SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY	**: Indictment No. 23-06-00080-S**
	: App. Dkt. No. A-003522-23T1
v.	**: Sat Below:**
	: Hon. Mitzy Galis-Menendez, Pr.Cr.
KE WANG	**:**
	: Criminal Action

BRIEF AND APPENDIX ON BEHALF OF APPELLANT, KE WANG

On the Brief:

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APPELLANT IS ON PRETRIAL RELEASE

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[1] The Affidavit to the Search Warrant has been filed Confidentially

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LIST OF PARTIES

Party Name	Appellate Party Designation	Trial Court Party Role	Trial Court Party Status
Ke Wang	Appellant	Defendant	Participated
State of New Jersey	Respondent	Plaintiff	Participated

PRELIMINARY STATEMENT

This matter arises out of an egregious Brady violation in which New Jersey State Police Detective John Barnett ("Barnett") took the stand twice and perjured himself to try and save an unlawful search from suppression. Weeks after Barnett's second time taking the stand the State produced Barnett's own notes which directly undermined his testimony and unequivocally demonstrated his deceit.

On November 5, 2021, New Jersey State Police Detective John Barnett ("Barnett") was part of a team responsible for executing a search warrant at 132 Tuers Avenue in Jersey City, New Jersey. Ke Wang ("Appellant") challenged the constitutionality of the search arguing that Barnett and his brother officers exceeded the bounds of the search warrant. In support of this contention Appellant argued that the door to his apartment was breached with a Halligan tool and was clearly outside the conscripts of the search warrant.

To quash Appellant's theory, and motion to suppress, Barnett testified in two separate hearings before the trial court that the door to Appellant's apartment was not breached and was instead wide-open. Two weeks after Barnett testified for the second time, the State produced Barnett's notes which unequivocally stated that the door to Appellant's apartment was breached thus demonstrating that Barnett's testimony was perjured.

The court below found that the State committed a Brady violation. The trial court granted Appellant's independent motion to suppress on the merits but denied his motion to dismiss for the Brady violation. Appellant contends that the Indictment in this matter should have been dismissed based on the egregious nature of the Brady violation committed. In the absence of a dismissal there is no consequence for State's egregious conduct.

STATEMENT OF PROCEDURAL HISTORY[2]

On November 5, 2021, Appellant was charged on Complaint-Warrant 0906-W-2021-003802 with two counts of Endangering the Welfare of a Child in violation of N.J.S.A. 2C:24-4(b)(5)(a)(i) and 2C:24-4-4(b)(5)(b)(iii). [Da001].

On June 21, 2022, Appellant filed a Motion to Suppress evidence ("First Motion to Suppress"). [Da002]. On January 31, 2023, Appellant's Motion to Suppress was denied. [Da003-007].

On February 13, 2023, Appellant filed a Motion for Reconsideration. [Da008]. On May 11, 2023, Appellant's Motion for Reconsideration was denied. [Da009].

[2] "1T" refers to the transcript dated 10/13/22 of Hearing
"2T" refers to the transcript dated 10/18/2022 of Motion
"3T" refers to the transcript dated 5/11/2023 of Motion
"4T" refers to the transcript dated 12/15/2023 Motion
"5T" refers to the transcript dated 1/31/2023 Motion
"6T" refers to the transcript dated 5/01/2024 Motion

On June 28, 2023, an Indictment was returned charging Appellant with two counts of Endangering the Welfare of a Child in violation of N.J.S.A. 2C:24-4(b)(5)(a)(i) and 2C:24-4-4(b)(5)(b)(iii). [Da011-012].

On September 1, 2023, Appellant filed a Motion to Suppress ("Second Motion to Suppress"). [Da013]. On September 12, 2023, Appellant filed a confirmatory letter regarding outstanding discovery. [Da014-015]. On January 6, 2024, Appellant filed a Motion to Dismiss the Indictment for a Brady Violation. [Da016].

On May 20, 2024, the trial Court found that the State committed a Brady violation and granted Appellant's Motion to Suppress while denying his Motion to Dismiss. [Da017-029].

STATEMENT OF FACTUAL HISTORY

a. First Motion to Suppress

In September 2021, Det. Anthony Eggert ("Eggert") of the New Jersey State Police Internet Crimes Against Children Unit was investigating the electronic transfer of Child Sexual Abuse Materials ("CSAM"). 1T: 31:23-32:24; 36:2-13. During the investigation Eggert believed that an Internet Protocol ("IP Address") registered to 132 Tuers Avenue, Jersey City, New Jersey 07306 ("132 Tuers") belonging to a Jean Haedrich ("Haedrich") was involved in the electronic transfer of CSAM. 1T: 38:16-41:6. Eggert conducted some background investigation into 132 Tuers and concluded that it was a multi-unit residence. 1T: 41:7-42:4. The U.S. Postal Inspector's Office advised that

Chungying Tsai and Weihua Hao received mail at 132 Tuers. Da033-046. A DMV inquiry revealed that Chungying Tsai, Yin Zhou, Weihua Hao, Ronald Illagan and Zhenfei Liang may reside at the address. Id.

Eggert prepared a search warrant in furtherance of the investigation. 1T: 42:5-12; Da033-046. The search warrant was for 132 Tuers which was described as the left-hand side of a two-family, three-story home, divided vertically. 1T: 44:7-16; Da033-046. On November 5, 2021, law enforcement executed the search warrant. 1T: 48:1-:14.

At the time the search warrant was executed Eggert was the lead investigator. 1T: 48:16-21. As the lead investigator, Eggert was not part of the initial entry into the dwelling but only entered after the TEAMS unit deemed the premise secure and safe at which point, he entered and conducted his search for evidence. 1T: 49:1-13. Barnett was a member of the TEAMS unit that made initial entry in the execution of the search warrant at 132 Tuers. 1T: 75:22-76:2; 78:25-79:9.

Upon making entry, the TEAMS unit encountered a staircase that went straight to a second-floor apartment that had three occupants and a kitchen. 1T: 82:16-18; 91:6-24; Da049; Da.050.

The kitchen had a door, which was closed but not locked, that led to a downward staircase. 1T: 87:24-88:24. When the TEAMS unit went down the stairs, they found a door leading to another area that was locked and assumed it went into 130 Tuers. 1T: 100:18-22; 101:3-9; Da051.

Across from the kitchen door was another door that contained a staircase that continued up to the third floor where there was a small kitchen which Appellant's room and a second bedroom adjoined. 1T: 90:1-91:5. The doored staircase leading from the second to the third floor was on the opposite side (right side) of the dwelling from the front door for 132 Tuers. 1T: 98:19-22. Barnett testified that the interior front door did not contain a lock. 1T: 103:8-15. Barnett further testified that the door was either closed but unlocked or opened and there was no need to breach the door and if they did breach the door, they would have needed permission because they questioned whether the third-floor was covered by the search warrant. 1T: 104:4-22; 2T: 12:24-13:19; 57:13-17; Da052.

After the tactical team deemed the premise safe Eggert entered the dwelling through the left door marked 132 Tuer. 1T: 51:11-17. Upon entering the dwelling Eggert observed a small foyer and staircase leading to the second floor where there were multiple bedrooms and a kitchen. 1T: 51:18-25. By the time Eggert had entered the dwelling the tactical team had taken everyone out of their rooms and put them in one group for safety purposes in addition all the doors were already opened by the TEAMS unit. 1T: 58:20-59:4; 60:23-25. There was a door in the kitchen on the second floor that led to a small doorway on the right-side of the building, where there was another door separating the second and third floors that led to a staircase to the third floor where Appellant's room was also located on the right side of the building and a second room was on

the left. 1T: 53:1-54:12; 55:2-9; 60:20-22; 61:24-62:2; 72:1-5. At that point Appellant's electronics were seized and he was placed under arrest. 1T: 55:15-57:4; 71:1-72:5.

b. Trial Court denies the First Motion to Suppress

On January 31, 2023, the trial court denied Appellant's Motion to Suppress. [Da003-007]. In denying Appellant's motion the trial court, in pertinent part, held that the officer's made their way to Appellant's room without any indication that it was not part of 132 Tuers Avenue and without any impediments or obstacles. Id. In arriving at this conclusion, the trial court found Eggert and Barnett's testimony credible with respect to reaching Appellant's apartment with no obstructions. Id. More specifically, the trial court accepted Barnett's representation that he did not encounter any locked doors. Id.

c. Motion for Reconsideration

Appellant filed a Motion for Reconsideration in which he challenged the trial court's findings. [Da008]. The trial court denied Appellant's Motion for Reconsideration. 3T. Despite denying the motion, the trial court unequivocally stated, **"I think the only dispositive fact that would, I think, change my opinion would be that if [Appellant's] door was actually locked and someone broke it. That would be – that would be a fact that would make a difference… The testimony that was presented to this Court, they just kept walking through without breaking any doors. So unless the door was broken, that would be an**

altering factor for this Court, for sure." 3T: 53:5-24 (emphasis added). The court further indicated, "[i]f you find that it's important to reopen because I don't have the correct facts as to the breach of a door… let me know and I will entertain the application. 3T: 54:20-23.

d. Second Motion to Suppress

On September 1, 2023, Appellant filed a second Motion to Suppress based on newly found information from a retired police officer which indicated, for the first time, that door to Appellant's apartment had damage to it which was consistent with it being breached with a Halligan tool. [Da016].

On December 15, 2023, the court below heard testimony regarding this issue. Barnett testified for a second time. For the first time, and unlike his initial testimony, Barnett testified that there was confusion about whether the door which led to Appellant's apartment was part of the search warrant. 4T: 19:3-18. As a result of the confusion the Sergeant First Class was called. Id. According to Barnett the Sgt. First Class granted permission to go through the door and up the third floor where Appellant's apartment was located. 4T: 13:5-14:3.

New Jerey State Police Sgt. First Class Villalta-Moran ("Villalta-Moran") was the squad leader. 4T: 67:10-17. Villalta-Moran contradicted Barnett. Villalta-Moran indicated that the only door that he had a conversation about going past was the kitchen door which led from 132 Tuers Avenue into the common egress and not the door that led to

Appellant's third floor separate apartment. 4T: 115:19-118:25; 129:2-3. Villalta-Moran explained that they will always clear common areas like the stairwell in this case because it is accessible to anyone. 3T:79:22-80:6.

