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March 23, 2025

Honorable Marc C. Lemieux, A.J.S.C.
Monmouth County Courthouse
71 Monument Park, 3rd Floor
Freehold, NJ 07728

Re: **State v. Paul Caneiro**
Case No. 18-004915 / Indictment No. 19-02-283-I

Defense Response to State's Watson Motion

Dear Judge Lemieux:

Please accept this letter brief, in lieu of a more formal brief, in response to the State's previously filed Watson motion.

RELEVANT FACTS

On February 28, 2025, the State filed a Proffer of Testimony in accordance with State v. Watson, 254 N.J. 558, 605 (2023). The Proffer of Testimony reveals the State's intent to call three key witnesses to narrate the events depicted in various video recordings it seeks to introduce at trial: (1) Detective Ryan Mahoney, (2) Captain Brian Weisbrot, and (3) Lieutenant Patrick Petruzziello – all of whom are employed by the Monmouth County Prosecutor's Office. In its proffer, the State details each officer's involvement in the case and identifies the specific video evidence the State intends to have narrated.

At the outset, the defense notes that it does <u>not</u> object to all of the proposed testimony. Specifically, as it relates to these detectives' testimony, the defense does <u>not</u> object to narration testimony that is limited to providing the jury with <u>helpful</u> contextual details. For example, the defense does not object to these witnesses providing testimony that introduces jurors to the visible streets and that clarifies the directions in which the houses and cameras are facing. The defense has no objection to objective testimony that would orient the jurors to the time and location. Likewise, the defense has no objection to testimony regarding the camera placements and the geographic context of the footage.

Beyond these <u>helpful</u> narrations, however, and as discussed in detail below, the defense objects to the proposed narration testimony outlined by the State. Contrary to <u>Watson</u>, this testimony is speculative, inference-driven, improper opinions, and disputed.

<u>RELEVANT LAW</u>

In <u>State v. Watson</u>, supra, our New Jersey Supreme Court established clear guidelines regarding the admissibility of narration testimony by a law enforcement officer who reviewed video evidence, but did not observe the events in real time. 254 N.J. 558, 600-608 (2023). Specifically, our Supreme Court provided the following guidance:

First, pursuant to <u>N.J.R.E.</u> 701, an "investigator who has carefully reviewed a video a sufficient number of times prior to trial can [] satisfy the rules' 'perception' and 'personal knowledge' requirements as to what the video depicts." <u>Id.</u> at 601. However, "Rule 701 also contains a critical limiting requirement that is important in the context of narration evidence: a lay witness may only present testimony that will be **<u>helpful</u>** to the jury." <u>Ibid</u>. (Emphasis added). Therefore, assuming the State's proposed witness has in fact reviewed the video 'a sufficient number of times,' the remaining issue for determination is whether the narration testimony will be "helpful" to the jury. "Whether narration testimony is 'helpful' depends heavily on the nature of the recording and the proposed comments." <u>Ibid</u>. Additionally, "whether narration evidence is helpful turns on the facts of each case." <u>Id.</u> at 602.

As our Supreme Court goes on to explain, there are indeed instances where narration testimony can be "helpful." For instance, when the video depicts "types of chaotic or confusing recorded events that are not easy to follow" narration testimony may be helpful because it is "unrealistic to think jurors can absorb that type of content when a video is played at trial" nor should we leave them to resort to playing the video "repeatedly" during deliberations to "trace individual movements from frame to frame." Id. at 601. Likewise, if there is "a small or nuanced detail" that the State is concerned about the jury missing, narration testimony may help "draw a jury's attention to particular spots" of the video, after which the jury can then "make its own evaluation" of what the video evidence shows. Id. at 601. In sum, the "helpfulness prong can be satisfied when an investigator draws attention to key details that might be missed, or helps jurors follow potentially confusing, complex, or unclear videos that may otherwise be difficult to grasp." Id. at 602.

