Superior Court of New Jersey
APPELLATE DIVISION
DOCKET NO. A-2645-24T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Hudson County.
v.	:	Sat Below:
JASON O'DONNELL,	:	Hon. Mitzy R. Galis-Menendez, P.J. Cr.
Defendant-Respondent.	:	

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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June 16, 2025

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PRELIMINARY STATEMENT

This appeal arises from an order requiring the State to produce or log a wide swathe of purely internal deliberations and work product—including "all communications . . . related to" all consensual intercepts, and all "intra-agency communications or internal assessments" regarding a cooperating witness—among prosecutors and investigators without any threshold showing of justification by the defendant. That is a classic fishing expedition, which our Supreme Court has made clear courts should not countenance. And by the State's estimation, complying with the portions of the order on appeal would entail reviewing some 45,000 emails. Those portions should be vacated.

Defendant Jason O'Donnell has been indicted for bribery stemming from his alleged acceptance of cash payments from a cooperating witness, Matthew O'Donnell (MOD) (no relation), in exchange for agreeing to provide MOD public work if defendant won public office. The trial court previously granted a motion to dismiss, which this Court reversed (and was affirmed by the Supreme Court in so doing). The State produced voluminous discovery. But on remand from the Supreme Court, defendant demanded, and the motion court granted, sweeping discovery far beyond that required by Court Rules or precedent. While the State opposed other aspects of the order as well, in the interests of expediency it complied with most of the order's provisions, and

repeatedly urged reconsideration or clarification of the remaining provisions to limit the most troubling aspects. Having now been granted leave to appeal, the State continues to focus only on the three most untenable portions of the order.

First, the court ordered the State to produce all communications "by, between, and among the State's investigators, DAGs and third parties" related to all consensual intercepts sought or authorized in the investigation of defendant, despite defendant's having established no basis for such sweeping discovery. The court did so even though the State already provided documents foreclosing the two speculative reasons offered by defendant—that he believed the first intercept was not timely authorized, or that there was no basis for that approval. And, just as the order extends to cover communications about subsequent intercepts (even though defendant's speculative theories concerned only the first), it has no time limit at all—so on its face it extends even to communications about litigation strategy "related to the consensual intercepts" transmitted the very day of the court's order. So it imposes a substantial burden.

Second, the court ordered the State to turn over all "intra-agency communications . . . between and among State investigators . . . related to the Defendant, the investigation of the Defendant, and/or [MOD's] cooperation and any potential benefit that MOD could potentially or did in fact derive therefrom." This broad order—covering purely internal communications, and

again with no time limit—likewise lacked any threshold basis, as the motion court implicitly acknowledged in directing the State to simply put all such communications in a privilege log and justify withholding them. But it is defendant's burden to show why he is entitled to discovery outside the parameters of the normal discovery rules, not the State's burden to explain why its categorical privileges should not be violated by reviewing and cataloguing thousands upon thousands of privileged documents. Such a procedure—unprecedented in criminal practice—has no limiting principle and would immediately impose a massive drain on taxpayer resources (if it could even be cabined only to discovery requests against the State).

Third, and finally, the order requires the State to produce or log "internal assessments" concerning MOD's "potential liability, cooperation credit and other benefits related to his cooperation with the State, sentencing, and his own potential criminal liability." Such internal assessments are again textbook privileged materials, and they are irrelevant to any cross-examination of MOD because, by definition, they were not shared with MOD. So here too, there was no basis to require the State to produce or log these purely internal communications—exactly the kinds of materials the work-product and deliberative-process privileges exist to protect. This Court should vacate the relevant portions of Paragraphs 3(a)-(c) of the discovery order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On February 3, 2021, a State Grand Jury returned Indictment No. 21-02-00011-S, charging defendant Jason O'Donnell with one count of second-degree bribery under N.J.S.A. 2C:27-2(d). (Sa1-2). The following facts, as alleged, are from the Supreme Court's opinion in a prior appeal on an unrelated issue:

> In February 2018, an individual who cooperated with law enforcement [MOD] met with defendant Jason O'Donnell. At the time, defendant was a candidate for mayor of Bayonne. At the end of the evening, defendant asked for $10,000. Defendant said that he needed street money and that the individual would "be his tax guy." Candidates for office ordinarily use "street money" for get-out-the-vote efforts and related activities. See N.J.A.C. 19:25-12.6(a).
>
> During the investigation that followed, the cooperator met with defendant, spoke with him on the phone, and recorded their conversations. The two met again on April 23, 2018[,] at defendant's campaign headquarters. During the recorded meeting, the cooperator said, "street. When do you need that, next week?" Defendant responded, "the weekend before [the race] is good." Defendant added, "Well it's gonna be easy because you'll be the tax attorney."
>
> On May 3, 2018, investigators gave the cooperator $10,000 in cash to give to defendant. The money was inside a white Baskin-Robbins bag with pink lettering. During a recorded conversation at campaign headquarters later in the day, the cooperator said, "I just want to be your tax guy." Defendant responded, "Yeah

[1] The statements of procedural history and facts are closely related and are presented together for the Court's convenience.

> done. That's, that's easy but I need." A video of the meeting depicts defendant holding the Baskin-Robbins bag.
>
> [State v. O'Donnell, 255 N.J. 60, 67-68 (2023) (footnote omitted).]

Following his indictment for second-degree bribery, defendant filed a motion to compel discovery, (Sa3-9), as well as a motion to dismiss the Indictment. The trial court granted the motion to dismiss the Indictment, but this Court reversed, and the Supreme Court affirmed this Court's reversal. O'Donnell, 255 N.J. at 66. On remand from the Supreme Court, defendant refiled his discovery motion. (Sa10-11). By that time, only a handful of discovery issues in defendant's motion remained unresolved.

On May 17, 2024, defendant filed a motion to compel additional discovery requesting, among other things, all materials related to the consensual-intercept authorizations in this prosecution; all communications between investigators and prosecutors related to the investigation of defendant and MOD's cooperation; all communications between the State and MOD's attorneys; and "Brady/Giglio materials" for prosecutors related to the case. (Sa12-15). On September 27, 2024, the Honorable Mitzy Galis-Menendez, P.J. Cr., issued an order providing, in relevant part:

3. The State shall . . . produce to Defendant the following:

a. Produce to Defendant all communications, including but not limited to emails, and text messages, by, between, and among the State's investigators, DAGs and any third parties, that are related to the consensual intercepts and/or consensual intercept authorizations that were sought and/or authorized in the investigation of the Defendant;

b. All intra-agency communications, including but not limited to emails and text, messages by, between and among the State investigators, or between State investigators and any third parties,[2] related to the Defendant and the investigation of the Defendant, and related to Matthew O'Donnell's ("MOD") cooperation, and any potential benefit that MOD could potentially or did in fact derive therefrom; [and]

c. Identify and produce to Defendant all communications between the State and the law firm of Calcagni & Kanefski, LLP, and any of its attorneys, related to MOD, his potential liability, cooperation credit and other benefits related to his cooperation with the State, sentencing, his own potential criminal liability, and all internal assessments thereof.

[(Sa17)].

The State filed a motion for reconsideration and/or clarification. (Sa19-20). On March 7, 2025, following several days of argument, Judge Galis-Menendez issued an order granting in part and denying in part the State's

[2] Although the State does not believe that all of the communications between investigators and third parties are generally discoverable, in the interest of attempting to avoid further litigation over the court's overbroad order, it has produced them.

motion. As relevant to this appeal, Judge Galis-Menendez denied the motion as to paragraphs 3(a) and 3(b) and granted in part and denied in part the motion as to paragraph 3(c), modifying that paragraph to require the State to "identify all such internal assessments, . . . submit a privilege log as to internal assessments not subject to disclosure," and produce the communications with MOD's attorneys consistent with the remainder of paragraph 3(c) by March 31. (Sa21-24).[3] The order stated that, if the State asserted a privilege over any required document, it would have to provide the documents in camera and provide the court and defendant with a privilege log. On March 12, Judge Galis-Menendez denied the State's request for a stay. (Sa25-26).

On March 25, the State moved for a stay or extension of time to comply with the March 7 order. (Sa31-38). On April 2, Judge Galis-Menendez extended the time to comply with the order until April 28. (Sa39).[4]

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[3] On March 18, the court issued an amended order correcting a typographical error in a compliance date. (Sa27). Defendant argued in opposition to the State's motion for leave to appeal that the March 18 order superseded the March 7 order, while the State maintained that it did not. Because this Court granted the motion for leave to appeal expressly as to the March 7 order, this issue appears to be resolved or otherwise moot.

[4] Judge Galis-Menendez did not re-visit the motion for a stay that she had previously denied. (8T31-8 to 15).

The State filed a motion for leave to appeal and for a stay of the lower court's order. (Sa40-41). On April 28, this Court, finding that the State had "demonstrated entitlement to relief," granted the State's motion for a stay and motion for leave to appeal. (Sa42-45).

LEGAL ARGUMENT

The documents required by all non-moot aspects of Paragraphs 3(a)-(c) of the motion court's order—largely consisting of internal communications among prosecutors and investigators—are not properly subject to disclosure. To start, these materials go beyond those normally required by Rule 3:13-3,[5] and a court may order discovery beyond what is required by the Rules only if doing so will "further the truth-seeking function or ensure the fairness of a trial." State v. Hernandez, 225 N.J. 451, 463 (2016) (citation omitted). In determining whether such additional discovery is appropriate, a court should consider whether the evidence would contribute to an adequate defense and whether that evidence could be obtained from another source. State in Interest of A.B., 219 N.J. 542, 555 (2014). A defendant seeking discovery outside of the categories specified in the Court Rules bears the burden of establishing need. Ibid.

Internal communications between prosecutors and investigators, as well as internal assessments by prosecutors, are generally shielded by both the work-product and deliberative-process privileges. The work-product privilege shields from discovery "a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents,

[5] The Rule lists as discoverable items including video and audio recordings, police reports, and lab reports. See R. 3:13-3(b)(1)(A), (C), (E), (H).

in connection with the investigation [or] prosecution . . . of the matter." R. 3:13-3(d). The work-product privilege is intended, "to afford a measure of protection to the attorney's privacy against pretrial disclosure of his litigation strategies, his mental processes and the like." State v. Mingo, 77 N.J. 576, 584 (1978). It is especially "vital" in criminal cases, where the interests of both society and the defendant "demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." United States v. Nobles, 422 U.S. 225, 238 (1975). Thus, "documents such as internal reports and memoranda prepared by the prosecution in connection with the investigation or prosecution of a criminal action are generally not subject to discovery." State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978).

The deliberative-process privilege likewise "recognizes the importance of promoting government's full and frank discussion of ideas" and protects from disclosure material that "would reveal the nature of the deliberations that occurred during the agency's processes." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 295-96 (2007) (citations omitted). It thus protects "advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated," and "is rooted in the notion that the sovereign has an interest in protecting the integrity of its deliberations." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 83 (2000).

It is also based on "the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news." U.S. Fish & Wildlife Serv. v. Sierra Club, Inc., 592 U.S. 261, 267 (2021); see also, e.g., Integrity, 165 N.J. at 85-86 (holding courts determining whether privilege has been overcome should consider "the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions").

Here, defendant has not come close to meeting his burden to establish a need for the three categories of discovery ordered, nor has he provided any basis to overcome these bedrock privileges as to any of the discovery at issue.[6]

[6] Defendant has suggested that the State has tried to avoid producing the communications by not putting them in the "file," and that the State's definition of file is too narrow. (6T20-15 to 21-3; 6T23-14 to 24-7; 8T5-8 to 11; 8T20-11 to 16). But the State is not arguing that the communications are not discoverable because they are not in any particular file. Rather, they are non-discoverable because they are not relevant and are plainly privileged—regardless of where they are stored.

POINT I

DEFENDANT HAS SHOWN NO BASIS TO OBTAIN DISCOVERY OF ALL COMMUNICATIONS "RELATED TO" ALL CONSENSUAL INTERCEPTS.

Paragraph 3(a)—requiring the State to produce all communications "by, between, and among the State's investigators, DAGs and third parties, that are related to" all consensual intercepts sought or authorized in the investigation of defendant, (Sa17)—is both legally and factually unsupported and would require the production of communications that are irrelevant, plainly privileged, or both. Defendant has never met his burden to establish a basis to require the State to compile and log these voluminous materials, and instead has made clear that this is no more than a classic fishing expedition.