Both Barnett and Villalta-Moran agreed that the team was in possession of a Halligan tool to breach doors. 4T: 14:4-17; 82:23-83:2. A Halligan tool is used to pry open a locked door by sliding it into the door jamb between the door and frame and crack it open. 4T: 22:2-17; 23:18-24:14. If the door to Appellant's apartment was locked you would need a Halligan tool to break into it. 4T: 119:1-11. If a Halligan tool was used, you would see damage around the area of the locking mechanism because that is where you would pry it from. 4T: 126:6-12.

Hiedrich lives at and owns the property located at 130 and 132 Tuers Avenue. 4T: 133:5-17. Hiedrich indicated that, in addition to other damage throughout the property, the door to Appellant's third floor apartment was damaged. 4T: 149:5-150:9. More specifically, Heidrich indicated that that there was damage around the locking mechanism, scratch marks to the door frame, and cracking. Id. Heindrich indicated that her handyman placed a metal bracket on the door near the locking area[3] to maintain the integrity of the door. Id; Da.053; Da054; Da055.

[3] In contrast, Barnett testified that the door did not contain a lock. 1T: 103:8-15.

Despite being confronted with this damage, Barnett was unequivocal that the door to Appellant's separate third floor apartment was "never breached" and that the Halligan tool was not used on any interior door of the property. 4T: 20:2; 39:24-40:2; 42:13-23. Villalta-Moran testified that he never authorized any officer to kick down or damage any doors and that a tool was not used to breach any doors. 4T: 84:17-21; 119:16-22

e. Discovery Requests

On September 12, 2023, Appellant provided the State with a discovery deficiency/request letter. [Da014-015]. Request number eight asked the State to provide the identity of all officers that made up the TEAMS unit… and identify which officer breached the door to Appellant's apartment. [Da015]. Request number nine requested the identity of the officers who possessed a Halligan tool. [Da015].

On September 18, 2023, the State responded. [Da046-048]. With respect to request number eight, the State indicated that the relevant officers were identified on Barnett's report and ignored the request to identify the officer who breached Appellant's door. With respect to request nine, the State ignored Appellant's request to identify the officers who possessed a Halligan tool and again directed Appellant to Barnett's report for all pertinent details. [Da047].

f. Barnett's Notes

On January 4, 2023, some two years after Appellant was charged, eighteen months after Appellant filed his first motion to suppress, eleven

months after Appellant filed for reconsideration, over six months after Appellant was Indicted, four months after Appellant filed his second suppression motion and three weeks after the Court concluded a second evidentiary hearing, the State provided Barnett's notes for the first time which, contrary to his testimony, indicate that the door to Appellant's separate third floor apartment was breached. [Da044-045].

g. Court's Decision

On May 20, 2024, the trial court issued a written decision that held that the State's failure to turn over Barnett's notes constituted a Brady violation. [Da019-031]. The trial court held that the Brady violation did not warrant dismissal. Id. The trial court did, however, find that that the officer's exceeded the bounds of the search warrant and suppressed the evidence that was seized. Id.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISMISS FOR THE STATE'S EGREGIOUS BRADY VIOLATION

(Issue Raised and Decided Below in Trial Court's May 20, 2024, Opinion and Order – Da.017-029)

A. The State Committed a Brady Violation

Due process lies at the heart of American jurisprudence. In 1963, over sixty years ago, the United States Supreme Court in the seminal case of Brady v. Maryland, 373 U.S. 83 (1963) held that a prosecutor's

suppression of material evidence favorable to an accused is a Constitutional violation and is sanctionable. Here, the State withheld Barnett's notes until January 4, 2023. By way of reference, January 4, 2023, was some two years after Appellant was charged, eighteen months after Appellant filed his first motion to suppress, eleven months after Appellant filed for reconsideration, over six months after Appellant was Indicted, four months after Appellant filed his second suppression motion and three weeks after the Court concluded a second evidentiary hearing at which Barnett testified for a second time.

For months on end, and motion after repeated motion, Appellant steadfastly argued that the State exceeded the bounds of the search warrant by breaching Appellant's distinct apartment. For months on end, brief after brief, sworn witness after sworn witness – including Barnett who testified twice - the State represented that Appellant's door was wide open and never breached. During this time the State possessed, maintained, and controlled Barnett's notes which unequivocally corroborated Appellant's argument and was the death knell of the illegal search.

What is more, in denying Appellant's motion for reconsideration on May 12, 2023, the trial court went so far as to say, "[t]he only fact that may make a difference here truthfully is whether the door was locked and they broke into it. That's the only fact that would be dispositive, that would make a difference to this court." Despite the State being on notice

of this specific issue and having evidence in their control that would settle the issue for Appellant and the Court, they continued to perpetuate a charade. The State's actions are inexcusable.

Three essential elements that must be considered to determine whether a Brady violation has occurred: (1) the evidence at issue must be favorable to the accused, either exculpatory or impeachment evidence; (2) the State must have suppressed the evidence, either purposely or inadvertently; and (3) the evidence must be material to the Appellant's case. See, State v. Nelson, 155 N.J. 487, 497 (1988)(citing Moore v. Illinois, 408 U.S. 786, 794-95 (1972)).

Here, all three essential elements support the trial court's finding that the State committed a Brady violation. Regarding the first prong, Barnett's notes are exculpatory at best and impeachment material at worst. The main issue in litigating the motions to suppress had been whether the officers exceeded the bounds of the search warrant by entering Appellant's third floor apartment.

Appellant long argued that the officers had reason to believe Appellant's apartment was not covered by the search warrant and the officers unlawfully broke the door open to gain access. Knowing they exceeded the bounds of the search warrant, and to defeat Appellant's meritorious argument, Barnett concocted a story for court in which he testified under oath that the interior door leading to Appellant's apartment was wide open and not breached. Barnett knew this was a blatant lie.

Barnett's notes clearly indicated that the officers breached the door to Appellant's separate and distinct third floor apartment.

The State had been on notice for the better part of a year that the trial court was laser focused on this exact issue. Barnett's notes are exculpatory at best and impeachment evidence at worst thus satisfying the first prong.

The second prong also militates in Appellant's favor. The State, whether intentionally or inadvertently, suppressed Barrett's notes. The State only produced Barrett's notes after Villalta-Moran mentioned them on cross examination during the second evidentiary hearing he testified at, and the gig was up. Barnett never once, in two separate hearings, mentioned his notes. Instead, Barnett chose to intentionally lie to the trial court in turn convincing the Court that he was being truthful. The State was obligated to produce Barrett's notes pursuant to the Rules as well as their Brady obligations. Had Villalta-Moran not mentioned Barnett's notes on cross examination and had counsel not made an immediate request for such notes from the State it is likely that Appellant never would have received the notes. That is a sad situation. Our justice system is based on the pursuit of truth. Not winning or losing. The State's actions show they lost sight of this principle.

Finally, the third prong overwhelmingly militates in Appellant's favor as Barrett's notes are material to Appellant's case. For two motions to suppress and a motion for reconsideration Appellant argued with

conviction that the State exceeded the bounds of the search warrant by entering his apartment by breaching its locked entrance.

The State, in response, ostracized this theory by perpetuating a fraud. The State had the Court believe that Appellant's front door was unlocked and open knowing this was false. The State further attacked Appellant's theory by suggesting Appellant's investigator's opinion in his moving papers that a Halligan tool was used to pry the door was malarkey. The State even attacked Appellant's landlord when she testified that the police damaged the doors in her property suggesting that the damage could have been caused at some other time.

During all these attacks the State maintained proof positive in Barrett's notes that each claim Appellant made was true. Barrett's notes could not be any more material to Appellant's defense. Barrett's notes are Appellant's defense.

Barnett's notes are undeniably favorable to Appellant. Barnett's notes indicate that the door to Appellant's separate apartment was **breached** and not wide open as he testified and for which the trial Court fully credited his and other's testimony. What is more, Barnett's notes indicate it was apparent that Appellant's apartment had its own kitchen and bathroom and shared nothing with the second-floor apartment which was another contested issue.

In opposing the motion below, the State asserted that the notes were not material to the outcome of the motion and that the prosecutor

had no personal knowledge of the notes. The State even attempted to create alternative definitions for the word "breached", one for Barnett's testimony and another for Barnett's notes. The trial court correctly dismissed these arguments.

The materiality standard is specifically designed to encourage prosecutors to disclose information to the defense in close cases. Kyles v. Whitley, 514 U.S. 419, 439-40 (1995). The prosecutor was required to disclose Barnett's notes so long as there was a "reasonable probability" that the result would be different. United States v. Bagley, 473 U.S. 667, 682 (1985). The trial court told the parties, under no uncertain terms in denying Appellant's motion for reconsideration, that the only thing that would be dispositive to the Court is if there was proof that Appellant's door was locked when the officers entered. Barnett's notes proved, as Appellant has long argued, that the door to Appellant's separate apartment was locked and breached. As such, Barnett's notes are material.

In addition, and as the trial court found, the State further ignored the fact that on September 12, 2023, Appellant served a supplemental discovery request, Appellant's supplemental request requested the identities of all the officers that made up the TEAMS unit, the identity of the officer who breached Appellant's door, and the identity of any officers that possessed a Halligan tool. These specific requests were in

response to Appellant's expert witness' opinion that Appellant's door was breached with a Halligan tool.

On September 18, 2023, the State responded to Appellant's supplemental discovery requests by letter. The State's response rebuffed Appellant's very tailored requests and redirected Appellant to Barnett's narrative report for "pertinent details of the TEAMs entry on the date of the search warrant." Id. The State knew Appellant was seeking information about the officer's entry on the day the warrant was executed and they either withheld it or failed to even look for it. The State's conduct is unfathomable and in total contradiction of the Rules and law that mandate the State's discovery obligations.

