 (3d Cir. 1978) a government informant was represented by the same attorney as the defendant, and the informant became privy to attorney-client-privileged communications revealing that "the defense strategy would be to concentrate on the credibility of two key government witnesses." Id. at 204. The government representatives then solicited the privileged information from the informant, and the prosecutor "became privy to this strategy." Id. at 205. In those circumstances, the Third Circuit Court of Appeals held that "the only appropriate

remedy" was dismissing the indictment. While the circumstances in this case are not directly analogous to the Levy case, there can be no legitimate dispute Mr. Windish is entitled to know if the State intentionally invaded his attorney-client relationship with O'Donnell and used the information gleaned against him. It is clear that the State knew from the inception of the investigation that O'Donnell represented Mr. Windish and was aware that he was in financial distress because there were liens filed against his property. No other reason was provided by O'Donnell as to why he believed that Mr. Windish was susceptible to accepting a bribe, other than that he was at odds with the Mayor and his council colleagues. It should also be noted that this could have been through information that he obtained in his role as Municipal Attorney for the Borough of Mount Arlington.

In light of the above, it is beyond question that the information presented to Deputy Chief Manis is critical to the defense of Mr. Windish so he can effectively challenge the issuance of the intercept forms and seek to exclude any evidence that was improperly obtained by the State.

The State also argued that applying the order to Mr. Windish is improper because the dates that are referenced in the order specifically relate to the intercept requests that were authorized in the Thomas case which occurred in 2019, and Mr. Windish's conduct occurred in 2018. However, this appears to have been an oversight at the trial court level and the Order can be revised to include the correct

dates that relate to Mr. Windish. By way of background, at the September 19, 2023 hearing regarding the State's Motion for Reconsideration, counsel for Mr. Windish expressly requested any documents or information that were reviewed by Deputy Chief Manis in connection with the "the consensual intercepts that relate to Mr. Windish." 6T:54:18-21. Because it is uncontroverted that the Order was subsequently amended to include Mr. Windish (Psa239), it should be clear to the State that he is seeking the documents/information that Deputy Chief Manis reviewed in connection with the intercepts that related to his case and not Mr. Thomas's investigation.

Accordingly, we submit that the trial court properly concluded that Mr. Windish is entitled to the production of information that indicates why he was investigated by the State.

CONCLUSION

For the foregoing reasons, we submit that this Court should affirm the trial court's discovery orders.

Respectfully submitted,

/s/ Matthew T. Priore

MATTHEW T. PRIORE

cc: All Counsel of Record

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-1472-23T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Leave to Appeal from an Interlocutory Order of the Superior
v.	:	Court of New Jersey, Law Division, Somerset County.
SUDHAN THOMAS, JOHN CESARO,	:	
JOHN S. WINDISH.	:	Sat Below:
Defendants-Respondents.	:	Hon. Peter J. Tober, J.S.C.

REPLY BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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July 18, 2024

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PRELIMINARY STATEMENT

In this public corruption prosecution, the motion court issued a sweeping discovery order that goes beyond the discovery rules, is contrary to established precedent, and disregards longstanding privileges. That order required the State to produce a "list of crimes" the State believes a cooperating witness, Matthew O'Donnell, has committed—even though the sole responsive document is an internal prosecution memorandum protected by both the work-product and deliberative-process privileges. It directed the State to produce all documents related to other investigations involving that witness—despite precedent foreclosing discovery of this information. And the order required the State to identify all documents considered in authorizing consensual intercepts—even though defendants are not entitled to such material under the Wiretap Act.

Defendants' supplemental briefs fail to justify this unwarranted discovery. They have not established a substantial need for the list of crimes committed by O'Donnell that can overcome the internal prosecution memorandum's privileges. Defendants have also failed to establish that discovery of documents related to other investigations involving O'Donnell is likely to lead to relevant evidence. Nor have they shown that the Wiretap Act entitles them to the documents considered in authorizing consensual intercepts. And most strikingly, they have not identified a single analogous order requiring production

of any of these categories of alleged discovery—let alone all three at once. The lack of case law support is telling, and this Court should reverse the motion court's erroneous and unprecedented order.