To begin, defendant has provided no factual basis to justify his sweeping request for all communications related to all consensual intercepts—least of all where the State has already produced the signed consensual authorization forms and investigative reports that set forth all relevant information that provided a basis for the consensual authorizations. Under the Wiretap Act, N.J.S.A. 2A:156A-1 to -37, which regulates the State's interception of electronic communications, consensual intercepts are one of the "exceptions to the rigorous requirements under the Act," and are subject to substantially less "strict" conditions for approval. State v. Toth, 354 N.J. Super. 13, 21-22 (App.

Div. 2002); see also State v. Martinez, 461 N.J. Super. 249, 269, 275 (App. Div. 2019) (noting the 1999 "amendment to the Wiretap Act eliminat[ed] the reasonable suspicion element" for consensual intercepts, which can be used so long as "they are expected to yield relevant information"). Thus, to justify a consensual intercept under the Act, the State must only obtain (1) "consent by [the informant], and (2) prior approval by an authorized person." Martinez, 461 N.J. Super. at 269-70 (citing N.J.S.A. 2A:156A-4(c)). And while Martinez endorsed the customary standard that "intercepts should not be pursued unless they are expected to yield relevant information," id. at 275, "that "operational standard" is satisfied so long as the intercept could "hav[e] a tendency in reason to prove or disprove any fact of consequence to the determination of the action," State v. Buckley, 216 N.J. 249, 261 (2013).

While a defendant may challenge the basis for the authorizations of the intercepts, see Martinez, 461 N.J. Super. at 272, 275-76, that does not entitle every defendant to obtain virtually every internal memo and email drafted by the prosecution in every case involving consensual intercepts, or to force the State in every such case to spend months generating a privilege log with tens of thousands of clearly privileged entries. Rather, discovery regarding a consensual intercept that has satisfied the statutory conditions is warranted only if a defendant can "articulate how" that disclosure "will lead to relevant

information" about the validity of the consensual intercept. Hernandez, 225 N.J. at 462. So, like a defendant seeking to challenge a search-warrant affidavit, a defendant seeking sweeping discovery for the asserted purpose of challenging a consensual-intercept cannot simply suppose in a conclusory fashion that the information will be useful—he must establish some plausible threshold basis to believe that such allegedly relevant information casting doubt on the authorization exists. See ibid.; cf. State v. Desir, 245 N.J. 179, 187 (2021) (holding that a defendant seeking to challenge a search-warrant affidavit must first establish a "plausible justification that casts reasonable doubt on" the affidavit); State v. Ballard, 331 N.J. Super. 529, 541-42 (App. Div. 2000) (reiterating that defendant seeking to obtain discovery to show selective enforcement must first establish a colorable basis for the claim (citing, e.g., United States v. Armstrong, 517 U.S. 456, 468 (1996))).

Here, defendant has not established (and cannot) any such basis to believe such information exists. Initially, defendant's theory relates to only one of the intercepts—the April 23, 2018 intercept. (1T107-8 to 12). In discovery, the State provided defendant with the authorization form showing that this intercept was authorized that afternoon, prior to the intercept that evening. (Sa46). Defendant nonetheless asserted that he sought to "get materials and the communications that show one of two things": that "[t]he intercepts were not

secured timely, and there was no basis for Mr. Picione to authorize the April 23, 2018 Authorization." (1T107-8 to 12). Without waiving any objection, the State provided to the court and ultimately to defendant emails corroborating that the April 23, 2018 intercept was timely authorized. (2T21-24 to 22-8, 2T58-13 to 18; 4T36-20 to 37-15; 6T5-1 to 22). The State also provided a written report indicating that, on February 21, 2018, two months before the first consensual intercept was approved, defendant asked MOD for $10,000 in "street money cash." (1T25-10 to 16); see also (1T23-10 to 13). Cash contributions in excess of $200 are a violation of New Jersey election law. N.J.A.C. 19:25-10.6. This information was more than sufficient to show not only that the statutory conditions for the consensual intercept (consent by the subject and approval by an authorized person) were met, but also that the intercept would indeed reasonably be "expected to yield relevant information," Martinez, 461 N.J. Super. at 275—that is, that they would yield some information with "a tendency in reason to prove or disprove any fact of consequence to the determination of the action," Buckley, 216 N.J. at 261.

Defendant nonetheless argues that he is entitled to additional discovery to try to show—contrary to the documentary evidence—that the April 23 authorization was not given prior to the intercept. But he has presented no support for that theory to warrant the sweeping discovery he seeks. "The

discovery process is not a fishing expedition . . . or an unfocused haphazard search for evidence." Desir, 245 N.J. at 194 (citations omitted). For instance, even when challenging the basis for a search warrant (which of course requires probable cause, i.e., a higher bar), a defendant must "describe with reasonable particularity the information sought in discovery" and how that information is "sustained by a plausible justification 'casting a reasonable doubt on the truthfulness of statements made in the affidavit.'" Id. at 202-03 (citation omitted). And that "request should be buttressed by support for defendant's assertions of misstatements or omissions in the warrant affidavit that are material to the determination of probable cause, the basis for believing that the information exists, and the purpose for which the information is sought." Ibid. If such "particularity" is required even to challenge a search warrant, despite the Fourth Amendment's probable-cause requirements, it must necessarily be required to challenge a consensual intercept, where there is no search at all—only voluntary (and in this case highly inculpatory) statements by a subject to a third party who has consented to record the conversation.

Defendant's attempts to cast doubt on the intercept authorization here are unpersuasive. First, he argues that the intercept must not have been authorized on April 23 because the requesting officer was not working that day. Even if that fact could call into question the timeliness of the authorization by the senior

prosecutor who granted the authorization (which it could not), the State has now provided the email chain confirming that authorization was indeed provided by a senior prosecutor on April 23, confirming the accuracy of the authorization form. Defendant has never shown any basis at any for further inquiry—let alone done so with "particularity." See ibid.[7]

Moreover, defendant's unsupported theory that the April 23 intercept was not properly authorized clearly cannot justify his discovery request for all communications related to all consensual intercepts. Although the State has already produced to defendant signed consensual-authorization forms and investigative reports that set forth all relevant information that provided a basis for these consensual authorizations, defendant has provided no theory whatsoever—not even an illogical theory based on a requestor's day off—to challenge the consensual intercepts that came after the April 23 intercept. So, just as he shown no basis to obtain further discovery to challenge the April 23

[7] To be clear, defendant's theory that the requesting officer's having been on leave that day undermines that the senior prosecutor (who was not on leave) approved the request that day is illogical. A request can be made by an investigator before the date on which a prosecutor approves that request, or conveyed by another member of the investigative team, or even made while the requesting officer is on leave. Given the ubiquity of email (and perhaps a lack of work-life balance among the legal profession), even an approval could easily be granted while a prosecutor is formally "out of the office." In any event, as noted, the authorizing prosecutor was working that day, and the email chain confirms he provided the necessary authorization that afternoon.

intercept, all the more so has he failed to show a basis for obtaining discovery of all communications concerning those other intercepts on other dates.

This Court's unpublished opinion in State v. Thomas, A-1472-23, A-1473-23, A-1474-23, 2025 WL 87963 (App. Div. Jan. 14, 2025) (Sa47-79), is not to the contrary. In his opposition to leave to appeal, defendant relied on dicta from Thomas to argue that he is entitled to all communications related to all intercepts to "challenge" the "lawfulness of the intercepts," (see id. at *32-33), and to determine "whether the intercepts were premised upon an impermissible motive," (see Martinez, 461 N.J. Super. at 275-76). But defendant's reliance on the phrase he cites is misplaced. In Thomas, in order to establish that he was targeted because of a lawsuit he had filed, the defendant requested the foundational documents—not all communications, including internal communications—reflecting the information which provided the basis for authorizing a consensual intercept. (Sa75-76). This Court noted that the document providing the factual basis for the intercept "was relevant to the State's ability to admit the intercepted communications into evidence and defendants' challenges to the lawfulness of the intercepts." (Sa78). But defendant does not dispute that he has received those materials, and this Court in Thomas did not hold (or even suggest) that a defendant would be entitled to unfettered access to all internal communications among attorneys and

investigators (or a privilege log documenting every single one of those communications) based on a conclusory allegation, based on no more than supposition, that an intercept was not properly authorized.[8]

Moreover, unlike in Thomas, defendant here not only does not contest that he has the foundational documents providing the factual support for the authorization, but he does not even attempt to identify any plausible lack of legal justification for the intercepts or impermissible purpose for the authorization. And without showing any such threshold basis, the request amounts to a demand to forage through items not at issue in Thomas—the State's internal communications—to see if there is anything beneficial. This is clearly improper. "However expansive our discovery rule and jurisprudence may be, they do not sanction rummaging through irrelevant evidence." Hernandez, 225 N.J. at 463. Because defendant has not shown any other basis to conclude that further materials "will lead to relevant information" about the validity of this,

[8] It bears noting as well that Thomas was itself relying on dicta in Martinez, where this Court simply stated that it could "conceive of situations in which a planned intercept of an attorney interview is pursued with mixed objectives; e.g., where it is nominally sought to obtain relevant evidence, but principally based upon animus against a defense attorney or defendant." 461 N.J. Super. at 275. But the Martinez Court expressly declined to address whether animus would nullify an otherwise valid authorization because there were other grounds for relief, id. at 276, and in any event, the same problems would apply to a conclusory allegation of "animus" with no basis for the allegation identified.

much less any other, consensual intercept, the order requiring this discovery be turned over or logged erred as a matter of law.

Nor is this a mere abstract concern for the State, because requiring production of internal communications among prosecutors and investigators "related to" the consensual intercepts at the center of this prosecution plainly encroaches on both the work-product and deliberative-process privileges. See supra at 9-11. Indeed, internal communications among prosecutors and investigators concerning an investigation are generally shielded from discovery as work product under Rule 3:13-3(d). See Mitchell, 164 N.J. Super. at 202. Many of these internal communications also reflect deliberations concerning prosecutorial policies regarding investigations and therefore are also protected by the deliberative-process privilege. See Integrity, 165 N.J. at 84-85. And as with any significant prosecution, they are voluminous—meaning that the State cannot simply compile a short privilege log and be done with the matter. For instance, Paragraph 3(a) is not limited to the time of the investigation, which itself lasted three years, but continues even to the present day—and thus, as just one stark example, even communications among attorneys about this very discovery dispute would seemingly qualify as "related to" the consensual

intercepts.[9] Rather, where defendant has provided no basis for such broad rummaging through internal communications among the State's attorneys and investigators, requiring the State to devote substantial taxpayer resources to compiling a privilege log of largely privileged, and in any event irrelevant and non-discoverable, internal communications would be unduly burdensome. Because defendant has shown no plausible basis to challenge the intercept authorizations, Paragraph 3(a) should be vacated.

[9] An initial search in response to just a portion of paragraph 3 of the order yielded 30,000 emails. (8T24-5 to 12). After refining the search parameters and removing duplicate results, that number was reduced to just under a hundred emails, but that process took over one hundred hours of attorney time. (8T24-13 to 20). As of April 2, 2025, the State had identified an additional 65,000 items that may be responsive to other portions of the order, and which would also have to go through the same time-consuming review process. (8T21-6 to12; 8T24-20 to 25). And while Judge Galis-Menendez stated at one hearing that the State had not preserved an argument that compliance with the discovery order was unduly burdensome, see (8T7-5 to 15; 8T8-12 to 19; 8T16-5 to 8; 8T12-18 to 13-2; 8T14-14 to 18; 8T29-6 to 7), the State did raise this issue, and the judge acknowledged as much on two prior occasions, see (2T44-2 to 9; 6T43-9 to 10). The State's attempt to seek reconsideration or clarification in the interests of avoiding unnecessary appellate litigation only underscore the point. See (Sa19-20).

POINT II

DEFENDANT HAS SHOWN NO BASIS TO OBTAIN INTERNAL INVESTIGATOR COMMUNICATIONS.