Likewise, the trial court appropriately found it irrelevant whether the Assistant Prosecutor had personal knowledge of Barnett's notes prior to their discovery. Prosecutor's offices are required to establish "procedures and regulations... to ensure communications of all relevant information on each case to every lawyer who deals with it." Giglio v. United States, 405 U.S. 150, 154 (1972). Under Brady, all material that is relevant to a prosecution must be communicated and shared with the trial prosecutor to exercise a sound informed judgment on behalf of the State to ensure fairness. Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

Here there are at least three means through which the trial prosecutor should have been informed or known about Barnett's notes. First, Barnett was a law enforcement officer working directly with

prosecution. Barnett testified twice before the trial Court. Barnett had the opportunity to inform the prosecutor in their preparation and then had the opportunity to inform Appellant and the Court about his notes when he testified. Barnett, and the State, did not inform Appellant or the Court about his notes because that would have upended his lie and deceit. Barnett's knowledge is imputed to the prosecutor. See, State v. Carter, 69 N.J. 420, 429 (1976) (imputing knowledge of police investigator to prosecutor); State v. Lozado, 257 N.J. Super. 260, 274 (App. Div. 1992) (imputing knowledge of police to prosecutor); United States v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993) (imputing knowledge from "all enforcement agencies that had a potential connection with the witness" to prosecutor); United States v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991) (imputing information known to "some arm of the state" to prosecutor).

Second, Appellant's supplemental discovery requests should have triggered the State to produce Barnett's notes. Third, Barnett's report referred to an attached diagram that the prosecutor never produced despite continuously relying on Barnett's report as a blanket answer for all Appellant's inquiries.

B. The Trial Court Should Have Dismissed the Indictment

Although the trial court correctly granted Appellant's Brady motion it committed grave error in failing to dismiss the Indictment. Specifically, although the trial court correctly imputed Barnett's knowledge to the prosecutor, it failed to impute Barnett's bad faith and malice to the State,

even though Barnett was employed by the State and was a member of the State's prosecution team and perjured himself twice for the State. As a result, the trial court wrongfully concluded that the State's conduct was not willful or outrageous, even though it suggested that Barnett's actions were done purposely, with intent "to prevent an unfavorable outcome", where the State also contested and argued in its own motion for leave to appeal.

Absent a dismissal the State will have had endured no consequence for their unbelievable conduct. In opposing Appellant's motion for leave to appeal the State argued that dismissal was not warranted because Appellant's motion to suppress was granted. The irony in this position is palpable.

First, it is irrelevant to what relief is appropriate for the Brady violation because Appellant won his motion to suppress on the merits. Second, the State has proffered this specious argument while at the same time arguing, in a parallel appeal, that Appellant's motion to suppress should have been denied thus undermining the genuineness of such a position. Third, if the Court adopts such a position, it sends a message to the State that they can commit egregious Brady violations with relative impunity.

In the context of a Brady violation, the remedy of dismissal of an indictment with prejudice is utilized when "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."

United States v. Russell, 411 U.S. 423, 431-32, (1973). In State v. D.A.B., App. Div. A-1848-22, September 19, 2023, Pg. 15, this Court found that dismissal is warranted when a Brady violation occurs that is purposeful and misleading and would materially affect a Appellant's pretrial preparations. Specifically, this Court considered "the strength of the State's case, the timing of disclosure of the withheld evidence, the relevance of the suppressed evidence, and the withheld evidence's admissibility." Id., Pg. 10 (quoting State v. Brown, 236 N.J. 497, 510 (2019)), and affirmed the dismissal with prejudice after finding that "the State potentially would have virtually no evidence with which to satisfy its burden of proof" Id., Pg. 13.

It is hard to fathom more egregious conduct than what has transpired in this case. Barnett withheld his notes because they contained an unfavorable version of events that would have resulted in suppression and then lied to the trial court at two separate testimonial hearings to try and save the improper search.

Barnett and the State dragged Appellant and the trial court through years of litigation knowing Barnett was lying and suppressing the evidence from Appellant that proved he was lying. Barnett's deplorable conduct and blatant lies are imputed to the State and justify dismissal. Dismissal with prejudice is a remedy this Court has affirmed as being within the sound discretion of the court under these facts and circumstances and, quite

frankly, should be black letter law that will serve to extinguish this type of conduct. Id.

In addition, as the State insisted in its own motion for leave to appeal that the trial court wrongfully "conclude[d], without support, that the door to the third floor was locked", the only record the State relied on was Barnett's testimony. On the other hand, Barnett's concealed notes directly discredit his testimony, and ultimately helped the trial court to grant Appellant's independent motion to suppress on its own merits. Clearly, the motion to suppress was granted because Barnett's testimony became untrustworthy and unreliable, not because the prosecutor violated Brady.

CONCLUSION

For the forgoing reasons the Indictment in this matter should be dismissed with prejudice.

Respectfully yours,

s/ Joel Silberman_____
Joel Silberman, Esq.

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-3522-23T1

		CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Motion for Leave to Appeal Granted from an Interlocutory Order of the Superior Court of New Jersey,
v.	:	Law Division, Hudson County.
KE WANG,	:	Sat Below: Hon. Mitzy Galis-Menendez, P.J.Cr.
Defendant-Appellant.	:	

BRIEF AND APPENDIX ON BEHALF OF THE STATE OF NEW JERSEY

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October 15, 2024

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TABLE OF APPENDIX[1]

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[1] Ra1 to 3, Ra4 to 7, Ra17 to 23, and Cma1 to 21 were omitted from defendant's appendix, and are essential to understanding the procedural history of this case and issues raised herein. See R. 2:6-1(a)(1)(I).

Ra8 to 16 was incorporated by reference by the judge for this matter, and is essential to considering the issues raised. (6T3-13 to 4-9).

Ra24 to 39 are photographic and video exhibits from the motion to suppress, which are also essential to properly considering the issues raised in this appeal. The included photographic defense and State exhibits were acquired directly from the trial court. Because the photographs that defendant included in his appendix at Da49, Da51, and Da52 were unmarked and blurry, the State provided the clearer photographs that were actually marked in evidence for the Court's review. See (Ra24 to 25; Ra28).

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[2] This video shows a fridge in front of the second floor's kitchen door, and personal items, that were not present when the search warrant was executed. (5T37-17 to 39-20; Ra24; Da55).

[3] This video also shows personal items that were not present when the search warrant was executed. (5T48-10 to 49-23; Ra26 to 27).

TABLE OF CONFIDENTIAL APPENDIX

VOLUME I

[4] This excerpted page was included to address the drawing that defendant included in his appendix at Da50.

TABLE OF AUTHORITIES

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CASES

STATUTES

RULES

TABLE OF CITATIONS[5]

"Da" refers to defendant's appendix to his appellant's brief (for this appeal).
"Db" refers to defendant's appellant's brief (for this appeal).
"Ra" refers to the State's appendix to its respondent's brief.
"Rb" refers to the State's respondent's brief.
"Cma" refers to the State's confidential appendix to this respondent's brief.
"1T" refers to the suppression-motion proceedings on October 13, 2022.
"2T" refers to the suppression-motion proceedings on October 18, 2022.
"3T" refers to the dismissal-motion proceedings, on speedy-trial grounds, on January 31, 2023.
"4T" refers to the reconsideration-motion proceedings on May 11, 2023.
"5T" refers to the reopened suppression-motion proceedings on December 15, 2023.
"6T" refers to the reconsideration and dismissal-motion proceedings on May 1, 2024.
"7T" refers to the suppression-motion proceedings on September 22, 2022.
"8T" refers to the suppression-motion proceedings on January 5, 2023.

[5] The State labeled the transcripts so that the transcript citations would be consistent for all briefs for this appeal and Docket No. A-3517-23T4.

PRELIMINARY STATEMENT

The judge ruled that the circumstances of this case did not warrant the dismissal of the indictment with prejudice. Two requirements must be met for such a drastic remedy: the State's conduct must be willful, and defendant's alleged prejudice must be irremediable with a lesser remedy. Because neither was met here, the judge's ruling should be affirmed.

Here, while the judge found that the State's conduct was negligent, she concluded that the State's conduct was not willful or outrageous. And as the judge recognized, the State turned over the two-paged diagram that had been delayed in discovery while the motion to reconsider her initial suppression ruling was still pending, at a point where the judge could still "deal with it and fix it." Indeed, the reopened suppression hearing, and the judge's thorough consideration of the diagram before she rendered her decision on the motion to reconsider her suppression ruling, wholly cured any prejudice.

Because the minimal requirements for dismissing an indictment with prejudice had not been met, the judge thus properly exercised her discretion in declining to dismiss the indictment. Additionally, as a matter of law, the delay in turning over the diagram did not amount to a Brady violation because (1) the diagram was not material for Brady purposes under a correctly applied Fourth Amendment analysis, and (2) the diagram was disclosed in time for its

effective use at trial. This Court should accordingly affirm the denial of the motion to dismiss the indictment.

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS[6]

In September 2021, the New Jersey State Police (NJSP)'s Internet Crimes Against Children (ICAC) Unit began an investigation into the distribution of child sexual abuse and exploitation material (CSAEM) via the internet, using online, peer-to-peer, file-sharing networks. (1T31-23 to 42-23; Cma4; Cma7 to 11). Specifically, on September 22, 2021, Detective Anthony Eggert, using investigative BitTorrent software, directly connected to a device that was file-sharing known CSAEM files using a specific IP address. (Cma9 to 10; 1T35-9 to 40-6). He was able to download thirty-five items of CSAEM from the suspect device. (Cma10). By checking the American Registry for Internet Numbers and serving a subpoena on the IP address's Internet Service Provider, the police determined that the device's IP address had a service address of 132 Tuers Avenue, in Jersey City, New Jersey, and that Jean Haedrich was the registered subscriber. (Cma10; 1T39-17 to 41-6).

Detective Eggert thereafter contacted the U.S. Postal Inspector's Office, which advised that two individuals received mail at 132 Tuers Avenue. (Cma10). Eggert also conducted a DMV inquiry, revealing that a total of five individuals potentially resided at the address. (Cma10 to 11). Further

[6] Because the procedural history and facts are interrelated, the State has combined them for clarity and the Court's convenience.

surveillance of the location revealed that "132" Tuers Avenue was part of a two-family building, with "130" being the other unit. (1T42-24 to 47-25; Cma1 to 2; Cma11). Detective Eggert observed, from the outside, that the building appeared to be "divided vertically," with a front door on the far left bearing the number, "132," and a front door on the far right bearing the number, "130." (1T42-24 to 47-25; Cma1 to 2; Ra30 to 31).