LEGAL ARGUMENT

POINT I

COMPELLING PRODUCTION OF AN INTERNAL PROSECUTION MEMORANDUM VIOLATES THE WORK PRODUCT AND THE DELIBERATIVE PROCESS PRIVILEGES.

Defendants demand a list of crimes committed by O'Donnell. But as the State explained in its opening brief (Psb19-22),[1] the sole potentially responsive document—a March 16, 2018 internal memorandum—is protected by the work-product and deliberative-process privileges. Defendants' responses suffer from three basic problems. These privileges apply. Defendants have not come close to surmounting either privilege. And there is no basis for the novel requirement that the State generate a new list of cooperator crimes, victims, or restitution.

1. Initially, defendants' arguments cannot overcome the fact that Part (b) of the trial court's order would require production of privileged material. First,

[1] "Psb" refers to the State's supplemental brief in this Court. "Psa" refers to the State's appendix. "1T" refers to the January 27, 2021, grand jury transcript (Windish). "4T" refers to the January 27, 2021, grand jury transcript (Thomas). "5T" refers to the July 13, 2023, motion transcript. "6T" refers to the September 19, 2023, motion transcript. "Tsb," "Wsb," and "Csb" refers to Thomas's, Windish's, and Cesaro's supplemental briefs in this Court, respectively.

the March 16, 2018 internal memorandum is protected work product because it was prepared by the prosecuting attorneys in the investigation and prosecution of O'Donnell. See Rule 3:13-3(d) (prohibiting the "discovery of a party's work product consisting of internal reports, memoranda or documents made by ... the party's attorney ... in connection with the investigation [or] prosecution …"); State v. DeMarco, 275 N.J. Super. 311, 317 (App. Div. 1994) (noting privilege applies in criminal cases and includes materials prepared by attorney).

Defendants do not dispute these key features. They never dispute that this is an "internal … memorand[um]" prepared by the State's "attorney"; that it was made "in connection with the investigation [or] prosecution"; or that it details potential charges to guide a supervisory attorney's decision as to how to resolve a case including charging decisions. Rule 3:13-3(d). But those basic points are dispositive. This memorandum—which contains legal impressions and opinions by prosecutors, for prosecutors, in order to guide the exercise of prosecutorial discretion—is classic opinion work product. See State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978) (holding "documents such as internal reports and memoranda prepared by the prosecution in connection with the investigation or prosecution of a criminal action are generally not subject to discovery"). Defendants thus do not cite a single case requiring the disclosure of an analogous document. And they likewise cannot distinguish the authority making clear that

internal memoranda of this kind are protected work product, and therefore are not subject to discovery. See (Psb20-21) (collecting cases).

Against the Rule, the nature of the internal memorandum, and significant case law, defendants' reliance on State v. Satkin, 127 N.J. Super. 306 (App. Div. 1974), is unavailing. Defendants cite Satkin to argue that this memorandum is not covered by any work-product protection because it relates to a "witness's promise of leniency by the State." (Tsb25; Csb17; Wsb21). But Satkin involved immunity agreements and promises of leniency provided to a defendant directly, 127 N.J. Super. at 309-10, which are necessarily not internal work product at all; the production to a defendant strips them of any privilege. An internal prosecution memorandum, by contrast, merely reflects prosecutors' own internal analyses and assesses a case to advise a supervising attorney how best to proceed, not any "promise" to a witness. Thus, Satkin only stands for the proposition that defendants may be entitled to the plea agreement and promises of leniency—material the defense received long ago in this case and are highly dissimilar from the material they now seek.[2]

[2] Defendants' reliance on the comments to Rule 3:13-3 fail for the same reasons. Citing Satkin, the comments simply instruct that discovery will be permissible to determine "whether there has been a promise of leniency or a plea bargain"—exactly the materials the State has already produced. See Pressler & Verniero, N.J. Court Rules, Cmt. 3.2.6 to R. 3:13-3 (collecting cases). They nowhere suggest that a privileged internal memorandum is discoverable.