In contrast, "narration testimony may **not** be helpful if a video is clear and not otherwise hard to follow or grasp." Id. at 602. (Emphasis added).

Regardless of whether the testimony is 'helpful,' however, "[n]arration testimony must also comply with N.J.R.E. 403[,]" which "guards against the risk of 'undue prejudice, confusion of issues, . . . misleading the jury . . and needless presentation of cumulative evidence." Id. at 602. As such, the Court makes clear that "[p]lacing appropriate limits on narration testimony can help avoid these problems." Ibid. These limits are vital "to ensure that the testimony does not improperly intrude on jury's domain." Id. at 603.

Most critically, our Supreme Court emphasizes in three separate parts of its Opinion – at 599, 602, and again at 603 -- that "narration evidence by a witness who did not observe events depicted in a video in real time **may not include opinions about a video's content and may not comment on facts the parties reasonably dispute**." Id. at 599; see also, id. at 602-03. As to the former, investigators can describe what is depicted on a recording "but may not offer opinions about the content." Id. at 603. That is, "they can present objective, factual comments, but not subjective interpretations." Ibid. As to the latter, "investigators may not offer their views on factual issues that are reasonably disputed" by the opposing party in good faith. Ibid. "Those issues are for the

jury to decide." Ibid. Thus, "a witness cannot testify that a video shows a certain act when the opposing party reasonably contends that it does not." Ibid.

An example is that – if not reasonably in dispute, the witness could testify that the "individual opened the door with his elbow" however, the witness cannot say, "he did so 'to avoid leaving fingerprints[.]'" Id. at 603. Again, even the 'opened the door with his elbow' testimony is only permitted if not reasonably disputed by the opposing party. Ibid.

In addition to these two critical limitations on narration testimony, another important rule set by the Court is that "continuous commentary during a video by an investigator whose knowledge is based only on viewing the recording" is not permitted. Id. at 603. "To avoid running commentary, counsel must ask focused questions designed to elicit specific, helpful responses." Id. at 603. Therefore, questions such as "what do you see?" are not acceptable. Ibid.

Additionally, "investigators should not comment on what is depicted in a video based on inferences or deductions, including any drawn from other evidence." Id. at 604. The reason is that inferences and deductions are not permitted is because "[t]hat type of comment is appropriate only for closing argument." Ibid. In fact, our Supreme Court expressly rejected this 'factor' originally suggested by the Appellate Division. Ibid.

"Consistent with [these] principles, an investigator who carefully reviewed a video in advance could draw attention to a distinctive shirt or a particular style of car that appear in different frames, which a jury might otherwise overlook." Id. at 604. However, an investigator is not permitted to say, "that's the same blue car" or "that's the defendant" if these facts are disputed. Ibid. Of course, the testifying investigator must "refrain[] from referring to the [perpetrator] as 'the defendant' in his testimony." Id. at 608.

The Court goes on to cite additional examples. In a drunk driving case, for instance, a bartender could testify to the specific times that she served a patron a drink. Ibid. Only if the person's identify is not in dispute, could she also testify that the patron is the defendant. Ibid. What she is not permitted to say is that "the defendant had been drinking

heavily for an hour and a half." Id. at 604. This would constitute an impermissible inference and/ or opinion testimony.

The Watson Court also directs our attention to State v. Dante Allen, another 2023 NJ Supreme Court case, to highlight these principles. 254 N.J. 530 (2023). Since the Dante Allen case "involved a shooting incident with sharply disputed facts[,]" it was improper for the detective to testify "that the video showed the defendant turn and fire his weapon." Id. at 604-05. Likewise, it was not permissible that the testimony was prompted with an open ended "what do you see" question and that the testimony then offered a "play-by-play" of the suspect's movements throughout the 57-second surveillance video. Id. at 607. Because the "video was not confusing, chaotic, or lengthy" and the jury "could follow it on its own[,]" "[c]ontinuous commentary and speculation about each step the robber took inside the bank did not satisfy the requirements of the rules of evidence." Ibid.