Accordingly, Detective Eggert drafted a search-warrant application for 132 Tuers Avenue, which included the following description of the location to be searched:

> The residence to be searched the left side of a two family, three-story home, divided vertically. The house consists light gray siding. There is a brick front porch leading to both doors of the residence. When facing from the street, address 132 Tuers Avenue would be the left door and 130 is the right door. Also on the porch are three windows with black metal bars. Both doors are covered by white metal awnings. A white metal fence surrounds the porch and another separates the sidewalk from the property. The back of the residence has a wood porch on the ground level with a door and large window covered by a metal guard**.** [(Cma1 to 2) (emphasis added).]

Detective Eggert also included photographs of the front and back of the residence in the search-warrant application. (Cma2; 1T42-24 to 45-16). Based on the above investigation, and his years of law-enforcement training and experience that included ICAC BitTorrent training as well as the methods used by CSAEM possessors and distributors, Eggert indicated that he had probable cause to believe that an individual, using a device or devices connected to the

traced IP address at 132 Tuers Avenue, unlawfully had and distributed CSAEM, and that evidence of these crimes would still be present or found on a device located therein. (Cma4 to 12).

On November 3, 2021, the Honorable Vincent Militello, J.S.C., granted the search warrant, which repeated the same description quoted above.[7] (Cma17 to 20). The warrant specifically authorized the police, "with the necessary and proper assistance[,] to enter and diligently search 132 Tuers Avenue, Jersey City, Hudson County, New Jersey 07306, by first knocking and announcing [their] presence, and then by force if necessary, to seize and search evidence pertaining to the crime" of the distribution and possession of CSAEM. (Cma18). The warrant also authorized law enforcement to conduct an on-scene, forensic examination of the electronic devices that were allowed to be seized, such as "[a]ny and all computers." (Cma18; Cma20).

On November 5, 2021, members of the NJSP, from the ICAC Unit and the Technical Emergency and Mission Specialists (TEAMS) Unit, were briefed

[7] Judge Militello had previously issued a warrant to search 132 Tuers Avenue on October 21, 2021, but the State was unable to execute it due to a State of Emergency, from severe weather and flash flooding, being declared on the date of its planned execution. (Cma4; 1T42-5 to 18). Defendant has only included the old search-warrant application in his appendix. (Da30 to 43). In reviewing the sufficiency of the November 2021 warrant, however, this Court should refer to the warrant's corresponding November 2021 application, which has been provided in the State's confidential appendix. (Cma1 to 21).

at the Hudson County Prosecutor's Office in preparation for the warrant's execution that morning. (1T42-5 to 44-10; 1T48-1 to 50-2; 1T67-10 to 21; 1T78-25 to 79-22; 1T87-3 to 17; 5T71-6 to 73-6). Shortly after the briefing, the officers drove to the property, and members of the TEAMS Unit made entrance through the front door of 132 Tuers Avenue after knocking and announcing several times.[8] (1T50-3 to 51-17; 1T79-23 to 82-20; 5T73-10 to 76-9). Detective Eggert, the lead investigator, was not part of the initial entry and entered after the TEAMS unit deemed the premises safe and secure. (1T48-16 to 51-10; 1T54-17 to 55-3; Da18).

Detective John Barnett was a member of the TEAMS Unit, specifically the security team. (1T75-15 to 80-15). As part of the security team, Detective Barnett was in the first TEAMS group deployed to secure the property's perimeter; but he was in the last TEAMS group to enter 132 Tuers Avenue, following in after the breach and entry teams. (1T79-23 to 80-15; 1T87-18 to 23; 5T15-24 to 18-6; 5T73-10 to 77-9).

When no one answered the door after the breach team knocked and

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[8] The TEAMS Unit is the NJSP's tactical SWAT unit which makes the initial entry for any search warrant, securing the perimeter and clearing the subject property first to render it safe. (1T49-25 to 50-20; 1T54-17 to 19). The TEAMS Unit thus conducted the initial entry before the ICAC detectives entered to perform the actual search for evidence pursuant to the warrant. (1T48-1 to 51-6; 1T75-22 to 80-15).

announced several times, and waited, 132's front door was forcibly breached with a ram; the TEAMS groups then entered to clear 132 Tuers Avenue and render it safe. (1T80-20 to 82-20; 5T16-10 to 18-6; 5T29-4 to 31-25; 5T34-9 to 37-5; 5T73-10 to 77-22). Upon entering 132's front door, there was a stairwell that winded up to the second floor. (1T51-11 to 22; 1T82-6 to 20; Ra30 to 31; Ra37 at 0:00:01 to 0:00:13). The second floor had a hallway, with unnumbered bedrooms and a bathroom, that ran from the front of the property to its rear and led into a kitchen. (1T51-11 to 52-5; 1T61-15 to 20; 1T71-14 to 15; 5T136-17 to 137-11; Da44; Ra24). At the rear of the kitchen was another door on the left, that faced the left side of the property. (5T136-17 to 24; Ra24).

Because of the tactical flow of clearing the area, Detective Barnett was at the kitchen door when the police encountered it. (1T87-18 to 89-8; 5T10-16 to 12-14; 5T40-19 to 41-21). The kitchen door was closed but not locked, with no dead bolts or markings, and Barnett understood the door to be an interior door. (1T82-21 to 83-20; 1T88-7 to 24; 5T10-16 to 12-23; Ra24; Da55).

The kitchen door faced the left side of the property, and opened onto a rear stairwell landing. (Ra24; Da55). Across from the kitchen door was another interior door that had no markings that would have indicated it was a separate apartment; and there was no locking mechanism, such as a deadbolt,

on the door other than a locking doorknob, which looked like another bedroom's doorknob on the second floor. (1T51-11 to 52-2; 1T60-20 to 22; 1T90-12 to 16; 2T77-1 to 9; 5T10-16 to 12-18; 5T59-3 to 60-11; 5T90-14 to 91-4; Da55; Ra28; Ra38 at 0:00:20 to 0:00:26; Ra37 at 0:00:27 to 0:00:30; Ra35). This door led into the attic area on the third floor, (Ra39 at 0:00:01 to 0:00:24; Ra27); and, like the kitchen door, the door faced further into the left side of the property. Compare (Ra24; Da55) with (Ra36 at 0:00:15 to 0:00:23; Ra33 to 34); Compare (Ra24; Ra38 at 0:00:11 to 0:00:22) with (Cma2). Opening the door to the third floor would reveal stairs, ascending on the left side of the property. (Da55).

The motion judge found that the door to the third floor was closed when the police encountered it. (Da27). When the kitchen door had been first encountered, the officers "held there" for a moment, called over the squad leader, and waited to proceed further. (1T102-13 to 103-7; 5T10-16 to 14-3; 5T42-13 to 17; 5T48-20 to 24; 5T78-11 to 80-11; 5T105-1 to 10; 5T107-9 to 111-10). Detective-Sergeant First Class Joseph Villalta-Moran, the squad leader that day, granted the team permission to do so. (5T13-22 to 14-3; 5T43-8 to 16; 5T64-13 to 24; 5T67-10 to 17; 5T70-9 to 19; 5T76-10 to 82-10).

Detective-Sergeant Villalta-Moran explained that he authorized continuing with the entry because, based on what they knew from the

operations plan and search warrant, the subject property "was a two-family and it should typically include the second and third floor." (5T79-15 to 21). He further noted that the TEAMS Unit will also generally clear common areas, like a stairway, for officer safety, because "the expectation is that those areas are accessible by anyone and everyone in the residence" and that "someone could have fled into that." (5T79-15 to 80-17). Villalta-Moran also explained that if the team knows they are in the correct area, they have authorization to forcibly open a door if it needed to be—whether because the door was locked, barricaded, and/or being held closed by a person. (5T119-16 to 120-23).

At the bottom of the stairs was a locked door, facing into the right side of the property, that the police believed went into 130 Tuers Avenue; thus, the officers did not enter that door. (1T88-7 to 90-12; 1T97-8 to 98-9; 1T100-13 to 101-9; 2T37-15 to 38-6; 2T74-16 to 75-9; 5T12-15 to 17; 5T82-2 to 7). There was also an unnumbered exterior door, with a deadbolt, that exited to the property's back porch and yard. (2T32-19 to 34-9; 2T76-17 to 25; Cma2; Ra36 at 0:00:01 to 0:00:22; Ra39 at 0:01:04 to 0:01:45).

The stairs beyond the door to the third floor, facing into the left side of the property, winded up to a "loft area" that was centered over the building. (Da55; Ra39 at 0:00:01 to 0:00:47; 1T71-1 to 15; 1T94-5 to 96-21; Ra25 to 27). It began with, what Detective Barnett described as, a "small kitchen."

(1T94-5 to 96-21; Ra39 at 0:00:01 to 0:00:24; Ra27). But unlike the second floor, which had a full kitchen with an oven and washer-dryer unit for which the kitchen door, across from the door to the third floor, was unlocked, (Ra24; Ra37 at 0:00:31 to 0:00:39), the third floor (kitchen, so to speak) at most had a temporary stovetop, that could be "just put . . . on the table," with a fridge and sink. (Ra27; Ra39 at 0:00:01 to 0:00:24; 5T139-6 to 140-4; 5T156-13 to 157-8). And it appeared to the police that the third and second floors were in fact part of one residence. (1T94-15 to 96-21; Da44).