Second, as the State explained (Psb22-26), this memorandum is separately protected by the deliberative process privilege, which "permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000). The memorandum fits the privilege perfectly: (1) it is pre-decisional because it pertains to the then-ongoing O'Donnell investigation and involves the State's forthcoming decisions regarding O'Donnell's prosecution and a potential plea agreement; and (2) it is deliberative because it contains recommendations regarding that proposed plea agreement. Id. at 84-85.

Defendants' argument that the deliberative process privilege cannot apply because the prosecution memorandum "does not relate to policy or changes in policy," (Tsb26; Csb18; see Wsb22-23), misunderstands this privilege entirely. An internal prosecution memorandum does relate to policy within the meaning of this privilege—namely, to the opinions and advice relating to the exercise of the State's prosecutorial enforcement discretion. See (Psb24) (collecting cases applying exception to prosecution memoranda); see also, e.g., United States v. Bulger, 928 F. Supp. 2d 305, 312 (D. Mass. 2013) (denying request for prosecution memoranda as it fell under both deliberative process and work product privileges). Moreover, all the underlying interests fully apply:

permitting the defense to "[e]xamin[e] the basis of a prosecution" by disclosing such an internal document "threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry"; could "undermine prosecutorial effectiveness by revealing the Government's enforcement policy," Wayte v. United States, 470 U.S. 598, 607 (1985); and risks undermining "the frank exchange of ideas and opinions" and "quality of administrative decisions," Redland Soccer Club, Inc. v. Dep't of Army of U.S., 55 F.3d 827, 854 (3d Cir. 1995). Defendants have no answer to the overwhelming authority applying this privilege in criminal cases to bar disclosure of prosecution memoranda.[3]

2. Because these two privileges squarely apply, defendants cannot meet their burden to justify piercing them in this case. Defendants claim they are entitled to a list of crimes so that they can cross-examine O'Donnell on his bias and "the 'benefit' of the bargain [O'Donnell] was able to negotiate with the State." (Tsb22-23; see Csb15; Wsb13-17). But defendants already have all the traditional materials defendants typically receive in prosecutions involving cooperating witnesses: the witness's plea and any cooperation agreements, any information concerning violations of such agreements, and any materially false

[3] Nor has Windish cited a single case to support his sweeping assertion that the deliberative process privilege categorically does not apply to criminal cases. See (Wsb22). The State is aware of no precedent suggesting that New Jersey law supports his view; to the contrary, the deliberative process privilege applies with equal force in criminal cases as it does in civil cases.

statements. See State v. Hernandez, 225 N.J. 451, 462-66 (2016). Defendants also have the investigatory reports of law enforcement illustrating the conduct by O'Donnell of which they were aware. Parties often use these very materials to probe a witness's bias and motivation to deceive. By contrast, no party has found a single case in which a court required the State to produce a privileged memorandum regarding their impressions of that witness's exposure.

There are multiple reasons why. As a general matter, defendants' right to cross-examination does not entitle counsel to any and all documents they wish to review notwithstanding privilege. See Pennsylvania v. Ritchie, 480 U.S. 39, 53, (1987) (plurality opinion) ("[t]he ability to question adverse witnesses, however, does not include the power to require the pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony"); State v. Smith, 158 N.J. 376, 284 (1999) (determining that Confrontation rights are "not absolute" and citing Ritchie for the proposition that the Confrontation Clause "does not compel pretrial discovery."); see also Integrity, 165 N.J. at 85-86 (courts consider "the availability of other evidence" as factor in determining whether privilege should be overcome). Here, the defense already received well over 100,000 pages of documents, including law enforcement's case file for O'Donnell and the drafts of O'Donnell's final plea agreements (drafts to which the defense was not even

entitled but produced only as a courtesy). (5T7-16 to 19). Defendants received reports of O'Donnell's proffer sessions and correspondence between the State and O'Donnell's attorneys, which speak to the bargain. (Psa257 to 258).[4] Indeed, Thomas's attorney acknowledged he already had "a lot to work with on cross-examination" based on the discovery then-provided. (5T30-18 to 31-7).