Paragraph 3(b), directing the State to produce all "intra-agency communications . . . between and among State investigators . . . related to the Defendant, the investigation of the Defendant, and/or [MOD's] cooperation and any potential benefit that MOD could potentially or did in fact derive therefrom," (Sa17), similarly requires the State to produce or log voluminous communications that are non-discoverable and in many if not most cases protected by the work-product and deliberative-process privileges. Because, as with Paragraph 3(a), defendant has shown no basis to obtain these documents either—and because the State has already provided defendant with all communications with MOD's attorneys and MOD himself that are responsive to the discovery order—this Court should vacate the non-moot aspects of Paragraph 3(b) that would reach purely internal communications.

Defendant has failed to establish any threshold relevance for these intra-agency communications to justify his sweeping request. As noted, to be entitled to disclosure of documents beyond those required by a Rule, a defendant must establish some plausible basis to conclude that the documents "will lead to relevant or admissible evidence." See Hernandez, 225 N.J. at 466; supra at 9. Defendant supports his request for these broad materials, which seem to include

all investigator communications about this case, by arguing that internal communications regarding MOD's cooperation may have somehow impacted MOD or other witnesses. But that fails as a matter of simple logic: because the "intra-agency communications" this part of the order addresses were purely internal, neither MOD nor any other witnesses would have been aware of them and therefore could not have been influenced by them.[10] State v. Jackson, 242 N.J. 52, 73 (2020) (citing United States v. Ambers, 85 F.3d 173, 176 (4th Cir. 1996) ("The critical question, we have observed, is whether the defendant is allowed an opportunity to examine a witness['s] subjective understanding of his bargain with the government, for it is this understanding which is of probative value on the issue of bias.") (cleaned up)). Defendant also argued in his opposition to leave to appeal that he is entitled to these communications because they relate to the underlying authorization for consensual intercepts. But that simply redirects to whether defendant has shown a basis to forage through virtually all internal communications in the hopes of finding something useful (or alternatively to divert substantial public resources to compiling an unnecessary and voluminous privilege log). And as already explained, see supra Point I, defendant has failed to establish any such basis.

[10] As noted, the State complied with the portion of paragraph 3(c) requiring it to produce communications with MOD attorneys.

Notwithstanding defendant's failure to establish the relevance of such intra-agency communications, Judge Galis-Menendez repeatedly instructed that the State must turn over anything related to defendant. (1T31-8 to 32-4; 1T33-9 to 34-8; 1T 35-11 to 16; 1T48-1 to 49-5; 1T51-23 to 52-3; 4T26-3 to 28-19; 6T43-22 to 24; 6T51-10 to 17; 6T64-15 to 17; 6T70-23 to 25; 8T25-5 to 15). And while she recognized at various junctures that many of the internal communications will presumably be privileged, e.g., (6T65-3 to 7), she nonetheless ordered that the communications be placed in a privilege log. See also (6T68-17 to 71-19) (acknowledging that deliberative-process communications are not discoverable but stating that "anything to do with" defendant must be logged and provided to the court). But this conclusion overlooks that it was defendant's burden to establish why he was entitled to broader discovery than that provided for in the Rule, and also improperly presumes that the State will not comply with its existing and acknowledged obligations, including to provide any exculpatory or impeachment information. See Hernandez, 225 N.J. at 468 ("We have no reason to believe that the State will not fulfill its professional responsibilities in making any required disclosures.").[11] Put simply, no defendant obtains full-scale access to a

[11] Though it is not clear from the order itself, to the extent Paragraph 3(b) requires the State to produce communications regarding MOD's cooperation in

prosecuting office's internal communications just because, in theory, impeachment information could reside there, see id. at 463, and to require the State to compile a privilege log of all such information just because that theoretical possibility exists would either require a massive influx of taxpayer funds or effectively hamper the State from prosecuting anything but the simplest cases. After all, while this case involves public corruption, complex criminal cases range from gangs, drugs, and sex-trafficking to fraud, child pornography, and murder. If each of those defendants has a freestanding right to require the State to produce or log essentially all internal agency communications with some connection to a prominent witness or piece of evidence—even where, as here, no plausible basis to believe such discovery would lead to relevant, discoverable information has been shown—then the predictable result is not just to delay accountability for those who break our laws, but to deny it altogether.

That most of these intra-agency communications are plainly protected by the work-product and deliberative-process privileges only underscores the problem. Internal communications among investigators about defendant or MOD are subject to work-product protection because they involve purely

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investigations of other defendants, it is contrary to Hernandez, which made clear that defendants cannot sift through files in unrelated investigations without a concrete showing of need, which defendant has failed to make. 225 N.J. at 468.

"internal . . . documents" and deliberations, made between and among a governmental "party's . . . agents, in connection with the investigation." See R. 3:13-3(d); supra at 9-11. And such internal communications concerning defendant or MOD also reflect deliberations on prosecutorial decisions and policies regarding the investigation and so are shielded by the deliberative-process privilege. See Integrity, 165 N.J. at 84-85. So the widespread applicability of these privileges is straightforward.

Defendant does not meaningfully dispute that, and his argument that the State cannot assert such privileges when it has not yet reviewed or identified any particular communications subject to the privileges ignores the categorical nature of what he seeks. Internal communications between State investigators discussing the investigation of MOD are categorically privileged work product—that is inherent in the nature of what defendant seeks and the relevant portion of Paragraph 3(b) orders. Nothing in precedent or logic requires a party—here the State, but the premise could just as easily apply to the defense—to produce a document-by-document review of purely internal communications about a particular case in order for a court to conclude that purely internal communications about that case are indeed privileged.

By a similar token, a defendant cannot compel broadscale in camera review based on mere supposition. Before a defendant can obtain in camera

review of categorically privileged or confidential information, he must make a threshold showing to justify that step. See, e.g., State v. Higgs, 253 N.J. 333, 358 (2023) ("An allegation that the information, if present, is relevant to the case is necessary for a defendant to obtain the trial court's in camera review of the file."); Hernandez, 225 N.J. at 462 (defendant must "articulate how" disclosure "will lead to relevant information"). And again, any party asserting a categorical privilege has a right to challenge such a conclusory demand without first going to the substantial time and expense of cataloging every document within the category. For example, a court would have little trouble rejecting a pro forma request for a production or log of all communications between a defendant and his attorneys just because it is theoretically possible that the crime-fraud exception would apply to some documents. See N.J.R.E. 504(2). And a defendant would not have to first catalog all such communications before he could assert the attorney-client privilege as to the category and demand some showing to justify the incursion.

In his opposition to leave to appeal, defendant disputed that any such threshold showing is required outside the narrow category of "internal affairs files" at issue in Higgs, but his argument is mistaken. A threshold showing is required in all cases seeking to subject privileged documents to in camera review as a matter of both precedent and first principles. See Hernandez, 225 N.J. at

462 (instructing that "discovery in a criminal case 'is appropriate if it will lead to relevant' information" (citation omitted)). Otherwise, the request would simply trigger the same "unfocused, haphazard search for evidence" prohibited by Hernandez, 225 N.J. at 463, but with the motion court and the public's limited resources footing the bill. And indeed, even in camera review "may jeopardize the legitimate interests of the government, or of the parties sought to be protected by the privilege, in the confidentiality of the withheld documents." Loigman v. Kimmelman, 102 N.J. 98, 108 (1986); see Wilson v. Brown, 404 N.J. Super. 557, 563 (App. Div. 2009) (reversing order granting in camera inspection of privileged emails between Governor and president of local union). Consider again the example of the defendant ordered to provide all his documents to the court for in camera review, not based on any threshold showing, but simply to ensure that they do not contain non-privileged evidence of a crime or fraud. See N.J.R.E. 504(2). It is hard to see how that could adequately safeguard the "vital" purposes protected by the privilege. See Nobles, 422 U.S. at 238.

The problem is only compounded by the massive volume of internal communications covered by Paragraph 3(b)'s relevant language. As noted above with respect to Paragraph 3(a), see supra at 20-21 & n.9, Paragraph 3(b) is not time-limited, and its broad language covers tens of thousands of non-

discoverable, privileged documents.[12] Requiring the State to log, describe, and produce each one of these documents—despite the State's categorical assertion of privilege and the lack of any showing by defendant to justify this undertaking—would consume an enormous quantity of taxpayer resources, in both the executive and judicial branches. And requiring such sweeping and unprecedented discovery—with no prior notice that such materials would be discoverable—would have a chilling effect on candid communications between law enforcement professionals and risk undermining the efficiency of the criminal justice system.

Finally, neither Brady v. Maryland, 373 U.S. 83 (1963), nor the Department of Justice Manual, (6T21-4 to 23-6; 8T5-12 to 15), are to the contrary. As to Brady, the point is simple: the State has never denied its continuing obligation to turn over any material required by Brady or its progeny, and that obligation remains enforceable through all established mechanisms, including a motion for a new trial. E.g., State v. Carter, 91 N.J. 86, 111-12 (1982). But our Supreme Court has already rejected the premise that Brady justifies such a "speculative venture, hoping to snare some morsel of information that may be helpful to the defense." Hernandez, 225 N.J. at 466. So too here.

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[12] As noted, the number of emails for the State to review under the relevant portions of order comes to roughly 45,000. See supra note 9.

Defendant's reliance on the federal Manual is similarly misplaced. Initially, the Manual simply provides guidance to federal prosecutors. See Department of Justice Manual, U.S. Dep't of Justice (Mar. 2024), https://www.justice.gov/jm/jm-1-1000-introduction. In any event, the Manual undermines defendant's arguments. It expressly authorizes the prosecutor, rather than the courts, to determine what is discoverable, does not give open access to communications as long as any discoverable information in those communications is disclosed elsewhere, and provides that communications containing only impressions of the case or strategies normally not be disclosed. Department of Justice Manual, § 9-5.002—Criminal Discovery, U.S. Dep't of Justice (Dec 2017), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#9-5.002. Thus, even if State prosecutors were governed by the Justice Manual, it does not support the discovery order below.

In short, as with Paragraph 3(a), defendant cannot justify imposing this burden without a sufficient threshold showing. That he has made no showing at all is sufficient to vacate the non-moot aspects of Paragraph 3(b) as well.

POINT III

DEFENDANT HAS SHOWN NO BASIS TO OBTAIN ALL "INTERNAL ASSESSMENTS" ABOUT MOD.

Though its precise meaning remains ambiguous, Paragraph 3(c) similarly errs in directing the State to produce all "internal assessments" related to MOD, his potential liability, his cooperation credit and other benefits, and sentencing. (Sa17). While the State has produced all communications with MOD's lawyers, defendant has provided no basis to require the State to produce to the defense "internal assessments" of MOD or of those communications with MOD's attorneys.

Initially, just as intra-agency communications are irrelevant because neither MOD nor any other witnesses would have been aware of them and therefore could not have been influenced by them, see supra at 23, so too are "internal assessments" of MOD. In his opposition to leave to appeal, however, defendant argued that such internal assessments are relevant even though "MOD may not have been privy to" them because "the State was aware of their own internal assessments and opinion of MOD's veracity and cooperation" and if the State "expressed" in these assessments that it "doubted the veracity of MOD," then that information could undermine the basis for the consensual intercepts. As discussed above, however, see supra at 12-15, defendant has established no threshold basis to challenge the consensual-intercept authorizations in order to

obtain discovery about them in the first place, so he cannot rely on this unsupported suspicion to obtain these "internal assessments."[13]

Indeed, while Judge Galis-Menendez recognized that purely internal strategy discussions and internal assessments cannot be relevant if MOD never learned about them, but the order still required the communications to be logged and produced to the court. (6T68-17 to 71-19). That was error because, as noted, courts should not order overbroad discovery on the presumption that the State will not comply with its discovery obligations. See Hernandez, 225 N.J. at 468 ("We have no reason to believe that the State will not fulfill its professional responsibilities in making any required disclosures."). Such internal assessments are classic privileged materials, see supra at 9-11, and for essentially the same reasons just given as to the relevant portions of Paragraphs 3(a) and 3(b), the motion court erred in ordering the State to review and place them on a privilege log for the court's review without any threshold showing of relevance. What is relevant, however, is what was already produced: documents showing MOD's actual cooperating plea agreement and communications with MOD's attorneys regarding that agreement. Absent any showing that other,

[13] As also noted, the State has provided the defense with discovery establishing that the State had sufficient statutory conditions for a consensual intercept, see supra at 14-15, foreclosing any theory to the contrary.

purely internal documents—which are presumptively privileged and as to which the State knows of no relevancy—will lead to relevant or admissible evidence, such an undertaking should not have been ordered.

CONCLUSION

This Court should vacate all non-moot aspects of Paragraphs 3(a)-(c).