The Court also highlights that it was not permissible for the testifying detective in Dante Allen to "qualify" his testimony with language that suggested he was offering an opinion about what the video showed, such as stating, "it **appears** the suspect removes the glove"; "it **appears** that either his left hand is on the door or in the area of the door"; and "it **looks like** he's using his elbow." Ibid. (Emphasis added). Similarly, the detective was not permitted to state, "in my opinion, from my observations, it looks like . . . [.]" Id. at 608. However, it was permissible for the detective to explain that "parts of the video helped him 'locate areas of interest for his processing of the crime scene.'" Id. at 605.

Importantly, "[a] lay witness with requisite knowledge can also testify about basic foundation issues: how long a recording is; when it was recorded; what device recorded it; the angle of the recording device; and similar points." Id. at 607. Likewise, "specialized knowledge would not ordinarily be required for other types of adjustments, like adjusting the speed of a video or creating a straightforward composite video, a screenshot, or an enlarged photo from a video. A lay witness can testify about those basic techniques[.]" Id. at 607. However, when testimony does call for "scientific, technical, or other specialized knowledge," then that testimony is considered expert testimony subject to N.J.R.E. 702. Id. at 592.

At bottom, at the heart of <u>Watson</u> is the fundamental principle that **the jury is the exclusive factfinder**, and trial courts must ensure that narration testimony does not improperly influence or usurp this role. To that end, our Supreme Court directs prosecutors "to provide a written summary of proposed narration testimony to defense counsel" and, "[f]or items that remain in dispute, the [prosecutor] should file a motion in limine to introduce the narration testimony." <u>Id.</u> at 605. Then, "[t]he trial court, in its discretion, may conduct a Rule 104 hearing to resolve any outstanding issues." <u>Ibid.</u>

LEGAL ARGUMENT

POINT I

A TESTIMONIAL 104 HEARING IS NECESSARY BECAUSE THE DEFENSE OBJECTS TO THE NARRATION TESTIMONY PROFFERED BY THE STATE AND REASONABLY DISPUTES FACTS THE STATE INTENDS TO HAVE NARRATED.

It is undisputed that Mahoney, Weisbrot, and Petruzziello did not witness the events depicted in the surveillance videos. None of them have first-hand personal knowledge. Nevertheless, the State intends to present what is seemingly copious amounts of narration testimony, much of which is contrary to <u>Watson</u>, constituting improper speculation, inference, or opinion testimony. Additionally, some of which calls for specialized testimony i.e. an expert opinion.

1. **Detective Ryan Mahoney**

According to its proffer, the State intends to have Detective Mahony narrate numerous videos he reviewed during his investigation. These videos were used to construct a timeline that is central to the State's case. However, this timeline is not only critical to the prosecution's theory—it is also fundamentally in dispute. A closer examination of Detective Mahony's proposed testimony, video by video, underscores why the State's proposed proffer is improper.

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30 Tilton Drive, Ocean, NJ – Channel 7 – Approx 2:07 AM

(*Proffer at 3*).

The State's proffer states that Detective Mahony will testify that the surveillance footage shows "a flickering of lights **indicative** of vehicle flashers (**possibly** unlocking of vehicle doors)" followed by "headlights coming from the area of Paul Caneiro's home." (Emphasis added).

The defense objects to this testimony because it is a purely speculative opinion, contrary to what is permitted by Watson. See Watson, supra, at 599, 602-03. It also constitutes drawing an inference, which is likewise not permitted by Watson. Id. at 603. Additionally, "indicative" and "possibly" are the type of 'qualifying' language that Watson prohibits. Id. at 607.

The proffer goes on to state that "The vehicle can then be observed on Tilton Drive traveling toward Green Grove Road." While it is dark outside, the video itself is not especially complex - a juror can plainly see a vehicle driving down the identified street, making Detective Mahony's narration of this portion of the video unnecessary and unhelpful.