Although defendants claim they also need to understand "all the crimes the State believes is included" in the non-prosecution clause of O'Donnell's plea agreement, (Wsb17) (emphasis added), that is a particularly weak basis to pierce the privilege. Importantly, the relevant questions the defense would ask at trial turn on the cooperating witness's motivation to deceive, meaning the relevant questions for the cross-examination relate to what O'Donnell believed about his exposure and thus what benefits he believed he was receiving for his testimony. See, e.g., Hernandez, 225 N.J. at 456. The materials defendants received, from the plea to the police reports detailing the conduct the State uncovered, may bear on those questions. But the internal prosecution memorandum—a document the State never shared with him—bears only on what the State thought of his exposure. Of course, there are no proper questions of the cooperator at trial

[4] The correspondence is also not subject to Rule 3:13-3 and are protected under N.J.R.E. 410; the State reserves the right to object to the use of same.

based only on what a different entity—the State—thought; that is why internal deliberative memoranda are not properly discoverable.

Indeed, the breadth of defendants' argument is stunning. In every case in which a cooperating witness testifies, the defense may well wish to question his incentive to plea, and thus might wish to know what the State thought of his list of potential crimes. Defendants' logic therefore seems to require the production of privileged, internal prosecution memoranda in potentially all cases involving cooperators. After all, while these defendants complain about the information provided in O'Donnell's own plea, pleas never contain a comprehensive list of every statute an individual may have violated, nor do they share the prosecutor's view of every offense for which that cooperating witness can be charged, or the likely sentences that would be imposed. Nothing about the nature of this plea entitles the defense to a prosecutor's mental impressions regarding O'Donnell's exposure; instead, the defense is entitled to ask their own questions based on the full information they have received regarding the pleas, the communications he had with the State, and the O'Donnell file, including the State's information about O'Donnell's bad acts. The State is aware of no court that has compelled the disclosure of an internal deliberative memorandum in such a case, and there is no basis to make this the first.

3. Defendants' remaining arguments—that the State must create a new list of crimes, or disclose information about victims and restitution—fall short.

As to the former, defendants' argument that this Court should compel the State to create a list of crimes committed by O'Donnell to avoid the issues with turning over a privileged memorandum, (Tsb24-25; Csb15-16; Wsb13-17), fails for two independent reasons. First, it is jurisdictionally improper. Below, Judge Tober held explicitly that the State was not to "invent new things to produce[.]" (6T22-10 to 11). To the extent defendants believe the State must in fact produce something new contrary to the trial court's decision, defendants would have had to file a cross-appeal in order to seek such relief from this Court. See, e.g., State v. Eldakroury, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) ("[W]here a defendant is seeking to expand the substantive relief granted by the trial court, as opposed to merely arguing an additional legal ground to sustain the trial court's judgment, the defendant must file a cross-appeal."). Because defendants filed no cross-appeal, the issue is not properly before the Court.

Second, on the merits, any new purported "list of crimes" the prosecutors create would be privileged. To create a new list of the crimes that they believe O'Donnell's conduct may have violated, prosecutors would be forced to pore over O'Donnell's file to consider which uncharged crimes could be applicable, which requires their own legal analysis of the scope of state statutes. The legal

analysis needed to generate the list is itself a subjective exercise of attorney judgment. The exercise of attorney judgment and resulting conclusions drawn from this process would be privileged work product which would not be subject to disclosure for the very same reasons laid out above.

Nor do defendants get any further demanding the State provide the defense with a list of O'Donnell's victims and sums of restitution. Defendants repeatedly say that the State failed to rebut that portion of the court's order. See (Tsb27-28; Csb16). But there is a good reason the State did not separately discuss it: at this time, there is nothing for the State to provide defendants under this portion of the order. And the order does not require the State to create any new material. See (6T22-10 to 11).

Given the discovery provided to date, defendants have not established a substantial need to discovery of sensitive material that is privileged twice over, and, to the State's knowledge, is unprecedented. This Court should reverse the motion court's order.

POINT II

PRODUCTION OF FILES FOR UNRELATED INVESTIGATIONS IS UNWARRANTED.