After the TEAMS Unit cleared the subject property and rendered it safe, Detective Eggert entered through the front door of 132 Tuers Avenue. (1T48-1 to 51-17; 1T62-9 to 14; 1T86-6 to 20). He stated there were no locked doors or obstructions as he moved along from the front door to the third floor. (1T51-18 to 52-11; 1T65-23 to 25; 1T90-20 to 91-2). In conducting the search authorized by the warrant, defendant's laptop was found turned on, running, and accessible (i.e., unlocked) in his bedroom on the third floor; and at that time, detectives were able to "pretty quickly" ascertain that it contained the same BitTorrent software that was sharing CSAEM, as well as CSAEM files.[9] (1T54-17 to 56-5; 1T60-3 to 10; 1T72-25 to 74-7; 2T67-4 to 69-12). The

[9] A later examination by the Regional Computer Forensic Laboratory discovered sixty-three videos, equal to 630 items of CSAEM, on defendant's laptop computer.

police were thus able to determine that defendant was their suspect due to what was on his laptop, and arrested him. (1T56-6 to 57-8; 1T58-11 to 60-10; 1T72-25 to 74-4; 2T68-4 to 18).

Pursuant to the search warrant, the police seized several electronic devices from defendant's room for further analysis, including multiple hard drives, two laptops, a thumb drive, and a cellphone. (1T64-10 to 17; 2T47-2 to 10). When the officers were finished, they left the same way that they entered, through 132's front door. (5T57-21 to 58-3).

A. The Complaint, and Judge's First Ruling on the Motion to Suppress.

Following the execution of the search warrant, defendant Ke Wang was charged on the same date, November 5, 2021, with two counts of endangering the welfare of a child (EWOC) under N.J.S.A. 2C:24-4(b) (for Possession of Child Sexual Abuse and Exploitation Material, and Maintaining Child Sexual Abuse and Exploitation Material via a File-Sharing Program). (Da1; Ra1 to 3).

On June 21, 2022, defendant filed a pre-indictment motion to suppress the evidence seized under the warrant. (Da2; 7T13-9 to 16; 7T16-22 to 17-20). On October 13 and 18, 2022, the Honorable Mitzy Galis-Menendez, P.J.Cr., held an evidentiary hearing and heard testimony on the motion. (1T; 2T). Following argument on September 22, 2022, January 5, 2023, and January 31, 2023, (3T; 7T; 8T), Judge Galis-Menendez denied the motion to suppress on

January 31, 2023, in an order and written opinion. (Da3 to 7). While the judge believed the door to the third floor was unlocked in initially denying the suppression motion, the judge also found that "the officers could not have known the interior layout of the home," and that the door to the third floor "appear[ed] to be an interior door similar to the [kitchen] door shown in S-3."[10] (Da6 to 7). Critically, the judge also found that "[d]efendant's room was in the attic accessed from the left side of the home, and it was reasonable for the police officers executing the warrant to believe [d]efendant's room was a part of 132 Tuers Avenue." (Da6) (emphasis added).

The judge also recognized, at the January 5, 2023, hearing: "Once [the police] have a warrant they're allowed to go through the whole house even if that means break[ing] in locked doors unfortunately. And that's my understanding of a warrant, whether we like it or no[t]." (8T40-13 to 41-22). The judge noted that what the police cannot do is "go into buildings and break down doors . . . in buildings we know they're separate units. So then the question becomes, how would [the police] have known that that was a separate unit"? (8T40-13 to 42-2).

In arguing the motion at oral argument, the trial prosecutor urged that

[10] Defendant included "S-3" (State's Exhibit 3) in his appendix for this appeal at (Da55). A clearer copy of this photographic exhibit was included in the State's appellant's appendix for Docket No. A-3517-23T4, at (Sa50).

the door to the third floor was unlocked based on the testimony; but, contrary to defense counsel's assertion, she never urged, "brief after brief," that the door was "wide open."[11] (3T; 4T39-11 to 40-24; 7T; 8T34-7 to 9; 8T39-4 to 8; Db11). Notably, the prosecutor urged that the relevant inquiry was what the officers knew, or could have reasonably found out, about the interior's layout before the warrant was executed, and not at the time they were clearing the house for potential dangers or other persons who may be armed. (8T17-17 to 20-8). The prosecutor further pointed out that the door to the third floor had no markings, and that it was "fairly illogical to assume that floors one and three [we]re part of one apartment and [that] floor two [wa]s part of another apartment . . . ." (8T18-21 to 19-3). Relying on State v. Hendricks, 145 N.J. Super. 27 (App. Div. 1976), the prosecutor emphasized "there was no way for [the police] to know the interior layout of the building." (8T17-17 to 19-25). And she noted that the State's argument would not change whether the door to the third floor was locked or unlocked. (8T33-21 to 34-11).

B. The Motion for Reconsideration.

On February 13, 2023, defendant, after acquiring new counsel, moved for reconsideration of the denial of his suppression motion, for which Judge

[11] In fact, at the reconsideration hearing on May 11, 2023, the prosecutor stated that she thought the unmarked door to the third floor was closed and the police opened it. (4T39-11 to 19).

Galis-Menendez heard argument on May 11, 2023. (Da8; Da10; 4T). In urging for reconsideration, defense counsel inaccurately represented that the door to the third floor was "on the far right of the house."[12] (4T41-25 to 42-24). (This is factually inaccurate, as shown by the photographic and video evidence of the building's structure. See (Rb7 to 8)).

Notably, however, defense counsel acknowledged that the door to the third floor was not marked, that the attic space was "an illegal apartment," and that the police would not have known the interior layout from the outside. (4T10-18 to 12-5; 4T15-19 to 21; 4T18-22 to 19-1). Defense counsel also acknowledged that, from the outside, the building appeared to be divided vertically. (4T14-23 to 15-1).

After hearing argument, the judge denied the reconsideration motion on the record. (Da9; 4T51-7 to 54-19). In denying the motion, the judge noted the only fact that would make a difference to her was whether the door to the third floor was locked and the police broke into it, (4T52-6 to 54-23), even

[12] The drawing that defendant included in his appendix at (Da50), purporting to show the interior of 132 Tuers Avenue, was first presented to the trial court in counsel's motion-for-reconsideration brief on February 13, 2023. (Ra40). As defense counsel explained to the judge at the reconsideration hearing on May 11, 2023, this drawing is not to scale, was created by his sister in architecture school, and he himself questioned whether the stairs were "exactly straight." (4T5-18 to 6-3). The drawing is not evidence, is inconsistent with the actual photographic and video motion evidence of the building's structure, and should not be relied upon by this Court due to its factual inaccuracy.

though the breach of a locked door does not mean that the area following it was not lawfully within the scope of the authorized search warrant.

C. The Subsequent Indictment.

Thereafter, on June 21, 2023, a State Grand Jury returned Indictment No. 23-06-0080-S, against defendant, charging him with two counts: second-degree EWOC for maintaining twenty-five or more items depicting the sexual abuse or exploitation of a child via a file-sharing program, in violation of N.J.S.A. 2C:24-4(b)(5)(a)(iii) (Count One); and third-degree EWOC for possessing child sexual abuse or exploitation material, in violation of N.J.S.A. 2C:24-4(b)(5)(b)(iii) (Count Two). (Da11 to 12).

D. Judge's Second Ruling on the Motion to Suppress, and Defendant's Motion to Dismiss the Indictment with Prejudice.

On September 1, 2023, defendant filed a second motion to reconsider his motion to suppress. (Da13; Da19). In support of the motion, defendant submitted a certification, dated September 7, 2023, from private investigator, Robert Hovan, who had interviewed the property owner, Jean Haedrich, in August 2023, and reviewed a photograph provided by defense counsel "depict[ing] the door that le[d] to [defendant]'s then attic apartment," opining that the police had likely used a Halligan Tool to open it. (Ra4 to 7). Defendant also submitted a discovery-request letter on September 12, 2023, (Da14 to 15), that the prosecutor addressed on September 18, 2023. (Da46 to

47).

On December 15, 2023, Judge Galis-Menendez held an evidentiary hearing on the reconsideration motion, hearing additional testimony from the State as well as testimony from Haedrich. (5T). The defense, however, did not call Hovan to testify. (5T).

During Detective-Sergeant Villalta-Moran's testimony, who testified at the reopened December 15, 2023 hearing but not the initial October 2022 hearings, it was revealed that possible "notes" had been taken down by the officer assigned to write the report for the search warrant's execution, most likely by Detective Barnett. (5T124-21 to 126-13). The trial prosecutor did not have such notes and was unaware that such notes existed. (6T15-10 to 16-21; 6T19-7 to 22; 6T44-17 to 46-24; Ra8). She immediately contacted Detective Barnett and asked if he made or kept any notes. (6T16-7 to 21; Ra8 to 9). Barnett responded that he did and provided her with the notes, which was a two-paged diagram of the searched location. (See Da44 to 45; Ra9). There had been a reference in Barnett's report to see the "attached diagram," but the diagram had not been attached—which both the trial prosecutor and defense counsel had inadvertently missed.[13] (6T15-10 to 25; 6T44-18 to 22;

[13] In answering a question on cross-examination at the reopened hearing on December 15, 2023, Detective Barnett stated that he would "have to reference [his] diagram," before Detective-Sergeant Villalta-Moran mentioned that

Ra9). As a result, the diagram had mistakenly not been turned over in discovery yet. (6T15-10 to 16-21; Ra8 to 9). Upon receiving the diagram, the trial prosecutor promptly turned it over to defense counsel on January 4, 2024. (6T13-17 to 19; 6T16-13 to 21; Da20 to 21).

The diagram stated: "Closet door outside kitchen was breached. No indication it was separate from the residence. Door led to 3rd Floor loft." (Da44). The diagram does not indicate how this door was "breached," unlike the front door to 132 Tuers Avenue (which the diagram noted was "[b]reached with [a] ram"). (Da44); (see also 5T31-3 to 34-16).

Detective Barnett testified at both the reopened hearing on December 15, 2023, and the initial evidentiary hearing on October 13, 2022. At the December 15, 2023, hearing, Detective Barnett testified that the door to the third floor was "closed" and "unlocked."[14] (5T12-1 to 13-4; 5T19-3 to 21-11). Barnett also testified there was no locking mechanism, like a deadbolt, on the door other than a locking doorknob. (5T59-13 to 60-11).

At the October 13, 2022, hearing, Detective Barnett testified that he

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possible notes had been taken. (5T37-6 to 38-7).