Lastly, the proffer states, "The Detective will likely utilize photographs or daytime video to provide visual and spatial orientation to the area given the darkness of night."

Based on this statement, the defense is uncertain whether it finds this possible testimony acceptable. First, the State is indicating that it "likely" will do so. Watson makes clear, however, that the defense must be on notice of what the State actually intends to do. Second, the State has not identified which "photographs or daytime video," specifically, the State intends to utilize to orient the jury to the location depicted in the video. As such, this is another reason why a 104 hearing is necessary: the defense must be able to see what additional videos/ photographs the State intends to splice together with this night time video, and the Court must be able to observe same in order to decide whether it is admissible under Watson.

30 Tilton Drive, Ocean, NJ – Channel 5 – Approx 2:07 AM

(*Proffer at 3*).

The State's proffer indicates that Detective Mahony will testify that this video shows the same vehicle as in the Channel 7 footage, traveling on Tilton Drive toward Green Grove Road. The proffer further states that, "Careful review of this video allows the first glimpse at **a distinct tail/ brake light pattern/ configuration**, which is consistent with other video to be discussed." The State contends that, "Detective Mahoney can explain, consistent

with the <u>Watson</u> holding which specifically allows for such explanation, **the light configuration in relation to the Porsche Macan** which was seized from the defendant's driveway on November 20, 2018, <u>**utilizing the assistance of other video as well as photographs for purposes of context and comparison**</u>[.]"

First, again, the defense in unclear what "other video as well as photographs" the State intends to use to assist in the narration of this particular video. Without observing testimony, or knowing specifically what additional video/ photos the State intends to use, and how Mahoney specifically intends to incorporate them into his testimony, the defense is left in the dark contrary to <u>Watson</u>'s intent to ensure notice to the defense. Without seeing this evidence, and how the State wants to use it to assist in its narration, the defense objects.

Next, the defense objects to the testimony related to the purported "distinct tail/ brake light pattern/ configuration." The defense disputes that the claim that the vehicle in the footage displays a "distinct" light pattern. Moreover, if it somehow did, this would require an expert opinion given the blurry, unclear nature of this footage. (<u>Exhibit A</u>).

The defense is confounded by the State's claim that 'the <u>Watson</u> holding specifically allows for such explanation.' To the contrary, <u>Watson</u> makes clear that this testimony is <u>not</u> permitted: an investigator is <u>not</u> permitted to say, "that's the same blue car" if this fact is disputed. <u>Id.</u> at 603. Although <u>Watson</u> does state that the investigator can "draw attention to a distinctive shirt or particular style of car that appear in different frames" – this is only when the facts are not in dispute, and, when the various video frames make objectively clear the vehicle is, in fact, the same vehicle.

Here, the video is dark, blurry, and far from clear. (<u>See</u> <u>Exhibit A</u>). Additionally, the State's purpose in attempting to identify "a distinct" vehicle light pattern is so that the State can then argue that the vehicle depicted in these Ocean Twp. videos near Paul Caneiro's home is the same vehicle that is later seen on similar dark, blurry, unclear surveillance video in Colts Neck, near Keith Caneiro's home. This is what the defense disputes. The defense disputes that the vehicle depicted in the Ocean Twp. surveillance is the same vehicle depicted in the Colts Neck surveillance. The defense suspects that not even an expert could draw this conclusion based on the poor quality of these videos.

308 Green Grove Road, Ocean, NJ – Channel 3 and Channel 4 – Approx 2:07 AM
(Proffer at 4)

The State's proffer for these two videos again wish to improperly identify the vehicle and its "distinctive" brake lights. However, these videos are likewise unclear, and without an expert who possesses specialized knowledge, the State cannot offer this testimony through speculative, lay opinion testimony. (<u>Exhibit B</u>).