Part (c) of the motion court's order compelling the State to produce "all documents relating to their criminal investigations involving [O'Donnell], whether or not resulting in criminal charges" for in camera review, (Psa232-33),

conflicts with Supreme Court precedent. See State v. Hernandez, 225 N.J. 451 (2016). As the State already laid out, (Psb31-40), our Supreme Court confronted a highly analogous discovery order in Hernandez and rejected it. As Hernandez explained, although a defendant is entitled to the cooperating witness's plea and cooperation agreements, information concerning violations of such agreements, and materially false statements, he was not entitled to "sift through the files" in unrelated criminal investigations involving the cooperating witness "hoping to snare some morsel of information that may be helpful" in his effort to discredit that witness. 225 N.J. at 464-66. Instead, the defendant has to show "how the disclosure of documents in the unrelated investigations will lead to relevant or admissible evidence." Id. at 466, 468. Defendants' attempts to distinguish their demand from the one rejected in Hernandez miss the mark, because each is based on unsupported speculation or misapprehension of the law.

First, Thomas and Windish's argument that the unrelated case files could be relevant to their unfounded assertion that O'Donnell abused his attorney-client relationships cannot justify the discovery order. To start, Thomas's bald assertion of an attorney-client relationship between himself and O'Donnell—cast in his supplemental brief as a "proffer," (Tsb31)—cannot be reconciled with the record. None of Thomas's cherrypicked quotes from the intercept transcripts support his assertion; instead, the transcripts reveal that the two discussed non-

legal issues, including the agreement to have O'Donnell raise funds for Thomas in exchange for a city job. Compare, e.g., (Tsb10 (quoting "tax returns" as purported evidence of attorney-client relationship)) with (Psa80 (O'Donnell asking if Thomas has filed his tax returns "[b]ecause there's nothing more embarrassing when you invest in a person" who is revealed to not "file tax returns for ten years")).

Indeed, Thomas's own statement confirms that he in fact had no prior attorney-client relationship with O'Donnell. Compare (Tsb10-11 (Thomas's brief characterizing O'Donnell as "counsel" for Thomas in his 2016 campaign)), with (Psa150 (Thomas to investigators: "[I]n 2016 when I ran, there was no financial transaction, nothing… Zero and he didn't help me with nothing.")); [5] (Psa145 (Thomas to investigators: "I mean I met [O'Donnell] really in March of February of this year [2019]" and describing relationship with O'Donnell in 2016 as limited); (Psa145 (describing 2016 discussion about O'Donnell's potential as a "facilities lawyer" for the City Council, but confirming "nothing really came out of it"). Instead, the record evidence shows that Thomas's relationship with O'Donnell was limited to soliciting illegal campaign

[5] Thomas's protestations regarding whether he previously sought $10,000 from O'Donnell in 2016, (Tsb17 n.2), is supported only by his own self-serving protestation when confronted by investigators after he just accepted a $35,000 cash bribe from O'Donnell on June 3, 2019 in exchange for making O'Donnell Jersey City's special counsel. See (Psa80; Psa142).

contributions in 2016 and receiving illegal campaign contributions in 2019. See (Psa85; Psa142).

Windish's argument fares no better. While no one disputes an attorney-client relationship once existed between Windish and O'Donnell, Windish offers no evidence that O'Donnell "exploited" privileged information about Windish's personal financial status in this case; indeed, the record shows Windish asked O'Donnell for $7,000 cash for his campaign, not for personal use. (1T36-22 to 37-1). That had nothing to do with O'Donnell's representation of Windish in personal estate and property matters, nor is it plausibly related to O'Donnell's representation of the Mount Arlington Borough Council.[6] In any event, it is also unclear why the presence of such a relationship would warrant this broad discovery into other case files in any event. After all, the proffer reports that the State provided years ago reveal who O'Donnell accused. The O'Donnell McCord billing records defendants have received show who O'Donnell represented. And yet defendants have been unable to offer any indication that any of the other individuals named in the proffer had an attorney-client relationship with O'Donnell, and O'Donnell has stated that other than Windish,

[6] While the State initially stated that O'Donnell represented Windish in one matter, a further review of O'Donnell's proffer does show that O'Donnell was retained by Windish individually more than once. (Psa203-04). But as Windish acknowledges, any such relationship terminated in 2017. (Wsb18).

he did not represent any. (Psa203-04). Given the evidence they already have, and the baseless nature of the claim, defendants cannot make the extraordinary showing that the disclosure of unrelated case files (let alone the entirety of those files) is proper under Hernandez.