[14] Detective-Sergeant Villalta-Moran's testimony, referenced in the judge's opinion at (Da20), was about the kitchen door, noting it was "unlocked" and "[t]here was no need to breach it." (5T77-23 to 82-10; 5T101-20 to 120-20). Villalta-Moran did not recall if a tool was used to open the door to the third floor, or if anyone had to kick it open. (5T128-21 to 130-8).

believed that this door may have been "opened" or "unlocked," because there was no stopping as he was "mov[ing] up" with the team in a train and he was not the first officer up the stairs. (1T90-7 to 21; 1T97-5 to 98-9; 1T101-17 to 105-22). Barnett mistakenly recalled that the door for the third floor was at the top of the stairway. (1T88-7 to 90-16; 1T97-5 to 98-9; 1T101-17 to 105-22). But at the December 2023 hearing, Barnett recalled the door for the stairs to the third floor was in the second-floor hallway by the kitchen door.[15] (5T12-1 to 13-4).

On January 6, 2024, defendant filed a motion to dismiss the indictment, with prejudice, on Brady[16] grounds. (Da16; Db3). Judge Galis-Menendez heard oral argument on both motions—for reconsideration of the suppression motion and to dismiss the indictment—on May 1, 2024. (6T).

At the hearing, the judge stated that she had "serious concerns with the testimony . . . by the officer and the notes." (6T5-8 to 14). But the judge noted that she was not going to hold Detective Barnett to his testimony because he testified that he was not first in line in the train, recognizing that "[h]e was like behind in the line" and had no personal knowledge of how the

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[15] Detective Barnett also mentioned at the October 13, 2022, hearing too that the team stopped to seek permission to continue beyond the kitchen door. (Compare 1T100-13 to 105-22 with 5T13-5 to 14-3; 5T19-3 to 21-11).

[16] Brady v. Maryland, 373 U.S. 83 (1963).

door to the third floor was (or was not) breached. (1T90-7 to 21; 1T97-5 to 98-9; 1T101-17 to 105-22; 6T41-22 to 43-9). This was pointed out throughout the motion hearings by defendant's former and current defense counsel, and commented on by the judge. (4T19-16 to 21-5; 4T22-5 to 6; 4T26-16 to 23; 8T7-9 to 25; 8T12-10 to 13-2; 8T23-2 to 24-4; Da18 to 19).

On May 20, 2024, Judge Galis-Menendez issued a written opinion and order on both motions. (Da17 to 29). As to defendant's motion to dismiss the indictment, the judge ruled that Brady had been violated. (Da21 to 25). But in considering what happened, the judge determined that a dismissal of the indictment, with prejudice, was not warranted. (Da25). While the judge ruled that what happened, including Detective Barnett's testimony, was palpably negligent, the judge found that she "[could] not say that the [State's] conduct was willful or outrageous." (Da25 to 26). The judge therefore declined to dismiss the indictment. Ibid.

Still, for the "palpable negligence in this case," the judge stated that "[d]efendant must have a remedy" and granted the motion to suppress, thereby using a "palpable negligence" standard to suppress all the State's evidence seized under a valid warrant that was not based on the reasonableness of the police's conduct during the warrant's execution. (Da25 to 26). The judge did so too even though she recognized that the diagram had been turned over while

they were "still in the middle of the motion," while they were "still litigating the case," and while they were still at a point "where [the judge] c[ould] deal with it and fix it[.]" (6T47-13 to 48-6). The judge also alternatively addressed the merits of the motion to suppress and concluded—based on her mistaken belief that the door to the third floor was on the right side, or 130 Tuers Avenue side, of the property—that the breach of the door to the third floor was outside the lawful bounds of the search warrant. (Da26 to 29).

E. The Motions for Leave to Appeal.

On June 6, 2024, the State filed a Notice of Motion for Leave to Appeal, Docket No. A-3517-23T4, in this Court, challenging the judge's suppression of the evidence seized under the warrant that quashed the majority of the evidence against defendant.[17] (Ra17).

On June 10, 2024, defendant also filed a Notice of Motion for Leave to Appeal, in this Court, separately challenging the judge's denial to dismiss the indictment with prejudice for the inadvertently delayed discovery of the location diagram. (Ra18 to 19).

On July 15, 2024, this Court granted both the State's and defendant's motions for leave to appeal, calendaring the cases back-to-back. (Ra20 to 23).

[17] The State filed its appellant's brief for Docket No. A-3517-23T4, addressing the suppression of the evidence seized under the warrant, on September 23, 2024.

LEGAL ARGUMENT

POINT I

THE JUDGE PROPERLY DENIED DEFENDANT'S MOTION TO DISMISS THE INDICTMENT WITH PREJUDICE.

The judge properly exercised her discretion in declining to dismiss the indictment with prejudice for the delayed disclosure of the diagram. Two requirements must be met to dismiss an indictment with prejudice: (1) the State must have acted willfully, and (2) defendant's alleged prejudice must be irremediable with a lesser remedy. Neither of those minimal requirements were met here. The judge ultimately found that the State did not act wilfully or outrageously. And, as the judge recognized at the motion-to-dismiss hearing, the diagram had been turned over while the motion was still pending, while the case was still being litigated, and at a point "where [the judge] c[ould] deal with it and fix it[.]" (6T47-13 to 48-6). For these reasons alone, this Court should affirm the denial of defendant's motion to dismiss.

A. A dismissal of the indictment with prejudice was unwarranted under the circumstances, where the judge found that the State's conduct was not willful or outrageous and where defendant's alleged prejudice was remediable with a lesser remedy.

The judge properly exercised her discretion in declining to dismiss the indictment with prejudice for the State's inadvertently delayed disclosure of the diagram. "A decision to dismiss an indictment is generally left to the

sound discretion of the trial court and is reviewed only for abuse of discretion." State v. Zadroga, 255 N.J. 114, 131 (2023); see also State v. Washington, 453 N.J. Super. 164, 179-80 (App. Div. 2018) ("A trial court's resolution of a discovery issue is entitled to substantial deference and will not be overturned absent an abuse of discretion . . . that is well 'wide of the mark,' or 'based on a mistaken understanding of the applicable law.'").

"[I]n the context of a Brady violation, the remedy of dismissal of an indictment with prejudice is utilized when 'the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" State v. Brown, 236 N.J. 497, 528 (2019) (quoting United States v. Russell, 411 U.S. 423, 431-32 (1973)). Generally, the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." United States v. Morrison, 449 U.S. 361, 364 (1981); see also Washington, 453 N.J. Super. at 190 (noting "the sanction of preclusion is a drastic remedy and should be applied only after other alternatives are fully explored").

Where a defendant shows that the State committed a Brady violation, "the usual remedy is a new trial, not dismissal with prejudice." United States v. Swenson, 894 F.3d 677, 684 (5th Cir. 2018); Virgin Islands v. Fahie, 419

F.3d 249, 259 (3d Cir. 2005) (holding dismissal with prejudice was abuse of discretion because there was "no showing . . . of willful government misconduct," and because prejudice to accused could be corrected with lesser remedy). Where there is no willful misconduct that irremediably prejudiced the defendant, a dismissal of the indictment with prejudice is inappropriate. See Brown, 236 N.J. at 528; Fahie, 419 F.3d at 259 ("[T]o merit the ultimate sanction of dismissal, a discovery violation in the criminal context must meet the two requirements of prejudice and willful misconduct . . . .").

Here, the reopened suppression hearing, and the judge's consideration of the delayed diagram before she rendered her ruling on whether her initial motion-to-suppress decision should be reconsidered, wholly cured defendant's allegations of prejudice. And the inadvertent circumstances did not warrant the drastic remedy of dismissing the indictment with prejudice.

As the judge recognized at the motion-to-dismiss hearing, the delayed diagram had been turned over while they were "still in the middle of the motion," while they were "still litigating the case," and while they were still at a point "where [the judge] c[ould] deal with it and fix it[.]" (6T47-13 to 48-6). Because any prejudice to defendant was remediable with a lesser remedy, the judge properly exercised her discretion in declining to dismiss the indictment for this reason alone.

In addition, as the judge found, the State's conduct was not "willful" or "outrageous." (Da25 to 26). As soon as the trial prosecutor was aware that "notes" possibly existed, she immediately contacted Detective Barnett about them and asked if he made or kept any notes. Barnett responded that he did and provided her with the notes, which was a two-paged diagram of the searched location. Though there had been a reference in Barnett's report to see that "attached diagram," both the trial prosecutor and defense counsel inadvertently missed that the diagram had not been attached. Upon receiving the diagram, the trial prosecutor promptly turned it over to defense counsel—which defense counsel acknowledged at oral argument. See (6T13-17 to 19) (telling the judge that "to the State's credit, they provided [him with] the notes as soon as possible"); (Rb16 to 17).

As for Detective Barnett, the judge noted at the motion-to-dismiss hearing that she was not going to hold Barnett to his testimony because he testified that he was not first in line in the train, see (1T90-7 to 21; 1T97-5 to 98-9; 1T101-17 to 105-22), recognizing that "[h]e was like behind in the line" and had no personal knowledge of how the door to the third floor was (or was not) breached. (6T41-22 to 43-9). The judge ultimately found that his conduct was negligent. (Da25). Barnett also referenced the diagram of his own accord during his testimony at the December 2023 hearing—before Detective-

Sergeant Villalta-Moran testified—which is inconsistent with any motive that Barnett was trying to hide the diagram. (5T37-6 to 38-7).

These circumstances are unlike this Court's unpublished opinion, State v. D.A.B., No. A-1848-22 (App. Div. Sept. 19, 2023), that defendant relies on in his brief. (Db19). In D.A.B., the trial judge found that the prosecutor purposely misled defense counsel and withheld, during plea negotiations, that the victim had notified the State through her attorney, in writing, that she would not testify against defendant at trial if she were subpoenaed to do so. D.A.B., slip op. at 2, 4-8. Plus, at the time of the appeal, the prosecutor still had yet to provide the letter to defense counsel. D.A.B., slip op. at 5 n.5. Nothing of the sort happened here. D.A.B. is an outlier, unpublished decision, where the panel concluded that the prosecutor's conduct during plea negotiations compromised the integrity of the criminal-justice process. D.A.B., slip op. at 15-16. In turn, the panel there deferred to the trial judge's fact-findings and affirmed the judge's exercise of discretion that the dismissal of the indictment was warranted. D.A.B., slip op. at 13-17.