Respectfully submitted,

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STATE OF NEW JERSEY Plaintiff-Appellant, v. JASON O'DONNELL Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-2645-24 (AM-384-24) CRIMINAL ACTION **ON APPEAL FROM AN INTERLOCUTORY ORDER**: Superior Court of New Jersey, Hudson County, Criminal Division Docket No.: HUD-19-8256 Sat Below: THE HON. MITZY R. GALIS-MENENDEZ, P.J.Cr.

DEFENDANT-RESPONDENT'S BRIEF IN OPPOSITION TO THE STATE'S APPEAL

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PRELIMINARY STATEMENT

Quite simply, Judge Galis-Menendez's March 18 Order was a noncontroversial, routine discovery Order. Her exercise of discretion did not and cannot amount to an arbitrary and capricious decision. What lies beneath the State's Appeal of this routine Order is a desire by the State to accomplish three things. First, the State seeks a Court's blessing in its ill-advised, contumacious and illegal game of hide the discovery ball it has played against Defendant for half a decade. In order to achieve that end, the State is now asking this Court to overturn two well-established and distinct lines of criminal discovery precedent. For the Court to conclude that Judge Galis-Menendez's March 18 Order was arbitrary and capricious, it must first overturn seven years of precedent dating back to State v. Martinez which stands for a basic principle: a Defendant has an unqualified right to challenge the factual and legal bases underpinning a consensual intercept authorization.

Second, the Court would need to reverse over a half a century of decisional law and court rule driven precedent requiring the State to provide criminal defendants with an open file. For this to happen, the Court would need to create a work product privilege that goes beyond any prior holdings or dicta of this Court, the New Jersey Supreme Court and any other Court in the country to find

that communications between law enforcement agents are definitionally work product.

Third, Martinez buttressed by Thomas remains good law. The right to challenge a consenual intercept authorization affords criminal defendants due process and protects against intrusive invasions of privacy driven by baseless investigative measures. The open file approach ensures that Defendants in this case and every other case in the New Jersey Courts are provided with materials in the sole possession of the State to defend themselves against attempts to restrain and, indeed, take away their freedom and liberty. Because Martinez remains good law, because the open file approach remains a safeguard of this system and because the newly proposed expansion to the "work product privilege" would create an untenable potentially insurmountable barrier towards the quest for truth, the State's Appeal must fail.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On October 11, 2017, Defendant Jason O'Donnell ("Defendant") launched his 2018 campaign for election of the Office of Mayor of the City of Bayonne.[2]

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[1] The statements of procedural history and facts are intertwined, closely related, and are presented together for the Court's ease of reference and convenience.

[2] Max Pizarro, *O'Donnell Will Kick Off His 2018 Bayonne Mayoral Campaign Next Week,* Oct. 4, 2017, https://www.insidernj.com/odonnell-will-kick-off-2018-bayonne-mayoral-campaign-next-week.

i. The State's Proffer Sessions with MOD

Approximately three (3) months later, on January 31, 2018, Investigator Kristin Maier ("Maier"), Federal Bureau of Investigation Special Agent Sean McCarthy ("McCarthy"), and Deputy Attorneys General Pearl Minato ("DAG Minato"), Anthony Robinson ("DAG Robinson") and John Nicodemo ("DAG Nicodemo") met with Matthew O'Donnell ("MOD"). MOD was an attorney under State and Federal investigation suspected of engaging in a "pay to play" criminal enterprise related to his practice of law. MOD was accompanied by his attorneys. DOA001-005. This meeting, characterized as a proffer session, is memorialized in a Supplemental Investigative Report dated February 2, 2018, and signed by Maier. Id.

During this first meeting, MOD advised that he and his law partner, engaged in a years' long criminal scheme that generated millions of dollars in legal fees from government clients. Id. MOD, Valandingham and their scheme were a criminal enterprise. Id. They provided illegal contributions to elected officials in order to "gain additional [public sector, taxpayer funded legal] work" and that at the time of this interview, he and his firm "represent[ed] approximately 18 municipalities in New Jersey." Id. at DOA005. MOD advised those present of "the names of approximately 12 politicians that he has dealt

with in the past and believes he can [provide assistance] in charging for multiple crimes." Id. Notably, MOD indicated that "with only some of the politicians [has he] committed criminal activity in the past." Id.

After discussing more than ten elected officials or aspiring elected officials, MOD advised that Defendant "has an event on 02/01/18 and [had] asked for his financial support since he is scrambling for money for his upcoming election in May." Id. at DOA005. MOD then stated that "[he] told [Defendant] they would schedule a meeting in the coming weeks to discuss and [MOD] may start by giving [Defendant] $10,000.00." Id. The Investigative Report contains no statements from MOD alleging that Defendant had previously engaged in any criminal offense, and at no point was a prospective government contract with the City of Bayonne – the office to which Defendant was seeking election – mentioned in relation to any monies sought or to be exchanged, including campaign contributions. Id.

On February 16, 2018, MOD, and his attorneys met with Maier, DAGs Minato, Robinson, Nicodemo and Agent McCarthy. DOA012-017. Maier memorialized this second meeting in a Supplemental Investigative Report dated February 22, 2018. Id. During this proffer, "[MOD] stated he and Jason spoke two weeks ago through [redacted] [MOD] stated

they spoke about setting up an event for Jason in New York City at the Grand Havana Room (expecting cash)." Id. at DOA012.

During this proffer, MOD called Defendant on his cell phone at the direction of the State. Id. at DOA13. Maier memorialized the substance of the call as follows:

> They spoke about having a meeting at an Italian restaurant in NYC and that he will "text Mike now." [MOD] told Jason as for the 2019 town re-eval by Appraisal Systems, they want to throw him a fundraiser at the Grand Havana Room. Jason said he won't be able to make an event being held on 02/28/18. [MOD] stated he spoke to "DPR" last night and hopefully they can get together in Belmar with Mike and "Vin."
>
> [Id.]

MOD was then asked follow-up questions related to the first proffer session. Id. at DOA014. Maier indicated in her Investigative Report that this "list of numbered questions" was attached, but that not all questions listed were asked. Id. The answers to the questions were recorded by the handwritten notes of Maier, which were annexed to the Supplemental Investigation Report which indicated that MOD claimed to have spoken directly to Defendant since the last proffer session. Id. One of the questions on the pre-drafted list of questions used by Maier in the interview was: "**Who are the 3-4 politicians that are desperate for money right now?**" Id. (emphasis added).

In her report, Maier indicated that "[MOD] identified [Defendant]" and three other politicians as "desperate for money right now." Id. Again – as was with the first proffer – at no point did MOD allege that Defendant had previously committed a criminal offense, and at no point was a prospective government contract with the City of Bayonne mentioned in relation to any monies sought or to be exchanged, including campaign contributions. Id.

MOD and his attorneys met with Maier and DAGs Minato, Robinson and Nicodemo on February 21, 2018. DOA059-062. Maier documented this meeting in a Supplemental Investigation Report dated February 23, 2018. Id. Defendant was not mentioned in that report. Id.

On February 27, 2018, MOD and his attorneys again met with Maier and DAGs Robinson, Minato, and Nicodemo. DOA072-076. Maier issued a third Supplemental Investigation Report dated March 9, 2018 memorializing the February 27, 2018 meeting. Id. According to Maier's Report, MOD indicated that "[he] had spoken with Defendant on 2/21/18 while at a dinner in Manhattan, NY. On the way home from the event, [MOD] stated that [JOD] asked him for $10,000 in street money (cash) for his upcoming election." Id. at DOA072.

Maier's report further indicates that, at the end of the meeting, "[MOD] was asked to confirm the list of potential targets he believes he could be helpful with and a timeframe." Id. at DOA076. The report then includes a list of twelve

individuals, with the numbers 1 through 11 next to each individual (or, in one instance, a pair of individuals) and a brief narrative. Included in the numerical chart is:

> 1. Jason O'DONNELL – will accept $10,000 in cash directly to him – April fundraiser.
>
> [Id.]

On April 30, 2018, Maier penned a Supplement Investigation Report entitled "Matthew O'Donnell Correspondence" ("the First April 30 Report"). DOA098-099. The First April 30 Report contains two paragraphs, which reads as follows:

> **Matthew O'Donnell Correspondence:**
> This is my communication with Matthew O'Donnell regarding Jason O'Donnell. A copy of ***text messages*** from his cell phone [omitted] to my ***work cell*** phone on April 23, 2018 are attached. Please see the attached printed screen shot for complete details (1 page total).
>
> *Monday 04/23/18:* At approximately 11:43am [MOD] texted my cell phone to confirm he had a meeting scheduled with Jason O'Donnell (AKA "Bayonne"). I texted him advising him I would pass this information to someone else to follow up with him as I was not working. I then made Lieutenant Fallon aware of the message.
>
> [Id. at DOA098 (emphasis added.)]

Maier's text message chain is annexed to the First April 30 Report. Id. at DOA099. MOD transmitted a text message to Maier at 11:51 a.m. stating "I have a meeting tonight with Bayonne." Id. Maier responded "Ok I will pass on and

someone else will contact you. Thank you and good luck." Id. Maier's response to the MOD text is time stamped at 12:01 p.m. Id.

ii. The DAGs and Investigators' Intra-Agency Communications

After repeated demands and an Order of the Court, the State turned over on September 25, 2024 a screen shot of a text purportedly extracted from Maier's cell phone. DOA100. (1T:108-110). This screen shot – dated April 24, 2018 – displays a text chain with Lieutenant Michael Fallon ("Lt. Fallon"), and three (3) others: Detective Brian Powers, Detective Miguel Rodriguez, and Sergeant Ho Chul Shin. ("the Maier text chain"). Id. At 12:48 p.m., Maier sent the following message to the text chain: "He just texted me he does in fact have a meeting planned for tonight. I told him I would pass it on to you guys and someone else would reach to him to coordinate plans." Id. About half an hour later, Lt. Fallon responds, "Is Ho with you?" Id. That is the last message that appears on the screen shot of the Maier text chain. The State has not produced any other text messages in response to Lt. Fallon's question.

Approximately forty-eight (48) minutes later, at 1:36 p.m., DAG Minato authored and sent an email entitled "RE: Update from Mike"[3] to DAG Anthony Picione, DAG Robinson and DAG Nicodemo, stating:

> FYI, spoke to Mike briefly. ***They*** have decided to move forward with [Jason] O'Donnell tonight. There will be

[3] Presumably, referring to Lieutenant Michael Fallon.

> a meeting of just MOD and [Jason] O'Donnell, former Assemblyman and now mayoral candidate for Bayonne. ***At the meet, MOD will hand to [Jason] O'Donnell donations consisting of a few checks, all of which are legitimate***. MOD will then engage [Jason] O'Donnell in conversation regarding other types of donations, e.g. street money. **The sole purpose of tonight's meet is *to generate conversation of illegal financial support* to O'Donnell in his upcoming bid for the Mayoral seat.**"
>
> [DOA101 (emphasis added).]

About thirty-six (36) minutes later, DAG Picione responded to the email chain. The unredacted portion of this communication reads "Calcagni told us are expecting payments by the end of the month. [sic] It may be one more . . . O'Donnell (who MOD is meeting with tonight) and 1 other. DOA102.

Thirteen minutes (13) later DAG Jeffrey Manis answered DAG Pearl Minato, DAG Anthony Picione, DAG Anthony Robinson and DAG John Nicodemo by asking the following: "If we are indeed proceeding with in effect a third spin-off operation tonight, this time involving Bayonne Mayoral candidate, Jason O'Donnell. Do we want to open a new matter and also have a new consensual authorization with Jason O'Donnell (and others as yet unidentified) as the target?" DOA105.

Less than twenty (20) minutes later, at 2:43 p.m., DAG Picione responded to this email. His response, which suddenly includes four (4) additional recipients identified as Renee Nepa, Lt. Fallon, Sgt. Shin, and Det. Maier, states:

> Case name – Jason O'Donnell
>
> Description - ***Allegations of bribery***, illegal campaign contributions and pay to play involving Jason O'Donnell, Mayoral candidate for City of Bayonne.
>
> Team - you have oral authority to proceed with the consensual. Once I get the written form, I will sign it.
>
> [DOA108 (emphasis added).]

iii. The Relevant Consensual Intercept(s)

Subsequently, Investigator Ho-Chul Shin ("Shin") of the New Jersey Attorney General's Office, Office of Public Integrity ("OPIA") issued an Investigation Report dated May 2, 2018 ("the Shin Report"). DOA117-118.