Second, Thomas's theory that he is entitled to unrelated case files to flesh out a claim that he was selectively prosecuted for participating in a civil school-funding lawsuit against the State holds no water. As the State explained (Psb36-37), to obtain discovery on such a claim, "a defendant must establish a colorable basis for a claim of selective enforcement" by presenting "some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." State v. Ballard, 331 N.J. Super. 529, 541 (App. Div. 2000) (citation omitted). Thomas makes no effort to meet that standard in his briefing. Moreover, he has not identified why sweeping discovery into all unrelated casefiles "will lead to relevant or admissible evidence" on his specific theory of selective prosecution on his facts, Hernandez, 255 N.J. at 466, which requires demonstrating that "similarly situated individuals of a different class were not prosecuted for similar crimes." Ballard, 331 N.J. Super. at 529.

In addition, Thomas has no colorable basis to claim that he was selectively prosecuted—much less sufficient to overcome Hernandez's clear language. His

only argument is based on his claim that "credible evidence exists that Thomas received warnings and threats from a member of the Governor's administration that his political career would be over if he pursued the legal action." (Tsb32). Not only is there no record support for that claim, but it is also the wrong inquiry. Thomas has not attempted to supply a basis to claim that the Office of Public Integrity and Accountability—a different entity whose prosecutorial decisions are independent of the Governor and not subject to his review—selectively prosecuted him based on animus borne of a lawsuit relating to school funding.

To the contrary, the actual evidence makes clear that the investigation into Thomas predated the school-funding lawsuit filed on April 29, 2019. O'Donnell had a chance encounter with Thomas in February 2019. After seeing Thomas, O'Donnell recalled that Thomas had previously requested an illegal campaign contribution of $10,000 in 2016. (4T21-2 to 22-11). Thomas then messaged O'Donnell to arrange a meeting to discuss his upcoming campaign on April 25, stating that the meeting "will be my re-election kick off breakfast just like in 2016." (Psa52-61). This message was relayed to law enforcement days before the filing of the school funding lawsuit. Ibid. Thus, Thomas's claim that this investigation stemmed from the lawsuit rather than recorded attempts to solicit illegal campaign contributions (and that he is entitled to extraordinary discovery as a result of this treatment) is contradicted by the evidence and the timeline.

Third, defendants' assertion that this fishing expedition into other files is necessary to attack O'Donnell's credibility (Tsb33; Csb20; Wsb27), is squarely foreclosed by Hernandez. And defendants continue to misunderstand what N.J.R.E. 608 requires—which, as the State explained (Psb39-40), does not create a new exception to Hernandez. In deciding Hernandez, our Supreme Court had already read Rule 608 in the same manner as the post-Hernandez amendment, which merely codified the rule in State v. Guenther, 181 N.J. 129, 154 (2004). The Hernandez Court therefore expressly considered and rejected the very argument that defendants advance here. 225 N.J. at 467.

Fourth, defendants' argument that they should be allowed to rummage through these files for crimes that O'Donnell committed or for false statements which might be contained within has no merit. (Tsb33; Csb20; Wsb27). The State is aware of its discovery obligations, including to review files for impeachment information and if the State becomes aware of impeachment material or other material contained in those investigative files that should be produced pursuant to the discovery rules, the State will do so.[7] Defendants' position distorts those rules by deeming all files relating to the same cooperating witness presumptively discoverable because it could yield evidence of false

[7] The DAGs currently assigned to this matter are continuing to review these files for compliance with our ongoing discovery obligations and to be prepared for further proceedings of the matter when it returns to the trial court.

statements. But if defendants were correct in their approach, Hernandez would be wrongly decided, because every defendant would demand to investigate these other files to explore whether they contain any Brady/Giglio material that had not yet been produced. That is not the law.

Finally, Thomas's argument that the State supposedly failed to provide him with "critical" material provided to another defendant, Jason O'Donnell, in a case involving the same cooperating witness, (Tsb33-34), does not justify this broad discovery. While the vast majority of this material was not discoverable in the first instance and provided only as a courtesy, the State nonetheless provided this material to defendants in February 2024—well in advance of trial. See State v. Hyppolite, 236 N.J. 154, 167 (2018) ("When evidence is disclosed in time for its effective use at trial, no denial of due process has occurred."). Thomas should not be allowed to weaponize that courtesy in seeking impermissible discovery.