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85 Willow Brook Road, Colts Neck, NJ – Surveillance Camera affixed at the bottom of the driveway facing the street – Approx 2:23 & 2:26 AM
(Proffer at 4-5)

The State claims that this video depicts a vehicle consistent with those seen in the Ocean Twp. videos, once again citing the "unique tail light/ brake lights as seen on the Porsche Macan."

The defense once again objects to narration testimony regarding the brake and taillight configuration in the video -- especially any assertion that it matches the pattern as seen in the Ocean Twp. Surveillance videos or as seen on the Porsche Macan.

These videos – which are even more unclear and blurrier than the Ocean Twp. videos, do not clearly depict any specific vehicle, let alone any specific taillight/ break light configuration. (Exhibit C). Moreover, contrary to the State's assertion, the configurations do not match with that seen in the Ocean Twp. videos. This fact is strenuously disputed.

Likewise, given the blurriness and lack of clarity of these videos, the defense also strenuously objects to any testimony that the break lights/ taillights match those seen on the Porsche Macan. Again, this testimony is not only disputed but also improper lay opinion and speculation testimony.

Notably, in its brief, the State argues that it should be permitted to reference the Porsche Macan specifically -- and introduce photographs of the vehicle -- by analogizing this case to State v. Singh, 245 N.J. 1 (2021). In Singh, the Court allowed an investigator to testify that the shoes seen on a suspect in a surveillance video were similar to those worn by the defendant at the time of his arrest. Id. at 17–18. For context, the surveillance footage in Singh depicted a suspect approaching a gas station from outside near a dumpster, entering the front door, turning right, and confronting the store clerk with a knife. Id. at 8. During trial, the investigating detective testified about the suspect's attire, specifically highlighting the suspect's shoes and stating they were consistent with the shoes the defendant was wearing at the time of his arrest. Id.

The facts of Singh are easily distinguished from the instant matter. The surveillance video in Singh was complex—it involved multiple individuals, a weapon that could draw jurors' focus, and a suspect moving from outside to inside the building. Given these dynamics, it is reasonable that jurors might overlook the similarity in footwear. That concern simply does not apply here. The surveillance videos in this case are relatively short and simple, showing a single moving object on which jurors will naturally focus. Unlike Singh, there is no risk that jurors will "miss" a relevant detail due to the video's complexity.

Moreover, the surveillance footage in <u>Singh</u> clearly depicted white sneakers with a stripe—a readily identifiable characteristic that allowed for comparison. Here, by contrast, the State's videos do not clearly depict any specific vehicle, let alone one with distinguishing features. There is nothing in the footage that definitively identifies the car or cars in question, nor anything sufficient to establish that they are the same vehicle or "consistent with" the Porsche Macan that Mr. Caneiro was loaned. As stated, it is very much disputed that the vehicle in these dark blurry videos can be identified in any fashion.

44 Willow Brook Road, Colts Neck, NJ – Approx. 2:27 AM & 3:48 AM

(Proffer at 5)

The State's proffer indicates its intent to introduce two videos from this location—one timestamped 2:27:46 and the other 3:48:16. Once again, the State asserts that the footage depicts a vehicle whose "taillights are again consistent with that of the Porsche Macan." In the proffer for the later timestamped video, the State claims the vehicle "**appears to be the same vehicle** with the tail lights consistent with the Porsche Macan[.]" Additionally, the State wants Mahoney to testify that, "The vehicle **appears as if it is slowing down** as it passes Caneiro's home."

To be clear, these videos are the most unclear yet: they are blurry, distorted, dark, and entirely unclear. (<u>Exhibit D</u>). As a result, the make, model, style, and color of the vehicle cannot be determined with any degree of certainty in either video. The State's attempt to draw definitive conclusions from such unclear footage is not permitted by <u>Watson</u>.