The first paragraph of the Shin Report provides:

> On Monday, April 23, 2018, at approximately 1928 hours, Matthew O'Donnell (MOD) met with Jason O'Donnell (JOD), mayoral candidate for Bayonne, at 510 Broadway, Bayonne, NJ. Lt. Michael Fallon and the undesigned met with [MOD] prior to and after the meeting for briefing/debriefing. The meeting between MOD and JOD was recorded utilizing the DCJ equipment # 30549 and # 19602. The equipment was previously tested by the undersigned prior to use for functionality and found to be in proper working order. A consensual authorization was previously approved. The recording was downloaded to discs (labeled "DVD-0001V" and "CDR-001A") and vouchered into evidence #0392-18 and 0393-18 respectively.
>
> [Id. at DOA117.]

No consensual authorization form was annexed to the Shin Report. Id. And no consensual authorization was annexed to the First April 30 Report – an investigative report drafted by Maier, about the events of April 23, 2018, which was dated final as of April 30, 2018. DOA098-099.

Det. Maier issued a separate Investigation Report dated April 30, 2018. ("the Second April 30 Report") DOA119-120. The Second April 30 Report begins with the following two sentences: "This is my communication with Matthew O'Donnell. ***A copy of a text message from his cell phone…to my work cell phone on May 3rd, 2018 is attached.***" Id. (emphasis added).

Then, Maier indicated that at 10:14 a.m. on May 1, 2018, she and Detective Richard Lane of the Office of Public Integrity and Accountability ("OPIA") met with MOD at the OPIA office in Whippany. Id. At that meeting, MOD placed a call to Defendant – which was recorded – confirming a meeting on May 3, 2018 at JOD's campaign headquarters in Bayonne. Id. Maier then indicated:

> Note [MOD] stated Jason has asked him for money before. [MOD] stated Jason had an event in February of this year and asked for financial support since he is scrambling before his election in May. [MOD] also stated while on the car ride home from attending an event in New York on or around 02/21/18, Jason asked him for $10,000.00 in cash for street money.
>
> [Id.]

At a later point in the Second April 30 Report, Maier indicates that on May 3, 2018, at 9:24 a.m., MOD spoke with Maier to confirm that he was meeting Defendant at the campaign headquarters in an hour. Id. at DOA102. According to the report, and fifteen minutes before the meeting between MOD and Defendant was scheduled to occur, Maier and Shin met with MOD to provide him with $10,000 in cash. Id. The money was then placed by MOD in a white Baskin Robbins paper bag and then concealed inside a separate Baskin Robbins bag which had brown paper napkins inside. Id. MOD was equipped with recording devices which were activated upon his departure to Defendant's headquarters. Id.

At the conclusion of MOD's meeting with Defendant, MOD left the campaign headquarters to reconnect with Maier and Shin. Id. In her report, Maier indicates that "MOD stated he met with Jason privately and gave him the $10,000.00 in cash which he accepted. MOD stated Jason thanked him and assured him in return he would give him **work as part of being on his transition team if elected.**" Id.

Later in the Second April 30 Report, Maier indicates that "[a] copy of the consensual authorization (#79-2018-CGI) is attached to this report." Id. Attached to the Second April 30 Report is a document labeled "New Jersey Division of Criminal Justice Consensual Interception Authorization Pursuant to

N.J.S.A. 2A:156A-4c" ("the First Consensual Authorization"). DOA126. The First Consensual Authorization indicates that the "Date and Time of Authorization" was "April 23, 2018, at 4:00PM", and that the "Requesting Investigator/Detective" was "Det. Kristen Maier, #2810, Division of Criminal Justice." Id. The designee and signatory who authorized the intercept was Anthony Picione, Bureau Chief under Consensual # C79-2018-CGI. The "Initial Crimes/Offenses (If Any)" listed in the First Consensual Authorization were Official Misconduct and Bribery. Id.

On May 9, 2018, Mayor James Davis defeated Defendant in the non-partisan municipal election for Mayor of the City of Bayonne.

On December 4, 2018, and on nine (9) separate occasions thereafter, various Investigators associated with the OPIA – including Chin, Maier, and Detective Ross Portner – sought and received Consensual Intercept Authorizations from DAG Picione and DAG Manis, with the NJOAG. DOA127-136.

iv. Procedural History

Three (3) years after the April 23, 2018 consensual intercept, on February 3, 2021, a Grand Jury returned an indictment against Defendant charging one count of Bribery in Official and Political Matters in the Second Degree, in violation of N.J.S.A. 2C:27-2. Sa1-2. Following remand to the trial court, and

after a series of Appeals, Defendant filed his Motion to Compel Discovery on May 17, 2024. Sa10-11. On September 10, 2024, after briefing, the trial court held oral argument, and the Motion was granted. 1T:108:2-111:4. After allowing both parties to submit proposed edits to the language of the Order, the trial court entered a comprehensive Order on September 27, 2024 ("Sept. Order"). Sa17-19.[4] The Sept. Order required the State to produce the following materials to Defendant:

> 1. The State shall produce to Defendant the "group text" and/or message submitted *in camera* to the Court on August 27, 2024; and
>
> 2. The State shall produce to Defendant Detective Kristin Maier's Unsigned Notes Taken on Supplemental Report Form dated January 11, 2018, previously presented to the Court for *in camera* review on December 18, 2023, and any referenced or accompanying handwritten notes, if any, to the IR; and
>
> 3. The State shall, within twenty (20) days of the date of this Order, produce to Defendant the following:
>
> a. Produce to Defendant all communications, including but not limited to emails, and text messages by, between, and among the State's Investigators, DAGs and any third parties, that are related to the consensual

[4] On October 28, 2024, the State represented to the trial court that they were working through the materials encompassed by the September 27, 2024 Order to determine what is discoverable, non-discoverable and subject to a privilege log. 2T at T.40:6 to 41:23.

intercepts and/or consensual intercept authorizations that were sought and/or authorized in the investigation of the Defendant; and

b. All intra-agency communications, including but not limited to emails and text messages, exchanged by, between and among State investigators, or between State investigators and any third parties, related to the Defendant, the investigation of the Defendant, and/or Matthew O'Donnell's ("MOD") cooperation and any potential benefit that MOD could potentially or did in fact derive therefrom; and

c. Identify and produce to Defendant all communications between the State and the law firm of Calcagni & Kanefski, LLP, and any of its attorneys, related to MOD, his potential liability, cooperation credit and other benefits related to his cooperation with the State, sentencing, his own potential criminal liability, and all internal assessments thereof; and

d. All Giglio materials, if any, and disciplinary records for Deputy Attorney General John Nicodemo, Deputy Attorney General Anthony Robinson, Deputy Attorney General Jeffrey Manis and Assistant Attorney General Anthony Picione; and

e. Any and all payroll records, including time off/leave records, of Investigator Kristin Maier during the dates of April 23, 2018 to May 3, 2018; and

f. All names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the

prosecutor as to which of those persons may be called as witnesses pursuant to Rule 3:13(B); and

g. All materials previously produced by the State to the Court for in camera review, that Defendant has identified in Exhibit A to the Certification of Danyeris A. Lopez submitted in support of Defendant's Motion to Compel.

4. To the extent the State asserts a privilege over any documents the Court has directed the State to produce pursuant to this order, the State shall submit such documents to the Court *in camera* with an accompanying privilege log in a form substantially compliant with R. 3:10-2 and associated, interpretative decisional law, and the State shall contemporaneously serve a written notification of such *in camera* submission upon Defendant along with a copy of its privilege log.

[Sa16-18.]

On October 27, 2024, the State submitted a Motion for Reconsideration/Clarification as to paragraphs 3(a), 3(b), 3(c), 3(d) and 3(g) of the Sept. Order. Sa19-20. Accompanying the State's Motion was Exhibit D, the first portion of which contained an email chain, not previously produced, dated Monday, April 23, 2018. Da35-36. The initial email in the chain, as referenced supra, authored by DAG Manis at 2:26 p.m. to DAGs Minato, Picione, Robinson and Nicodemo stated: ***If we are indeed proceeding with in effect a third spin-off operation tonight,*** this time involving Bayonne Mayoral candidate, Jason

O'Donnell. ***Do we want to open a new matter and also have a new consensual authorization*** with Jason O'Donnell (and others as yet unidentified) as the target? DOA138. (emphasis added) Less than twenty (20) minutes later, at 2:43 p.m., DAG Picione responded to this email. Id. His response states:

> Yes, nice pickup Jeff. Renee – can you open a new matter in InfoShare?
>
> Case name – Jason O'Donnell
>
> Description – Allegations of bribery, illegal campaign contributions and pay to play involving Jason O'Donnell, Mayoral candidate for City of Bayonne.
>
> Please assign to DAGs Minato, Robinson and Nicodemo. Team – you have oral authority to proceed with the consensual. Once I get the written form, I will sign it. Good luck!
>
> Id.

No other emails were disclosed or produced by the State. The trial court subsequently conducted additional hearings in response to the State's Motion, and on February 4, 2025, Defendant filed opposition to the State's Motion for Reconsideration attaching emails, redacted by the trial court which, the State had produced to *in camera.* Sa19-20. These emails provided context to the above-described thread involving DAGs Picione, Robinson, Nicodemo and Manis. Id. Specifically, on April 23, 2018, at 1:36 p.m. DAG Minato emailed DAGs Picione, Robinson and Nicodemo, with a cc to DAG Manis stating:

> FYI, spoke to Mike [Fallon] briefly. ***They have decided to move forward with [Defendant] tonight.*** There will be a meeting of just MOD and [Defendant], former Assemblyman and now mayoral Candidate for Bayonne. At the meet, MOD will hand to [Defendant] donations consisting of a few checks, all of which are legitimate. MOD will then engage [Defendant] in conversation regarding the other types of donations, e.g. street money. ***The sole purpose of tonight's meet is to generate conversation of illegal financial support to O'Donnell in his upcoming bid for the Mayoral seat.***
>
> [DOA138 (emphasis added).]

DAG Minato's 1:36 p.m. email stating that "[**t]hey have decided to move forward with [Defendant] tonight"** comes fifty (50) minutes before DAG Manis responds at 2:26 p.m. asking whether a new matter and new consensual intercept authorization should be opened for Defendant. Da47. DAG Picione then provides authorization for the consensual intercept twenty (20) minutes after DAG Manis' request and one hour and seven (7) minutes after DAG Minato's message. DOA109.

On March 7, 2025, the trial court issued an Order denying in part and granting in part the State's Motion ("March 7 Order"). Sa21-24. In particular, the trial court denied the State's Motion as to Paragraphs 3(a) and 3(b) of the Sept. Order and granted in part the State's Motion as to Paragraph 3(c). Id. The trial court's March 7 Order maintained that the State must produce to Defendant the discovery encompassed by Paragraphs 3(a), (b) and 3(c) and may submit a

privilege log for any materials that a privilege is claimed for. Id. Thereafter, on March 18, 2025, the trial court entered an Order amending the March 7, 2025 Order insofar as amending the State's compliance deadline from March 21, 2025 **t**o March 31, 2025 ("March 18 Order"). Sa27-30.

On March 25, 2025, the State submitted a Motion, and a new proposed Order seeking either a stay, or an extension of time to comply with the trial court's March 7 Order, which was subsequently denied by the trial court. Sa31-38.

The next day, the State filed the instant Appeal.

STANDARD OF REVIEW

A judge's discovery decision is reviewed for abuse of discretion. State v. Hernandez, 225 N.J. 451, 461 (2016). Appellate courts "should generally defer to a trial court's resolution of a discovery matter, provided their determination is not so wide of the mark or is not based on a mistaken understanding of the applicable law." State in Int. of A.B., 219 N.J. 542, 554 (2014) (quotation omitted). Trial judges are given "considerable latitude" when deciding whether to admit evidence. State v. Jackson, 243 N.J. 52, 65 (2020) (quoting State v. Nelson, 173 N.J. 417, 470 (2002)). "We do not substitute our own judgment for the trial court's unless its ruling was so wide of the mark that a manifest denial

of justice resulted." State v. Higgs, 253 N.J. 333, 354 (2023) (quoting State v. Medina, 242 N.J. 397, 412 (2020) (quotation omitted)).