Rather than D.A.B., State v. Peterkin, 226 N.J. Super. 25 (App. Div.), certif. denied, 114 N.J. 295 (1988)—a published opinion by this Court—is more apposite. There, "one of the principal investigating police officers failed to preserve the photographic arrays from which identifications of [the]

defendants were made and attempted to conceal his dereliction by fabricating" new photo arrays. 226 N.J. Super. at 30-35 (emphasis added). Even in those egregious circumstances where the officer fabricated evidence, this Court on appeal reversed the trial court's dismissal of the indictments. In doing so, this Court held that dismissal of the indictments should have only been ordered "upon a finding that [the] defendants' rights to a fair trial ha[d] been irretrievably lost because of the police misconduct committed," and questioned "whether the public must pay the price by forfeiting its day in court on otherwise properly found indictments." Id. at 30-31, 38-39.

It is important to keep in mind that the purpose of the Brady rule "is not to punish society for a [State actor]'s conduct, but to avoid an unfair trial of an accused." State v. Vigliano, 50 N.J. 51, 61 (1967). Consequently, at a minimum, before an indictment is dismissed with prejudice, there needs to be a showing that the State acted willfully in withholding the undisclosed evidence, and the defendant must be prejudiced in a way that precludes him from receiving a fair trial. The key consideration is whether the discovery violation can be cured by a lesser remedy to ensure that a defendant has a fair trial.

The same is true for a violation of Rule 3:13-3, the court rule pertaining to discovery. Commonsensically, where dismissal of an indictment with prejudice would be inappropriate for a constitutional violation under Brady, so

too should dismissal be inappropriate for a court rule violation where a defendant's prejudice can be remediated by a lesser remedy. Even under Rule 3:13-3(f), which provides the remedies available for a discovery violation under Rule 3:13-3, "the public interest in the completion of criminal trials weighs against [dismissing an indictment] where other remedies are available," State v. Ruffin, 371 N.J. Super. 371, 388 (App. Div. 2004), and "this drastic remedy is inappropriate where other judicial action will protect a defendant's fair trial rights." State v. Clark, 347 N.J. Super. 497, 508 (App. Div. 2002). Indeed, dismissal of an indictment with prejudice is a "last resort because the public interest, the rights of the victims, and the integrity of the criminal justice system are [also] at stake." Ruffin, 371 N.J. Super. at 384. "An adjournment or continuance is [the] preferred remedy where circumstances permit." Washington, 453 N.J. Super. at 190.

Here, none of the minimal requirements for a dismissal of the indictment, with prejudice, was met. The judge found that the State did not act willfully or outrageously. And, as the judge recognized, the delayed diagram was disclosed while they were "still in the middle of the motion," while they were "still litigating the case," and while they were still at a point "where [the judge] c[ould] deal with it and fix it[.]" (6T47-13 to 48-6). In other words, defendant's rights to a fair trial had not been irretrievably lost by the delayed

disclosure—where the suppression hearing had been reopened, and the judge considered the diagram before she rendered her ruling on whether her initial motion-to-suppress decision should be reconsidered.[18] Under these circumstances, where the discovery error had already been remedied, the judge properly found that dismissal of the indictment with prejudice was unwarranted.

B. Additionally, as a matter of law, there was no *Brady* violation because the delayed diagram was not material for *Brady* purposes under the correctly applied Fourth Amendment analysis, and because the diagram was disclosed in time for its effective use at trial.

In addition, contrary to defendant's assertion, there was not a violation of Brady for the trial court to remedy. This is because the delayed diagram was not material for Brady purposes under a correctly applied Fourth Amendment analysis. And it was disclosed in time for its effective use at trial.

In Brady, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good

[18] Defense counsel misconstrued that the State's argument, in its brief in opposition to defendant's motion for leave to appeal, was "that dismissal was not warranted because [the] motion to suppress was granted." (Db18). Dismissal of the indictment with prejudice was still unwarranted, whether defendant's motion to suppress had been granted or not, because there were less drastic remedies available to cure defendant's allegations of prejudice and because the judge found that the State's conduct was not willful or outrageous.

faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added). To find a Brady violation has occurred, three elements must be established: (1) "the evidence at issue must be favorable to the accused either as exculpatory or impeachment evidence"; (2) "the State must have suppressed the evidence, either purposely or inadvertently"; and (3) "the evidence must be material to the defendant's case." Brown, 236 N.J. at 518 (citing State v. Nelson, 155 N.J. 487, 497 (1998)). Defendant bears the burden of establishing these elements. See State v. Martini, 160 N.J. 248, 268-89 (1999).

"[E]vidence is material if there is a 'reasonable probability' that timely production of the withheld evidence would have led to a different result at trial." Brown, 236 N.J. at 520 (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.'" Nelson, 155 N.J. at 500 (quoting Bagley, 473 U.S. at 682). In deciding materiality, courts "'examine the circumstances under which the nondisclosure arose' and '[t]he significance of [the] nondisclosure in the context of the entire record,'" considering the strength of the State's case, the timing of the disclosure, the relevance of the evidence, and its potential admissibility. Brown, 236 N.J. at 518-19 (quoting State v. Marshall, 123 N.J. 1, 199-200 (1991)).

However, "[n]o denial of due process occurs if Brady material is

disclosed [to defendants] in time for its effective use at trial." United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983); see also Swenson, 894 F.3d at 683-84. Therefore, as a matter of law, because the diagram here was disclosed before trial, in time for it to be effectively utilized at trial, Brady's principles were upheld. The diagram was disclosed four months before the judge rendered her decision on whether to reconsider her initial suppression ruling, addressed by the parties at the May 2024 motion hearing (and in briefing), and thoroughly considered by the judge in her final decision. The judge also could have ordered a continuance if she needed more time to consider it, or for the parties to address it.

Additionally, there was no Brady violation because, under the correct Fourth Amendment analysis, the delayed diagram was not material for Brady purposes. To evaluate "the constitutionality of police conduct in executing a warrant, the basic test under both the Fourth Amendment . . . and Article I, Paragraph 7, of the New Jersey Constitution is the same: was the conduct objectively reasonable in light of the facts known to law enforcement at the time of the search." State v. Rockford, 213 N.J. 424, 441 (2013); see also Maryland v. Garrison, 480 U.S. 79, 85 (1987) (holding courts must judge "constitutionality of [police] conduct in light of the information available to [the police] at the time they acted").

Here, irrespective of the witness testimony about whether the door to the third floor was closed, locked, or breached, the objective photographic and video evidence showed that the unmarked door to the third floor faced further into the left side, i.e., the 132 Tuers Avenue side, of the property; that the house appeared to be divided vertically from the outside; and that there were only two front doors for the two-family house, one on the far left marked "132" and one on the far right that was marked "130." And based on the facts known to the officers at the time they acted, which are more fully explained in the State's appellant's brief for Docket No. A-3517-23T4, the police reasonably believed this unmarked door to the third floor, facing further into the left side of the property, was part of 132 Tuers Avenue that was authorized to be searched under the warrant.

Under the circumstances of this CSAEM case—where an IP address being used to file-share known CSAEM files, by an unknown user over BitTorrent, was traced—probable cause existed to search the whole inside of 132 Tuers Avenue, subdivided or not, for the electronic devices that had been file-sharing or could be storing CSAEM pursuant to the search warrant. And whether the door to the third floor was locked or unlocked, the police's entry therein was reasonable to execute the search warrant for the entirety of 132 Tuers Avenue.

The law recognizes that "[a] lawful search of fixed premises generally extends to the entire area in which the object of the search may be found . . . ." State v. Watts, 223 N.J. 503, 515 (2015) (favorably quoting United States v. Ross, 456 U.S. 798, 820 (1982)); see also State v. Jackson, 268 N.J. Super. 194, 208-10 (Law Div. 1993). And it is usually "not limited by the possibility that separate acts of entry or opening may be required to complete the search." Ross, 456 U.S. at 820-21. The law also recognizes that "officers executing search warrants on occasion must damage property in order to perform their duty," Dalia v. United States, 441 U.S. 238, 258 (1979), and may break open locked interior doors in carrying out a search warrant. See Lynch v. City of Mount Vernon, 567 F. Supp. 2d 459, 467 n.5 (S.D.N.Y. 2008) (quoting Dalia and rejecting "argument that it was unreasonable for the officers to break down locked interior doors in carrying out the search [warrant]"); Simmons v. Loose, 418 N.J. Super. 206, 217-18, 227, 229-30 (App. Div. 2011) (quoting Dalia and holding damage inflicted to five, locked interior doors was consistent with a reasonable execution of search warrant under review).

For these reasons, under the totality of circumstances presented here, whether the door to the third floor was closed, locked, or breached does not change that the officers' conduct was reasonable in executing the search warrant for 132 Tuers Avenue, which is all that is required. See Rockford, 213

N.J. at 441. As a result, the delayed production of the diagram should not have resulted in the suppression of the evidence that was seized under this valid and reasonably executed warrant. Consequently, under a correctly applied Fourth Amendment analysis, the delayed diagram did not violate Brady, because it was not material for Brady purposes.

To be clear, this is not to say that the State did not have a discovery obligation to disclose the diagram. But, to find a Brady violation for the trial court to remedy, materiality must be shown. And here, under the applicable Brady standard, there was no violation of Brady to remedy—because, under a correctly applied Fourth Amendment analysis, the delayed diagram was not material for Brady purposes.

Nonetheless, whether or not there was a Brady violation, the judge properly exercised her discretion in finding that a dismissal of the indictment with prejudice was unwarranted. As the judge recognized, the diagram was disclosed while the motion to reconsider her initial suppression ruling was still pending, at a point where she "c[ould] deal with it and fix it." Overall, the reopened suppression hearing, and the judge's consideration of the delayed diagram before she rendered her ruling on the motion, wholly cured defendant's allegations of prejudice. And the judge ultimately found that the State's conduct was not willful or outrageous.