Thus, again, these are disputed factual issues. Moreover, "**appears** <u>to be the same vehicle</u>" and "**appears** <u>as if it is slowing down</u>" is the exact type of qualifying language, speculative, and improper opinion testimony that <u>Watson</u> directs courts to disqualify. The defense again strenuously objects to this testimony.

85 Willow Brook Road, Colts Neck, NJ – Approx 3:45 AM

(Proffer at 5-6)

The second video from this location is problematic for the same reasons as the first. Once again, the State attempts to impermissibly identify the vehicle in the video as what "**appears** [to be] **the same vehicle**" as was seen on this surveillance video earlier.

Additionally, the State further wishes to narrate that "the video **appears to indicate** that the side profile of the vehicle **indicates** it is light and/ or white in color while the bottom of the passenger side door area **appears** to be dark and/ or black."

To be sure, Watson makes clear that speculative, lay opinion testimony, or testimony using "qualifying" language that suggests a personal opinion, is simply not permissible. Here, the defense objects because this testimony is not permitted by Watson and also because the facts are in dispute. Like the other videos, these videos are entirely unclear, dark, blurry, etc., and testimony suggesting otherwise is improper. (Exhibit E).

308 Green Grove Road, Ocean Township, NJ - 308 Tilton Drive, Ocean Township, NJ – Channels 4 & 3 – Approx 4:08 AM
(Proffer at 5-6)

The State intends to offer narration testimony that the vehicle depicted in the channel 3 video is "readily identifiable" as the same vehicle that was seen earlier on this camera headed in the opposite direction. As with prior videos, the State intends to offer testimony pertaining to the "taillight configuration of the vehicle" and also claiming that the vehicle matches Paul Caneiro's loaner Porsche Macan vehicle. For the reasons previously expressed, this testimony is far from narration of objective facts and observations seen on video; rather, it constitutes impermissible opinion testimony about facts that are in dispute, which invades the province of the jury. That is, whether the vehicle in question is indeed the same one previously captured on camera is a determination for the jury, not Det. Mahony. (Exhibit F).

Additionally, as with the other surveillance videos discussed, these two videos are not particularly complex. Jurors are fully capable of identifying relevant details and making their own observations without undue influence.

30 Tilton Drive, Ocean Township, NJ – Surveillance Camera Channels 5 & 7 – Approx 4:08 AM
(Proffer at 6)

In these videos, the State wants Mahoney to testify that the vehicle "**appears to be a white SUV** with a black stripe on the bottom of the passenger side doors" and that, "At 4:08:34 **it appears that the same vehicle** that just turned onto Tilton Drive enters the frame." For the reasons already stated, the defense objects to this improper opinion testimony that is qualified with impermissible language.

Additionally, the State again wishes to testify to the purported "taillight/ break light configuration" which, as previously discussed, the defense disputes. (Exhibit G). As such, the defense objects to this testimony, which is not narration testimony but rather an expression of an impermissible opinion.

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Finally, the proffer states, "The State submits that Detective Mahoney, who is familiar with the area and was able to drive between the two locations, will also provide testimony regarding travel time between Tilton Drive and Willow Brook Road."

The defense objects to this testimony as the defense is not on notice of same. Rather, in Det. Mahony's 7 page report (dated 3/4/19), it states:

> **A google map search** indicates that the travel time from 27 Tilton Drive, Ocean, NJ to 15 Willow Brook Road, Colts Neck, NJ [is] eighteen (18) to twenty-one (21) minutes depending on route of travel.

(Mahony Report, 6). (Emphasis added).

Det. Mahony goes on to note that, per his timeline pieced together based on his review of the surveillance videos, the Porsche Macan's total travel time is "approximately twenty (20) minutes – **consistent with Google Maps travel time estimate**." (Mahoney Report, 7). (Emphasis added).