Thomas also speculates that additional material was provided to Jason O'Donnell's attorney, which somehow entitles Thomas to "review of records from other files." (Tsb33-34). But his only support for that contention is a chart prepared by Jason O'Donnell's attorney in a motion exhibit, purportedly reflecting the dates on which Matthew O'Donnell was working with the State as a cooperating witness while simultaneously billing government entities for legal

services. See (Dsa81-175) (certification noting chart was created by paralegal reviewing billing records from Matthew O'Donnell's firm and a privilege log). For one, that chart is not a part of this record, and cannot be considered by this Court. See R. 2:5-4(a); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 452 (2007). For another, nothing about the chart suggests the State produced other case files to Jason O'Donnell; it did not. And even if defendant were entitled to the exact same materials provided to Jason O'Donnell—which the State does not concede—that would still not allow defendant unfettered access to every unrelated investigative file.

Because defendants have failed to demonstrate an entitlement to the files of unrelated investigations involving O'Donnell, Part (b) should be vacated.

POINT III

THERE IS NO BASIS TO JUSTIFY FURTHER DISCOVERY REGARDING CONSENSUAL INTERCEPTS ISSUED IN THIS CASE.

As the State explained in its brief, (Psb41-45), defendants are not entitled to the "documentation and information … reviewed by Deputy Chief Jeffrey Manis which formed the basis for the issuance of Consensual Intercept Forms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019, and August 26, 2019," as required by Part (a) of the motion court's order. (Psa232). Defendants' responses—both regarding whether to decide this issue,

and on the merits of Part (a)—are unavailing.

As an initial matter, this Court should address and resolve this issue. Defendants have made clear that they will demand additional information regarding the specific documents Deputy Chief Manis reviewed at an evidentiary hearing challenging the consensual intercept. See, e.g., State v. Smith, 251 N.J. 244, 256 (2022) (quoting State v. Kovack, 91 N.J. 476, 486 (1982)) (explaining that there are exceptions to mootness where the issue is likely to surface again). Thomas could hardly be clearer, stating that his plan is to challenge the validity of the consensual intercept recordings "through an evidentiary hearing" (Tsb40), where he intends to call the prosecutor to testify (TMsb9; 5T22-15 to 22-21). Thus, whether the three defendants are entitled to an accounting of "all documentation and information reviewed by [] Manis that formed the basis for the" intercept will resurface again imminently and will bear directly on that evidentiary hearing. If the Court declines to review this question now, the State will be forced to seek another interlocutory appeal in short order, which would be detrimental to judicial economy and efficiency—in an ongoing prosecution that has already been delayed for multiple years.

Moreover, despite Thomas's contentions that the issue is moot as to him, see (Tsb36-38), his arguments do not apply to either Cesaro or Windish. While the State's January 9, 2024 letter confirmed that Thomas already has the

materials on which Deputy Chief Manis relied, that letter relates only to Thomas, because Part (a) of the court's order concerned the dates tied to consensual intercepts for Thomas. See (Psb45 n.9; Psa228). But Cesaro and Windish believe that this order should be expanded to include the dates of consensual intercepts that relate to them. (Csb22-23; Wsb31-32). While Cesaro and Windish should have filed a cross-appeal to raise their theory that this provision of the order applies to them, this Court should nonetheless review their claims in the interest of judicial economy, since they will almost certainly raise these very issues if this Court does not resolve them in this appeal.

On the merits, this Court should vacate Part (a) of the motion court's order because defendants have not established any entitlement to a precise accounting of which information and materials Deputy Chief Manis reviewed. As the State explained, (Psb42-43), because "[c]onsensual interceptions … do not represent the same intrusions into constitutionally protected privacy" as wiretaps, State v. Toth, 354 N.J. Super. 13, 21, 22 (App. Div. 2002), there are "only" two "express statutory requirements" for such intercepts: "(1) consent by [the informant], and (2) prior approval by an authorized person." State v. Martinez, 461 N.J. Super. 249, 269-70, 275 (App. Div. 2019). And while Martinez endorsed the customary practice that "intercepts should not be pursued unless they are expected to yield relevant information," that "operational standard," id. at 275, is satisfied so long

as the intercept could "hav[e] a tendency in reason to prove or disprove any fact of consequence to the determination of the action," State v. Buckley, 216 N.J. 249, 261 (2013) (citing N.J.R.E. 401).