LEGAL ARGUMENT

Each category of documents the trial court mandated the State to turn over to Defendant outlined in the Court's March 18 Order are subject to disclosure pursuant to Rule 3:13-3. Defendant has demonstrated that the documents sought, objected to, and ultimately compelled by Court Order were relevant and discoverable. The unfortunate history of this matter, and the State's repeated behaviors of stating that documents don't exist and/or are not relevant and then ultimately releasing some portions of some documents that may benefit their immediate interest flies in the face of decades of decisional law. But the materials released by the State have confirmed a frightening reality: the State had no basis to seek and authorize a consensual intercept of the Defendant. Less than six (6) hours before the consensual intercept was authorized, the State had not opened an investigation into Defendant. It was not engaged in an active investigation with respect to Defendant, and the State has not produced a single document, predating the April 23, 2018 email, indicating that Defendant had engaged or planned to engage in any criminal conduct. The State's objective is born from a tactic of evasion.

The balance of the documents sought are certainly both responsive and relevant to Defendant's right to challenge the legal viability of the consensual intercept authorization. To be clear, this Court has – on two occasions over seven years – reaffirmed a Defendant's right to challenge a consensual intercept authorization. Now, the State has invented a new privilege – a work product privilege that does not include attorneys – in an attempt to stave off Defendant's targeted discovery demands. But, the State has improperly wielded privilege as both a sword and a shield.

At bottom, not only does the State attempt to strip Defendant of his right to challenge the consensual intercept, previously solidified by this Court in State v. Martinez, the State also improperly invokes absolute privilege. 461 N.J. Super. 249 (App. Div. 2019). Of course, the Appellate Division has confirmed that there is no absolute or blanket privilege protecting investigative files, deliberative materials or intra-agency memoranda, and the State's blanket assertion of the work-product and deliberative-process privileges, all without the creation of a privilege log, is contradicted by established precedent. See State v. Ballard, 331 N.J. Super. 529, 551 (App. Div. 2000) (citing McClain v. College Hosp., 99 N.J. 346, 353-54, 357-61 (1985)). If the State's position is advanced to its logical conclusion, then any communications not specifically reduced to the form of an investigative report by and among prosecutors and investigators,

would not be discoverable. The State urges this Court to place form over substance when in this matter the State has not abided by the very rule it wishes this Court to adopt.

Since 1973, the Courts of this State have required prosecutors to take an open file approach to discovery. The State now asks the Court to reconsider that position – baselessly. The trial court's Order was not an abuse of discretion; it should not be disturbed by this Court.

POINT I
THE DISCOVERY ORDER ENTERED BY THE TRIAL COURT DOES NOT EXCEED THE BOUNDS OR SCOPE OF RULE 3:13-3.

Rule 3:13-3 sanctions the disclosure of "intra-agency communications" between State investigators, DAGs and third parties as directed by Paragraphs 3(a), 3(b), and 3(c) contained within the March 18 Order.

The language of R. 3:13-3(b)(1) provides, in part, as follows:

> Discovery shall include exculpatory information or material. It shall also include, but it is not limited to, the following relevant material:
>
> (A) books, tangible objects, papers or documents obtained from or belonging to the defendant, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(B) records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded. The prosecutor also shall provide the defendant with transcripts of all electronically recorded statements or confessions by a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference.

(C) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are within the possession, custody or control of the prosecutor;

(D) reports or records of prior convictions of the defendant;

(E) books, papers, documents, or copies thereof, or tangible objects, buildings or places which are within the possession, custody or control of the prosecutor, including, but not limited to, writings, drawings, graphs, charts, photographs, video and sound recordings, images, electronically stored information, and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, into reasonably usable form;

(F) names, addresses, and birthdates of any persons whom the prosecutor knows to have relevant evidence or information including a designation by the prosecutor as to which of those persons may be called as witnesses;

(G) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecutor and any relevant record of prior conviction of such persons. The

> prosecutor also shall provide the defendant with transcripts of all electronically recorded co-defendant and witness statements by a date to be determined by the trial judge, except in no event later than 30 days before the trial date set at the pretrial conference, but only if the prosecutor intends to call that co-defendant or witness as a witness at trial.
>
> (H) police reports that are within the possession, custody, or control of the prosecutor . . .

Upon the return of indictment, a defendant has a "**right to automatic and broad discovery of the evidence the State has gathered in support of its charges**." State v. Scoles, 214 N.J. 236, 252 (2013) (emphasis added). To that end, the courts have adopted an "open-file approach to pre-trial discovery in criminal matters… [t]o advance the goal of providing fair and just criminal trials." Hernandez, 225 N.J. at 451 (quoting Scoles, 214 N.J. at 252).

Rule 3:13-3 was amended and redesignated on June 29, 1973. In fact, the "right to automatic discovery" under Rule 3:13-3 was reinforced in 1973 by the Supreme Court Committee on Criminal Procedure. The Report released by the Committee on April 9, 1973, confirmed that the proposed amendment "greatly enlarges the items which a defendant may discover **as of right**." 96 N.J.L.J. 459 (1973) (emphasis added). "The philosophy behind the proposed rules may be summarized by the phrase 'automatic discovery'; it is the general view of the Committee that – with the exception of areas involving work product, confidentiality, identity of informers, and the like – a defendant should be

permitted to inspect all relevant documents in the files of the prosecutor." Id.

The Committee noted that

> the proposed amendment makes an important change with respect to police reports. It would allow discovery of ". . . police reports which are within the possession, custody, or control of the prosecuting attorney and which are not subject to the provisions of subsection (c) (i.e., work product) of the rule. The present rule does not explicitly provide for the discovery of such reports. In the recent case of State v. Harrison, 118 N.J. Super 299 (Law Div. 1972) aff'd. 119 N.J. Super 1 (App. Div 1972) cert. den. 60 N.J. 513 (1972), it was held that a defendant may discover police reports of those policemen designated by the prosecutor as witnesses. This holiday has never been approved or disapproved by the Supreme Court; nevertheless, the proposed amendment goes even farther than the holding of the Law Division in Harrison by permitting the automatic discovery of all police reports (other than work product), both of witnesses and non-witnesses.
>
> . . .
>
> (d) Apart from the present rule and the Committee's proposed amendment, a defendant is entitled to disclosure of all witnesses which tends to exculpate him no matter what the source.
>
> . . .
>
> Another significant change envisioned in the proposed amendment is automatic discovery by the State. The proposed amendment allows such discovery, however, only if the defendant first seeks such discovery from the State.
>
> [Id.]

Another momentous modification to the Rule was referenced within the Committee Report – specifically with respect to the "definition of work product."

> The final major change envisioned by the proposed amendment is in the definition of "work product." The present rule excludes work product from the classes of items discoverable; it does not define the terms, except to note that it includes '… reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter …' The Committee has retained this definition, recognizing, however, that it is still vague. **Nevertheless, by withdrawing police reports from the definition of work product, a major uncertainty surrounding the "work product" concept may be resolved.** The Committee has concluded, moreover, that any remaining problems can best be handled on a case by case basis – through motions for protective orders and by resort to case decisions …" 96 N.J.L.J. 462 (1973)
>
> [Id. (emphasis added).]

The plain language and gravamen of the Committee Report is clear. A Defendant has a right to automatic discovery and that right encompasses police reports and materials that otherwise might be included in police reports.

The trial Court's March 18 Order is in conformance with the spirit and intent of Rule 3:13-3. The Order requires the State to turn over intra-agency communications related to the consensual intercept. The First April 30 Report authored by Maier makes reference to, and has annexed to it, a text message

from MOD to Maier. DOA98. On April 23, 2018, MOD sent a text message to Maier at 11:51 a.m. advising of his meeting with Defendant. DOA099. Maier responded at 12:01 p.m. confirming and stating she would pass this information to someone else to follow up with him as she was not working, and that Lieutenant Fallon ("Fallon") was aware of the message." Id. At some point between Maier's response to MOD at 12:01 p.m. and 7:28 p.m., a consensual intercept was authorized. DOA126.

Not only was the intercept authorized, but Maier did in fact text a group of investigators as represented to MOD. On September 25, 2024, in response to the trial court's forthcoming September 27 Order, the State turned over a screen shot dated April 24, 2018, displaying a text chain with Lieutenant Michael Fallon ("Lt. Fallon"), and three (3) others: Detective Brian Powers, Detective Miguel Rodriguez, and Sergeant Ho Chul Shin. ("Maier's text"). At 12:48 p.m., Maier sent the following message to the text chain: "He just texted me he does in fact have a meeting planned for tonight. I told him I would pass it on to you guys and someone else would reach to him to coordinate plans." About half an hour later, Lt. Fallon responds, "Is Ho with you?" That is the last message that appears on the screen shot of the text chain. The State has not produced any other text messages in response to Lt. Fallon's question. Nor has this text chain or any other communications from the cell phones of the four (4) other

individuals listed in the chain been extracted and turned over to Defendant or the Court for assessment.

Indeed, the open file approach in this matter has transformed into a cherry-picking approach. On January 16, 2025, the State disclosed redacted emails stemming from an email authored by DAG Minato at 1:36 p.m., forty-eight (48) minutes after Maier's text to Fallon, that was only sent to DAGs Picione, Robinson and Nicodemo, with a cc to DAG Manis, that indicated the following:

> FYI, spoke to Mike briefly. They have decided to move forward with O'Donnell tonight. There will be a meeting of just MOD and O'Donnell, former Assemblyman and now mayoral candidate for Bayonne.
>
> At the meet, MOD will hand to O'Donnell donations consisting of a few checks, ***all of which are legitimate***.
>
> MOD will then engage O'Donnell in conversation regarding the other types of donations, e.g. street money.
>
> **The sole purpose of tonight's meet *is to generate conversation of illegal financial support* to O'Donnell in his upcoming bid for the Mayoral seat**.
>
> [DOA101(emphasis added).]

At approximately 7:28 p.m. on April 23, 2018, MOD met with and recorded his conversation with Defendant. Da9. The corresponding consensual intercept authorization's "Date and Time of Authorization" was "April 23, 2018 at 4:00 [p.m.]", and that the "Requesting Investigator/Detective" was "Det.

Kristen Maier." Da20. The designee and signatory who authorized the intercept was DAG Anthony Picione ("Picione"), Bureau Chief. Later that evening at 8:05 p.m., DAG Robinson issued an email updating DAG Picione, DAG Manis, DAG Minato and DAG Nicodemo that ". . . tonight's meeting between MOD and Jason O'Donnell **went off as planned**." See Hurley Cert. Ex. E (emphasis added).

It is the State's very production of the redacted emails and prior Maier text that justify the Court's entry of the Order entitling Defendant to more. The State, not Defendant, has made intra-agency communications relevant and subject to disclosure. The email referencing "[t]hey have decided to move forward with O'Donnell tonight" is based on factual statements made by investigators, in either text messages or electronic mail form, about the investigation. These facts are, logically and undeniably, that which should have wound up in a police report but did not. The State has not and cannot refute that fundamental concept – that the communications between the investigators and the DAGs before the April 2018 intercept was authorized are, without question, **facts**. The State cannot now attempt to rely upon the strict interpretation of the term "police report" to unfairly justify their omission of facts that should otherwise be contained therein.

The initial inclusion of a text message exchanged between MOD and Maier triggered the need for, and basis for the trial court's Order which mandates the production of discovery that is relevant under Rule 3:13-3, and which is not work product. Even if it is "work product" the State doggedly skirts the requirement that each communication, email or text message, must be placed on a privilege log for the Court, not the State, to assess whether a privilege is applicable to that specific, individual communication. This is necessary when the State is directly challenging a Defendant's right to automatic discovery as solidified by Rule 3:13-3 which will be further discussed infra.

The State's strawman argument attempts to categorically shield police reports, as well as the facts and communications that could form the basis of such, from disclosure without properly detailing the basis for the privilege on a log that is submitted to the Court for review. This is antithetical to Rule 3:13-3 and as further discussed herein, continues to divest the Court of its rightful authority.

POINT II
EVEN IF THIS COURT DETERMINES THE DISCOVERY SET FORTH IN THE MARCH 18 ORDER IS NOT ENCOMPASSED BY RULE 3:13-3, THE STATE IS NOT THE ARBITER OF RELEVANCE, AND THE DISCOVERY IS NECESSARY FOR DEFENDANT TO CHALLENGE THE BASIS OF THE CONSENSUAL INTERCEPT AS SET FORTH IN MARTINEZ.