Nowhere in Det. Mahony's report does it indicate that he is "familiar with the area" or that he personally drove the route and calculated the time. If this is the case, the defense should be in receipt of a supplemental report outlining the date, time of day, traffic conditions, etc. so that the defense can adequately cross examine the detective at trial.

In sum, the State's proffer reveals an attempt to further encroach on the jury's role by having Detective Mahony testify—not just about the estimated travel time between Ocean and Colts Neck, but specifically in the context of these videos, to suggest that the vehicle seen throughout these videos is the same vehicle. While the defense acknowledges that the State may, at some point, introduce an investigator's approximation of travel time between these locations, it is improper to do so in connection with a video being used to identify a suspect vehicle. The defense fundamentally disagrees with the State's assumption that the vehicles captured on camera are all clearly the same, and therefore, disputes that the vehicles seen in various surveillance videos all belong to Mr. Caneiro. The State is not merely presenting objective facts—it is attempting to weave together separate videos with speculative commentary that improperly invites the jury to adopt the State's theory of identification rather than making an independent assessment of the evidence. As such, the defense objects to this testimony.

   2. *Captain Brian Weisbrot*

According to the State's proffer, Captain Weisbrot is the lead detective from the Prosecutor's Office overseeing the fire investigation in this case and is expected to testify in support of the State's alleged fire timeline.

27 Tilton – DVR Surveillance Footage from Garage – Approx 2:29 AM
(Proffer at 7)

The defense objects to testimony from Weisbrot whereby he identifies Mr. Paul Caneiro in his garage or basement. Unlike in <u>State v. Sanchez</u>, 247 N.J. 450, 458 (2021), where the parole officer had met with the defendant more than 30 times, here, there is no indication that Weisbrot has any familiarity with the defendant, let alone a familiarity that amounts to 30 occasions of contact.

19 Oxford Drive, Ocean, NJ – Camera 5 – **Approx 2:06 AM, 4:08 AM & 4:55 AM**
(Proffer at 8)

Captain Weisbrot's narration of the Channel 5 surveillance video is expected to include three assertions: (1) that Mr. Caneiro's vehicle is seen "backing down and out" of Mr. Caneiro's driveway, (2) that it later returns, and (3) that the footage depicts the Caneiro family moving Mrs. Caneiro's car after evacuating due to the fire. All three portions should be excluded.

The surveillance footage is too unclear to provide meaningful assistance to the jury, as it does not allow for definitive determinations. The alleged activity occurs in the upper left-hand portion of the screen, which is largely obstructed. While there are moments when lighting changes, these variations do not clarify what is happening. For instance, the State asserts that at 4:08:47 a.m., lights begin to appear, and after "multiple reviews," it is "clear" that a vehicle enters Caneiro's driveway and pulls up to the top. However, while the defense acknowledges some activity in that area of the screen, repeated viewings of the footage do not support the conclusion that a vehicle definitively enters the driveway and pulls up. This remains a fact in dispute and cannot be presented as a certainty to the jury.

Captain Weisbrot's narration is therefore not an objective analysis of the footage but rather an interpretation aligned with the State's theory of the case. Given the limited visibility in the small, obstructed portion of the video where the State claims these key actions occur, it is simply not possible to determine with certainty what is happening. Presenting such speculative observations as fact would be improper.

19 Oxford Drive, Ocean, NJ – Camera 7 – Approx 4:55 AM

(Proffer at 8-9)

As for this channel, which captures the back of the Caneiro residence, the State wishes to have Captain Weisbrot provide testimony that walks the jury through the moment the fire at the Ocean home first becomes visible and how it intensifies. His narration risks portraying the footage in a way that unfairly emphasizes the fire's progression rather than allowing jurors to form their own conclusions from the video evidence.

3. *Lieutenant Patrick Petruzziello*

Lieutenant Petruzziello is also expected to give problematic testimony per the State's proffer. Specifically Lt. Petruzziello is expected to testify about various surveillance videos at Keith Caneiro's home. The State indicates in its proffer that there will be limited narration of those videos and counsel would agree that those videos are straightforward and do not require additional context or narration to be helpful to a juror.