The consensual intercept challenged here fits each of those requirements—and the information that defendants demand has no bearing on them in any event. Defendants do not dispute that the two exclusive statutory elements were met: O'Donnell consented to these intercepts, and Deputy Chief Manis gave written approval for each. Which particular materials he reviewed are irrelevant to those elements. Moreover, the intercepts were authorized based on the expectation that the defendants would again seek monetary contributions in exchange for offering O'Donnell a government job—highly relevant to the public corruption investigation. O'Donnell named both Windish and Cesaro in proffers to law enforcement as individuals who had approached him to request unlawful contributions to their campaigns, (Psa1-5),[8] and he identified Thomas in February 2019 as someone who had solicited him for an unlawful campaign contribution, see supra at 14-15. There is no reasonable dispute that the consensual intercept could have a tendency to prove or disprove O'Donnell's

[8] Although Cesaro insists "there was no history of prior criminal activity of any type," the very passage he quotes in his brief describes a quid pro quo exchange: "O'Donnell stated Cesaro told him he needs his help with fundraising and in return would give him more work in Morris County." (Csb9) (emphasis added); see, e.g., N.J.S.A. 2C:27-2.

statements to law enforcement. Which documents Deputy Chief Manis reviewed is not needed to assess either the statutory or the "operational" standards.

Nor do defendants get any further by arguing that they have case-specific reasons under Martinez to obtain this information. Martinez held (and no party disputes) that consensual intercepts are not immune from judicial review, and addressed work-product privilege and constitutional right to counsel issues not implicated here. 461 N.J. Super. at 272. But it did not support these defendants' strained challenges to these conceptual intercepts. Thomas, for his part, claims he was "unfairly targeted for investigation solely due to the Jersey City Board of Education's [April 29, 2019] lawsuit against the State," and thus purportedly needs the documents to support his theory. (Psa228). But Martinez itself did not even "decide [] whether proven animus could nullify an authorization likely to yield relevant evidence." 461 N.J. Super. at 276 (emphasis added). And more fundamentally, even if proven animus could nullify a statutorily-valid authorization, Thomas did not remotely meet that standard: as the State laid out, the record makes clear the considerable evidence the State had, and decision to investigate it, made before Thomas filed suit, and Thomas responds with nothing to support his bald claim that a Deputy Chief in the Office of Public Integrity and Accountability was somehow driven instead by animus in light of a suit

about school funding. See (Psb43-44); supra at 16, 17. That falls far short of justifying this fishing expedition.

Further, that the motion court extended this order to Cesaro and Windish confirms how unsupported Part (a) is. Although Thomas's selective prosecution theory lacks merit, Cesaro and Windish do not even advance that theory, and so there is no even apparent rationale for extending the order to them. Indeed, as to Windish, his Martinez-based argument fails for two reasons. Initially, while he now argues that Martinez helps him because it also involved some arguments relating to defendant's attorney work product, (Wsb29-31), Windish never made that argument below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). In any event, it is plainly incorrect. Unlike in Martinez, where "at least some" of the defendant's attorney work product was revealed in the consensual intercept itself, 461 N.J. Super. at 288, Windish does not and cannot suggest that the intercepted conversation between him and O'Donnell revealed any work product. (The same applies to Thomas). And Windish is simply wrong to suggest the State must show "special need" before a consensual intercept of an attorney, (Wsb30); Martinez is clear that "th[is] 'special need' requirement" in the Wiretap Act "applies only to non-consensual wiretaps." 461 N.J. Super. at 271 (emphasis added).

Because no defendant articulates any viable challenge to these consensual

intercepts, this Court should vacate Part (a) of the motion court's order.

CONCLUSION

This Court should vacate the motion court's discovery orders.

Respectfully submitted,

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DATED: July 18, 2024