Even if this Panel determines that the March 18 Order was arbitrary and capricious, the intra-agency communications should be turned over to preserve and further Defendant's right to challenge the intercepts as crystallized in State v. Martinez, 461 N.J. Super. 249 (App. Div. 2019). The holding in Martinez is paramount to Defendant's Constitutional rights, and the State's interpretation of Martinez is tragically misplaced.

As a preliminary matter, the Wiretap Act "regulates the electronic interception of communications in New Jersey. . . Its purpose is to protect citizens' privacy from unauthorized intrusions." Martinez, 461 N.J. Super. at 267 (quoting State v. Toth, 354 N.J. Super. 13, 21 (App. Div. 2002)) (citing State v. Minter, 116 N.J. 269 (1989)). The Wiretap Act provides, in relevant part, that:

> Any person acting at the direction of an investigative or law enforcement officer to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made without the prior approval of

> the Attorney General or his designee or a county prosecutor or his designee.
>
> [N.J.S.A. 2A:156A-4(c).]

Indeed, our Supreme Court has "considered the prior authorization requirement [of N.J.S.A. 2A:156A-4(c)] to be vital, noting that, in cases of consensual interceptions, it was the "sole protection"" afford to citizens. Martinez, 461 N.J. Super. at 268; quoting State v.Worthy, 141 N.J. 368, 381 (995). And the Supreme Court went further, noting that "it cannot be doubted that the Legislature viewed the requirement of supervisory approval as an indispensable protection for the privacy interests implicated even in consensual telephone wiretaps." Worthy, 141 N.J. at 388. The Court held in Worthy – a holding later reaffirmed and buttressed in K.W. – that "a recording obtained at the direction of a prosecutor's investigator without prior authorization violated the Wiretap Act and had to be suppressed, notwithstanding an absence of wrongdoing." Martinez, 461 N.J. Super. at 269; see also Worthy, 141 N.J. at 386; State v. K.W., 214 N.J. 499, 509-10 (2013).

But the constraints of the Wiretap Act do not end with an inquiry into whether or not the appropriate, statutory prior authorization requirement has been met. The Court in Martinez reiterated that even though the conditions for authorization of consensual wiretaps were not as strict as non-consensual

wiretaps, the Court in Worthy "nevertheless considered the prior authorization requirement **to be vital, noting that, in cases of consensual interceptions, it was the "*sole* protection" citizens had "from overly zealous and completely discretionary law-enforcement practices**." Martinez, 461 N.J. Super. at 268 (quoting Worthy, 141 N.J. at 381) (emphasis added). Despite Worthy's clear dicta, the State contended that the prosecutor's authorization of a consensual wiretap is "not subject to judicial review." Martinez, 461 N.J. Super. at 272. The Appellate Division plainly rejected the State's interpretation of the Wiretap Act. Judge Sabatino's opinion, issued on behalf of a unanimous three judge panel of the Appellate Division, held that:

> Interpreting the Wiretap Act to enable unfettered and unreviewable discretion by prosecutors could render the prior authorization requirement merely a perfunctory task. **If an official can review a request for a consensual wiretap and approve it based on any reason – including, hypothetically, a whim, bias, or personal animus – then the approval process would serve no real purpose. This is particularly so if, as the State contends, the approval is never subject to judicial review. We decline to adopt that categorical position**.
>
> As we have already noted, the Legislature opted to retain the prior authorization requirement in 1999 when it removed the reasonable suspicion standard. In 2013, the Court in K.W. reiterated that prior authorization was more than simply an administrative or procedural nicety, but was intended by the Legislature as an "indispensable protection" to "safeguard personal privacy." K.W., 214 N.J. at 509-10, 70 A.3d 592

> (quoting Worthy, 141 N.J. at 379, 661 A.2d 1244). Hence, the prior-authorization review by the relevant official must operate in some way to strike a balance between investigative and privacy concerns, even without a need for reasonable suspicion. That, in turn, signifies that the approval process must satisfy some standard other than unfettered discretion.
>
> [Martinez, 461 N.J. Super. at 272.]

Therefore, the State's position that "the State must only obtain (1) "consent by [the informant], and (2) prior approval by an authorized person" for an intercept is inaccurate. Martinez did not endorse the standard that permits the State to approve a consensual intercept for a whim, impermissible motive or hunch. Id. "Discovery regarding consensual intercepts is permitted where the intercepts are expected to yield relevant information." State v. Thomas, A-1472-23, A-1473-23, A-1474-23, 2025 N.J. Super. LEXIS 69, *32 (App. Div. Jan. 14, 2025) (citing State v. Martinez, 461 N.J. Super. at 275). Our Court has reiterated that a judge "may also consider whether the intercepts were premised upon an impermissible motive, including animus against the defendant, and whether the intercepts violated a defendant's constitutional right, or the attorney-client privilege." See Thomas 2025 N.J. Super. LEXIS 69, *32 (citing Martinez, 461 N.J. Super. at 275-76).

The production of the intra-agency communications "will lead to relevant and material information" that bears directly upon Defendant's challenge to the

legality of the consensual intercept authorizations. State v. Williams, 403 N.J. Super. 39, 49 (App. Div. 2008), aff'd in part and modified in part, 197 N.J. 538 (2009); accord State v. Ballard, 331 N.J. Super 529, 538 (App. Div. 2000). Defendant is not pursuing "every internal memo and email drafted by the prosecution" as alleged by the State. Instead, Defendant is seeking precisely what the State has only cherry picked for **nondisclosure**. The State's production of the Maier text and of the redacted emails dismantle the State's already tenuous argument. The State has positioned the April 23, 2018 email sent at 2:47 p.m., along with the others, as purported proof that the consensual intercept was "timely authorized." The timing of the consensual intercept is but one of the grounds through which a Defendant can challenge a consensual intercept. The 2:47 p.m. email, in conjunction with the Maier text demonstrates Defendant's basis for further discovery: that there was no basis for DAG Picione to authorize the April 23, 2018 Authorization, and that the State is still withholding additional apparent communications that are part and parcel to those already produced so as to avoid further exposure of its fatal flaw.

The redacted emails expose a new timeline which establishes that when the Maier text was sent to Lt. Fallon and the three (3) other OPIA employees, there was no file or open investigation into the Defendant. This causes one to question, who was "looking into" the Defendant and where are those

communications detailing the "allegations of bribery, etc." that are the basis for opening a file? See Hurley Cert. Ex. C. It wasn't until 1:36 p.m., twenty-four (24) minutes after Lt. Fallon responded to the Maier text asking, "Is Ho with you?", that an email from DAG Minato was issued to DAG Picione, DAG Robinson DAG Nicodemo and DAG Manis stating, "FYI spoke to Mike briefly. **They decided to move forward with O'Donnell tonight**. . . . "**[t]he sole purpose of tonight's meet is to generate conversation of illegal financial support to O'Donnell in his upcoming bid for the Mayoral seat.**" See Hurley Cert. Ex. A. (emphasis added). These beginning two sentences epitomize the gaps in the State's argument and their persistent document concealment. Where are the written communications between Lt. Fallon and DAG Minato? Who is "they" that now on April 23, 2018, decided to move forward with O'Donnell? More importantly, "they" suddenly manifests as separate and distinct from the DAGs who would possess authority over the decision as to whether an intercept will "yield relevant evidence." Who communicated information to DAG Minato that spawned the concept of a meet with MOD that would "generate conversation of illegal financial support"? And where are the balance of the communications regarding Defendant – referred to as "O'Donnell" in Minato's email – that predate April 23, 2018? These facts demonstrate that as of 12:48 p.m. on April 23, 2018, when Maier who was physically out of the office, texted

four (4) other OPIA members about a meeting with Defendant and MOD, there was no file open for Defendant. Nor was there any open investigation into Defendant sanctioned by a DAG.

Even though the State continues to disagree with the clear, unambiguous holding in Martinez, the Appellate Division in State v. Thomas, A-1472-23, A-1473-23, A-1474-23, 2025 N.J. Super. LEXIS 69, *13 (App. Div. Jan. 14, 2025) affirmed Martinez's precedent. Thomas involves the OPIA, consensual intercept authorizations, and cooperating witness Matthew O'Donnell, Esq. In June 2023, Defendant Thomas's Counsel, filed an omnibus discovery motion seeking, among other things ". . . . any and all documentation and information that were reviewed by Deputy Chief . . . Manis and formed the basis for the issuance of the [c]onsensual [i]ntercept [f]orms dated February 27, 2019, April 30, 2019, May 29, 2019, June 28, 2019, July 27, 2019 and August 26, 2019." Id. at *14. The trial court granted the Motion with respect to this request, and the State sought reconsideration of the decision claiming that

> The State identified the documents already produced, which contained **"[t]he foundational knowledge** that Deputy Chief . . . Manis had when he issued the consensual intercept forms." "Deputy Chief Manis also relied upon information he received through verbal updates and conversations [,]" but "[a]ny factual information learned by Deputy Chief Manis through those verbal updates and conversations is reflected in the investigation reports . . . , which have already [been] produced to the defense."

[Id. at *16.]

Ultimately, the Court held that:

> Discovery regarding consensual intercepts is permitted where the intercepts are expected to yield relevant information. State v. Martinez, 461 N.J. Super. 249, 275 (App. Div. 2019). However, courts may also consider whether the intercepts were premised upon an impermissible motive, including animus against the defendant, and whether the intercepts violated a defendant's constitutional right, or the attorney-client privilege.
>
> Pursuant to these principles, we discern no error in part (a) of the court's order. The documentation supporting the authorization of the consensual intercepts was relevant to the State's ability to admit the intercepted communications into evidence and defendants' challenges to the lawfulness of the intercepts.
>
> [Id. at *32-33.]

The communications by and among OPIA Investigators and any DAGs related to the consensual intercept authorizations bear upon a core defense: that the consensual intercept authorizations were wrongfully issued and are in contravention of the law established in Martinez and reinforced by Thomas. Unlike Thomas, the State has not produced the documentation supporting the lawfulness of consensual intercept on April 23, 2018, and the other ten (10) consensual intercepts, and has not established the "foundational knowledge" known to DAG Picione and DAG Minato. See Thomas, 2025 N.J. Super. LEXIS

69, *16. There was no evidence or discovery that Defendant was alleged to have committed any criminal acts – or intended to commit any criminal acts - before April 23, 2018. Simply seeking $10,000 in campaign contributions from fifty (50) separate donors after an event, is not a crime.

In fact, the State has overlooked a crucial concept. Both Thomas and Martinez confirm that a consensual intercept cannot be premised on an impermissible motive such as whim, bias or animus. The intra-agency communications directly related to Defendant in this case are the only evidence the State can provide that confirms they did not act with an impermissible motive within the specter of context the State has deliberately manufactured.

POINT III
THE CLAIMED PRIVILEGES THE STATE SO HEAVILY RELIES UPON ARE INAPPLICABLE OR WHOLLY FICTIONAL

The State is improperly wielding "privilege" as a shield while also weaponizing it as a sword to prevent Defendant from obtaining discovery he is rightfully entitled to under Rule 3:13-3 and Martinez. Intra-agency communications are not protected by either the work-product or deliberative process privilege. It is the State's burden to prove the applicable privilege. Yet, the State does not, and cannot, point to any precedent or decisional law supporting these baseless assertions. Even if the communications were somehow privileged, the State must identify and categorize those materials on a privilege

log. The State cannot circumvent Defendant's ability to review and challenge the claimed assertions.

A. The work product privilege does not apply to investigator-to-investigator communications or intra-agency communications.

The roots of the work product doctrine can be traced back to its initial recognition in the United States Supreme Court, Hickman v. Taylor, 329 U.S. 495 (1947). In Hickman, the owners and underwriters of a tugboat – which sank in the Delaware River resulting in the deaths of five of the nine crew members – hired a law firm to defend against the "potential suits by representatives of the deceased crew members." Id. at 498. One of the attorneys from the retained law firm privately interviewed the survivors and took statements in anticipation of litigation. Id. Each of the survivors signed these statements. Id. The attorney also interviewed others he believed to be in possession of information relating to the accident, and for certain interviews, authored memoranda of what they told him. Id.