First, if narration is permitted in this case, it should be limited to only testimony necessary to orient a juror's view. The defense does not object to testimony that orients the jurors to the location of the home/ room depicted in the video.

However, second, the defense objects to any testimony beyond orienting the jurors. Specifically, the State wishes to proffer testimony that is impermissible for two reasons. One, the State intends to elicit testimony that contains the opinion-oriented 'qualifying' language prohibited by Watson. More specifically, the State wants Petruzziello to state that the person on video "**appears to be** attempting to reach up towards this light" and that "it **appears the that the person appears to be** wearing a light colored shirt and dark gloves." As <u>Watson</u> directs, narration testimony cannot be speculative or opinion-based. Rather, it must present <u>objective, uncontroverted facts</u>. While this portion of the video footage may constitute "a small or nuanced detail" that the State is concerned about the jury missing, narration testimony is limited to "draw[ing] a jury's attention to particular spots" of the video, after which the jury can then "make its own evaluation" of what the video evidence shows. <u>Id.</u> at 601. Therefore, the witness can draw the jurors' attention to a specific portion of the video, but cannot narrate speculative conclusions about what it

depicts. Two, the remainder of the testimony proffered (Proffer at 9-10), constitutes impermissible play-by-play testimony. Watson likewise makes clear this type of testimony is not acceptable before a jury. <u>Watson</u>, at 607 (discussing <u>Dante Allen</u>, supra).

CONCLUSION

As presented, the State's proposed narration is not sufficiently tailored to focus solely on objective, undisputed, and helpful facts. The defense respectfully submits that, if any narration is permitted, it should be limited to providing the jury with only essential contextual details. For example, through Detective Mahony, the State could introduce the visible streets and clarify the directions in which the houses and cameras are facing. Detective Mahony could also identify the direction a vehicle is traveling when it appears on the video. Similar testimony could be acceptable from Captain Weisbrot, specifically regarding the camera placements and the geographic context of the footage.

Beyond these <u>helpful</u> narrations, the State's witnesses will overtake the jury's critical role as the factfinder by introducing testimony on matters that are speculative, inference-driven, mere opinions, and disputed. Mr. Caneiro has consistently maintained his innocence, and the defense has made clear that it disputes the State's alleged version of events. While the State can attempt to make the surveillance videos align with its theory in closing argument, it cannot be permitted to present the proposed narration to the jury, which would unfairly and unquestionably prejudice the defense. <u>Watson</u>, at 604. Ultimately, as <u>Watson</u> makes clear, it must be the jury's responsibility to determine what the videos show and how they fit together, based on their own assessment of the evidence.

However, in order for this Court to make a well-informed determination about the proposed testimony and objections thereto, a testimonial 104 hearing is necessary. Such hearing is also necessary for the State to adequately establish its proffer – by way of running through the actual testimony with actual exhibits – rather than paraphrasing them on paper in its brief, which is generally not part of the appellate record. Also, as <u>Watson</u> directs, only certain types of specific, pointed questions are permitted; general "what do you see" questions are not. Thus, a hearing is critical not only to ascertain whether the

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witness testimony is objectionable, but also whether the questions are appropriate versus objectionable.

Moreover, given that this Motion entails numerous witnesses and many video clips, to make certain that there is a clear record in this case, direct testimony, opportunity for live-time objections as the testimony is presented, limited cross examination, and the video evidence should be played in court. This will ensure that all parties, including the testifying witnesses, are on the same page with respect to the proposed proffered testimony, the objections, and this Court's decisions once it makes its rulings.

Sincerely,

/s/ Monika Mastellone
Monika Mastellone, Esq. 122942014

/s/ Victoria Howard
Victoria Howard, Esq. 021052012

CC: AP Chris Decker; AP Nicole Wallace