CONCLUSION

For the foregoing reasons, the State urges this Court to affirm the denial of defendant's motion to dismiss the indictment with prejudice, and to reverse the judge's suppression of the State's evidence seized under a valid and reasonably executed search warrant.

Respectfully submitted,

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Dated: October 15, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

STATE OF NEW JERSEY	**: Indictment No. 23-06-00080-S**
	: App. Dkt. No. A-003522-23T1
v.	**: Sat Below:**
	: Hon. Mitzy Galis-Menendez, Pr.Cr.
KE WANG	**:**
	: Criminal Action

REPLY BRIEF IN FURTHER IN SUPPORT OF APPELLANT, KE WANG

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RESPONDENT IS ON PRETRIAL RELEASE

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PRELIMINARY STATEMENT

In opposing Ke Wang's ("Appellant") appeal, the State ("Respondent") argues in pertinent part that:

(1) The trial court's thorough consideration of the diagram before granting the motion to suppress cured any prejudice.

(2) Det. Barnett ("Barnett") withholding his notes and twice perjuring himself on the stand was not willful or outrageous.

(3) Barnett's notes were provided in time for their effective use at trial and were not material.

The irony and disingenuousness of Respondent's arguments is palpable. Respondent argues that dismissal is not warranted because the trial court "wholly cured any prejudice" in granting Appellant's motion to suppress. Respondent makes this argument while at the same time arguing in its cross appeal, see, Docket No. A-3517-23T1, that the trial court erred in granting the motion to suppress. Respondent's parallel arguments are insincere, contradictory and further demonstrate the bad faith with which this matter is being litigated.

Equally as baffling is Respondent's argument that the undisputed fact Barnett withheld his notes and took the stand twice and perjured himself is neither willful nor outrageous. It is hard to imagine more egregious conduct than an officer taking an oath before a court and flat out lying to try and justify an unlawful search. It is the willful and outrageous conduct that is generally saved for Hollywood fiction, and which is rarely seen in actual courts.

Respondent further argues that no Brady violation occurred because Barnett's notes were immaterial and were provided in time for their effective use at trial. First, Barnett's notes were material. Appellant's motion to suppress was premised on the notion Appellant's door was breached. The trial court even unequivocally told the parties that the only issue which would be dispositive was proof that Appellant's apartment door was locked. Second, it is irrelevant that the notes were provided prior to trial. Under Respondent's theory the State could withhold evidence that is material to motion practice with impunity so long as they provide such information prior to trial. Respondent's position is illogical and contrary to our well settled laws and rules.

LEGAL ARGUMENT

POINT I

THE INDICTMENT SHOULD HAVE BEEN DISMISSMED

A. Barnett's conduct was Willful and Outrageous

Respondent argues that the trial court properly denied Appellant's motion to dismiss the Indictment because Barnett's conduct was neither willful nor outrageous. In assessing this issue the trial court stated:

> "It is clear that [Barnett] testified twice before the court that [Appellant's] door to his third-floor apartment was closed and unlocked. It is now clear, from [Barnett's] own notes, that [Appellant's] door was to his third-floor apartment was breached. The Court is troubled by the fact that [Barnett's] notes only came to light after Sgt. Villalta-Moran's admission of them during his testimony. This provides further evidence that [Barnett's] disclosure was at the very least negligent as they were his notes and he on one

> occasion under oath stated there was no breach. This court cannot allow the State to withhold information from a Defendant that goes directly to the issue this Court has stated it finds dispositive to prevent an unfavorable outcome.
>
> While the circumstances are concerning, a dismissal of the Indictment is not warranted. The Court cannot say the conduct was willful or outrageous." Da. 25.

Although Respondent has married itself to this language, the trial court's factual findings and legal finding that Barnett's conduct was neither willful nor outrageous cannot be reconciled. Willfulness, by its plain meaning, is an intentional or deliberate act. Outrageousness is shocking conduct. The Supreme Court has described outrageousness in the criminal context as conduct that violates "fundamental fairness" or shocks "the universal sense of justice." United States v. Russell, 411 U.S. 423, 432 (1973).

The trial court found that Barnett perjured himself. The trial court further found - based on Respondent's concession that it did not want to recall Barnett - that no further testimony from Barnett would matter as "no information would change the outcome." Da. 26. These factual findings, which Respondent does not contest, only lead to one logical conclusion: Barnett intentionally perjured himself and no further testimony would explain away his conduct. An officer intentionally lying and withholding evidence is beyond outrageous.

An officer intentionally lying and withholding evidence, with an intent to "prevent an unfavorable outcome," as the trial court described it, is beyond outrageous. Da. 25. Barnett's willful and outrageous conduct is

imputed to Respondent. See generally, State v. Carter, 69 N.J. 420, 429 (1976) (imputing knowledge of police investigator to prosecutor); State v. Lozado, 257 N.J. Super. 260, 274 (App. Div. 1992) (imputing knowledge of police to prosecutor); United States v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993) (imputing knowledge from "all enforcement agencies that had a potential connection with the witness" to prosecutor); United States v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991) (imputing information known to "some arm of the state" to prosecutor).

Barnnett's actions cannot be described as anything other than willful and outrageous.

B. Respondent argues that Appellant suffered no prejudice because his motion to dismiss was granted while at the same time appealing that decision

Respondent argues that any allegations that Appellant had of being prejudiced were wholly cured because the trial court considered the withheld discovery prior to ruling on the motion to suppress. Respondent makes this argument while cross appealing the trial court's granting of the motion to suppress. See, Docket No. A-3517-23T1. The State's positions cannot be reconciled. Respondent cannot argue that everything is fine because Appellant's motion to suppress was granted and at the same time argue that the primary justification for not dismissing the instant Indictment (the fact the motion to suppress was granted) should be vacated in a parallel appeal. Respondent has accused the trial court of conflating the suppression and Brady issues when in fact it is the

Respondent trying to boldly conflate the two issues by double talking to gain an advantage.

C. The case law supports dismissal

Appellant concedes, as Respondent argues, that D.A.B. is factually distinguishable from the instant matter. It is, however, hard to determine which matter is worse. A victim's unwillingness to testify against their accuser in a domestic violence matter is commonplace in our municipal and superior courts. An officer withholding evidence, perjuring himself only to take the stand a second time and maintaining his deceit to win might be the most egregious and deplorable conduct an officer can engage in. Our entire system is premised on the pursuit of the truth; whatever that truth might be. An officer taking the stand and willfully lying under oath to circumvent his sworn oath to uphold the Constitution is disgraceful. Although the State's conduct in D.A.B. is deplorable Barnett's conduct in this matter is worse as it undermines the foundation upon which our entire system is based, truthful testimony.

Respondent's reliance on State v. Peterkin, 226 N.J. Super 25 (App. Div.), certif. denied, 114 N.J. 295 (1988) is also misplaced. Peterkin did "not concern prosecutorial concealment or suppression of exculpatory and material evidence" and "does not involve constitutionally offensive 'suppression by the prosecution of evidence favorable to the accused.' " as this case does Id. at 39. Peterkin dealt with the inadvertent destruction of evidence and an attempt to cover up the destruction of evidence. The

instant matter is far different. Here, Barnett took the stand under oath and withheld his notes which proved he was lying to intentionally mislead the court and save an unconstitutional search. Barnett's actions are so outrageous they are almost unbelievable.

D. Barnett's notes were material and their disclosure prior to trial is totally irrelevant

Respondent argues that Barnett's notes were not material to the outcome of the motion. The materiality standard is specifically designed to encourage prosecutors to disclose information to the defense in close cases. Kyles v. Whitley, 514 U.S. 419, 439-40 (1995). This case is not even remotely close. Respondent was required to disclose Barnett's notes so long as there was a "reasonable probability" that the result would be different. United States v. Bagley, 473 U.S. 667, 682 (1985).

The trial court told the parties, under no uncertain terms, that the only thing that would be dispositive was if there was proof that Appellant's door was locked when the officers entered it[1]. Barnett's notes unequivocally proved, as Appellant long argued, that the door to Defendant's separate apartment was locked and breached. Barnett's notes were not only material but were dispositive.

As if the trial court's instruction was not enough to show the materiality of Barnett's notes, Respondent's supplemental discovery

[1] This is consistent with State v. Nunez, 333 N.J. Super. 42, 51 (App. Div. 2000) where this Court found that "the fact of whether a door is locked or unlocked a … reliable predictor of a reasonable expectation of privacy."

request and renewed motion to suppress solidified this issue. Respondent's argument completely ignores the fact that on September 12, 2023, Appellant served a supplemental discovery request on Respondent. Da14-15. Appellant's supplemental request asked for the identities of all the officers that made up the TEAMS unit, the identity of the officer who breached Appellant's door, and the identity of any officers that possessed a Halligan tool. Barnett's notes were responsive to the trial court's instructions as well as Appellant's detailed request.

On September 18, 2023, months before Barnett testified for a second time, Respondent replied to Appellant's supplemental discovery requests by letter. Da46-47. Respondent rebuffed Appellant's very tailored requests and redirected Appellant to Barnett's narrative report for "pertinent details of the TEAMs entry on the date of the search warrant." Id. Respondent knew the trial court was laser focused on how the officers entered Appellant's apartment door and knew Appellant was seeking information about the officer's entry on the day the warrant was executed. Despite these uncontested facts, Respondent maintained Barnett's charade by failing to turn over his notes and then allowing him to perjure himself for a second time to 'win' the motion to suppress.

More bewildering is Respondent's argument that there is no harm because Barnett's notes were produced prior to trial. This argument completely undermines our broad discovery Rules and the State's ongoing Brady obligations. If this Court was to adopt this line of

reasoning it would in essence allow the State to withhold evidence that is favorable to a defendant's pre-trial motions so long as they provide the favorable evidence prior to trial and after the motions have been decided. This argument haunts the very tenants that our rules are based on.

CONCLUSION

For the forgoing reasons the trial court's decision to deny the motion to dismiss the Indictment should be overturned.

Respectfully yours,

s/ Joel Silberman_____
Joel Silberman, Esq.