During discovery, and in response to an interrogatory question, the law firm declined to turn over the memorandums or summarize their contents stating that "that such requests called "for privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private files." Id. at 499. The District Court for the Eastern District of Pennsylvania,

held that the requested matters were not privileged, and the Third Circuit Court of Appeal reversed finding that the information was "work product of the lawyer and privileged from discovery under the Federal Rules of Civil Procedure." Id. at 499.

The Court, in assessing the production of the memoranda and statements gathered by the attorney, stated that:

> it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways -- aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.
>
> [Hickman, 329 U.S. at 510-511.]

Yet, the Court cautioned that "we do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. . . the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." Hickman, 329 U.S. at 512.

New Jersey codified the work product doctrine in 1948 through the creation of Rule 4:10-2(c), which governs civil discovery. Rule 4:10-2(c) provides that

> [A] party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under *R[ule]* 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

> **A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party.** Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order . . . . For purposes of this paragraph, a statement previously made is (1) **a written statement signed or otherwise adopted or approved by the person making it**, or (2) a stenographic, mechanical, electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.
>
> [R. 4:10-2(c)].

In 2017, the Appellate Division clarified the scope of the work product privilege with respect to discovery in civil matters under R. 4:10-2(c). See Paladino v. Auletto Enterprises, Inc., 459 N.J. Super. 365, 374 (App. Div. 2017). When discussing the scope of the work-product doctrine generally, the Court acknowledged three factual predicates where the privilege does not apply. Id. at 275. First, the Court described that "[i]t has been long established that the doctrine only protects documents or prepared materials; accordingly, **it does not protect facts**." Id. at 275 (emphasis added) (citing Hickman, 329 U.S. at 513; R. 4:10-2(c); O'Boyle, 218 N.J. at 188-89). Second, the Court recognized that "the doctrine does not protect statements that are prepared in the normal course of business." Id. Third, the Court explained that "the protection of a statement

will usually be lost if the person who gave the statement is later called to testify at trial." Ibid. In addition, a party requesting **work-product** materials must show a "**substantial need**" of the materials and an inability without an undue hardship to obtain the substantial equivalent of the materials by other means. R. 4:10-2(c); In re Envtl. Ins. Declaratory Judgment Actions, 259 N.J. Super. 308, 319, (App. Div. 1992). As the Panel in Thomas emphasized, "the work product privilege is not absolute. It may be overcome through a strong showing of need that the information sought is both relevant and necessary to a fair determination of the issues." Thomas, 2025 N.J. Super. LEXIS 69 at *22 (quotations and citations omitted).

The attorney work product privilege applicable to criminal cases is governed by subsection (d) of Rule 3:13-3, which provides: this rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or the party's attorney or agents, in connection with the investigation, prosecution or defense of the matter nor does it require discovery by the State of records or statements, signed or unsigned, of defendant made to defendant's attorney or agents.

The intra-agency communications exchanged between the investigators before the consensual intercept was authorized are not work product and are not

protected under the work product privilege.[5] The text messages and emails exchanged between investigators are facts and impressions; indeed, they are the underlying basis for a justification as to whether the intercept would proceed.

[5] Though not briefed below, Defendant suggests that to the extent the Court were to find the existence of any privilege, attorney-client, work-product, deliberative process, or otherwise – the State's decision to reveal some but not all communications – subject to all those privileges has been effectively waived. To the extent that this Court considers the texts and emails to be privileged work product, N.J.R.E. 530(c)(1) explains that when a disclosure of work product is made in a state proceeding and waives the work-product protection, the waiver also extends to undisclosed communications if: (1) "the waiver is intentional"; (2) "the disclosed and undisclosed communications or information concern the same subject matter"; and (3) "they ought in fairness to be considered together." N.J.R.E. 530(c)(1). Rule 530(c)(1) exactly mirrors the language of Federal Rule of Evidence 502(a). In examining FRE 502(a), federal courts have acknowledged that the subject-matter waiver provision is applicable in "situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." Salmon v. Lang, 57 F.4th 296, 326-27 (1st Circ. 2022) (quoting Fed. R. Evid. 502(a) advisory committee notes); see also Neece v. City of Chicopee, 106 F.4th 83, 100 (1st Cir. 2024) (noting that FRE 502(a) is implicated when a party "partially disclose[s] privileged communications or affirmatively rel[ies] on privileged communications to support its claim or defense and then shield[s] the underlying communications from scrutiny by the opposing party"). In the present matter, because the texts and emails selectively turned over by the State concern the authorization of the consensual intercept, considerations of fairness dictate that the Defendant should be able to analyze the disclosed communications in the context of all communications pertaining to the authorization of the consensual intercept in order to obtain an unobscured and complete understanding of the factual predicate of that authorization. The factual predicate of a consensual intercept authorization is of the utmost importance because the authorization process is the "*sole* protection . . . from overly zealous and completely discretionary law-enforcement practices." Martinez, 461 N.J. Super. at 268 (quoting Worthy, 141 N.J. at 381).

As the State pens in its own brief – the **underlying facts** gathered by the investigators is what informs the DAGs that they do or do not have a basis to engage in an intercept that can reasonably be expected to yield relevant information. (pg. 15) (emphasis added). The text messages exchanged between Maier, Fallon Powers, Rodriguez, and Shin are not internal reports, memoranda or documents created under work product. Neither are the emails that are tethered to DAG Minato's 1:36 p.m. communication to the other DAGs discussing that "they decided to move forward." These communications are factual and provide the basis for the consensual intercept. And, they are kept in the normal course of an investigation, just like radio dispatch recordings where police officers communicate the characteristics of a suspect fleeing an active crime scene.

In United States v. Nobles, 422 U.S. 225, 238 (1975), the Court elucidated that the work product doctrine in criminal cases is applicable as "[a]t its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." The State's only argument is that intra-agency communications are cloaked with absolute immunity from discovery. But the State provides no basis in law or fact for this bald conclusion. In fact, the State's argument is that the definition of work product privilege is what the State deems to be work product,

wholly untethered to any legal justification. The unjustified expansion of the work product privilege impedes the truth-seeking function and strips Defendant of the fairness he is guaranteed at trial. This alone satisfies the substantial need standard.

Part and parcel to the State's strawman argument is their blatant disregard for this Court's numerous holdings crystallizing that there is no blanket privilege protecting intra-agency communications. That is because "privileges may often undermine the search for truth in the administration of justice." State v. Szemple, 135 N.J. 406, 413 (1994) (citing State v. Dyal, 97 N.J. 229, 237 (1984)). "They are obstacles in the path of the normal trial objective of a search for ultimate truth." State v. Briley, 53 N.J. 498, 506 (1969). Even if this Court were to find that the privilege applies, Defendant has demonstrated substantial need because the privilege here is outweighed by the invasion of an individual's privacy rights and the elimination of their freedom and liberties. The facts that comprise intra-agency text messages and emails are not available from any other source, except the State, its investigator and/or its DAGs who participated in the investigation. Truth has never been more paramount than it is here – in a criminal case which may culminate in a request to a jury of one's peers to forcibly strip Defendant of his liberty rights. Defendant has made and continues to make a sufficient showing that the intra-agency communications are not merely relevant, but the

only manner in which Defendant can challenge the legality of the consensual intercept as established in Martinez.

Furthermore, the State attempts to assert a carte blanche work product and deliberative process privilege over all communications, despite failing to review or identify any particular communications that would be subject to the privileges. And the State has the audacity to then allege that Defendant, who has not been provided a log identifying any claimed privileged material, has somehow failed in the non-existent obligation to overcome that blanket privilege assertion. How could any defendant ever challenge an asserted privilege without having the means to review and decide if the claimed privilege is appropriate? Of course, the answer is that it is impossible – which is the very reason that privilege logs exist and are necessary in litigation. Ballard, 331 N.J. Super. at 551.

Indeed, the State has created a specter – a blanket privilege assertion over all intra-agency communications – that casts a wide net precluding Defendant from accessing discovery unless the State, as the self-anointed arbiter of relevance and privilege, determines that an intra-agency communication is helpful to the State's position. How could any defendant fight this self-serving specter? How could any defendant meaningfully challenge a privilege assertion taken by the State without being provided a privilege log identifying the types

of communications at issue? The State has impermissibly crafted a self-fulfilling prophecy and the Court should realize it for what it is: a not so thinly veiled attempt to close those open files to which Defendants have been entitled to since 1973.

To force Defendant to address the State's irrational legal position is to force Defendant to argue in a vacuum. The State cannot assert privilege over all internal communications, especially when the communications relate to the underlying authorization for consensual intercepts which, as discussed, Martinez and Thomas demand the production of for the protection of Defendant's due process. The unwillingness of the State to review and analyze its own case file cannot be countenanced by this Court.

Therefore, this Panel should reject the State's position that the intra-agency communications are protected under the work-product privilege and either order their disclosure or remand and direct the State to produce a privilege log that Defendant can meaningfully review and if necessary, challenge before the trial court.

B. The deliberative process privilege does not apply to investigator-to-investigator communication or intra-agency communications.

The Supreme Court recognized the existence of the deliberative process privilege ("DPP") and defined its contours in In re Liquidation of Integrity Ins. Co., 165 N.J. 75 (2000). After the trial court held that a DPP existed in New

Jersey, the Appellate Panel reversed that determination, holding that "no such qualified privilege exists." Id. at 81-82. Upon review, the Integrity Court traced the historical roots of both federal and state case law assessing the deliberative processes to determine whether a DPP existed in New Jersey.

The Court emphasized that the "deliberative process privilege is a doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Id. at 83. For the deliberative process privilege to apply to a document,

> **First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional**. Coastal States Gas Corp. v. Department of Energy, 199 U.S. App. D.C. 272, 617 F.2d 854, 866 (D.C.Cir.1980) (emphasis added). Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. Ibid. **Purely factual material that does not reflect deliberative processes is not protected.** Environmental Protection Agency v. Mink, 410 U.S. 73, 88 (1973), superseded by statute on other grounds noted by, Zweibon v. Mitchell, 170 U.S. App. D.C. 1, 516 F.2d 594, 642 (D.C. Cir.1975). Once the government demonstrates that the subject materials meet those threshold requirements, the privilege comes into play.
>
> [In re Liquidation of Integrity Ins. Co., 165 N.J. at 84-85.]

Here, the communications that Defendant seeks are not subject to the deliberative process privilege. For the reasons set forth in sub-section A, supra, the underlying communications that lead to the consensual intercept are factual. And if the State contends that they are not factual and involve deliberative processes, they must be put on a privilege log so that Defendant can meaningfully review and potentially challenge same. Moreover, any communication after the e-mail in which DAG Minato states that "[t]hey have decided to move forward with [Jason] O'Donnell tonight" cannot be subject to the deliberative process privilege. DOA101. Indeed, a decision was already made – apparently by the detectives and investigators on the case and not the DAGs. Accordingly, no communication after this point can be reasonably argued "pre-decisional" in nature.

POINT IV
ANY ARGUMENT OF "BURDEN" THAT IS INJECTED INTO OR A PRESUMED COMPONENT OF THE STATE'S POSITION IS NOT PROPERLY BEFORE THIS COURT FOR REVIEW.

The State, despite this Court's denial of a Motion to expand the record, still attempts to improperly inject the argument of "undue burden" into the Appellate record. Any argument espoused by the State claiming that compliance with the March 18 Order is "burdensome" must be rejected as the State failed to properly preserve the argument for Appeal.

"It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the question so raised on Appeal go to the jurisdiction of the trial court or concern matters of great public interest.'" Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (quoting Reynolds Offset Co., Inc. v. Summer, 58 N.J. Super. 542, 548 (App. Div. 1959), certif. den. 31 N.J. 554 (1960)); see also State v. Robinson, 200 N.J. 1, 20 (2009).

The State did not argue before the trial court that preparing a privilege log for the intra-agency communications would be burdensome. Indeed, Judge Galis-Menendez made the same explicitly clear:

> **Judge Galis-Menendez:** … and ***I'm going to make this clear.*** There was ***no argument made to this Court that it was burdensome to produce this.*** That wasn't – ***that's not an argument that was ever made.***
>
> [See 8T 7:5-15 (emphasis added)];
>
> **Judge Galis-Menendez:** Well, burd – and ***I'm going to be clear. Burden is not before this Court. Burden has never been before this Court*** *and* ***if you're Appealing on burden,*** well, ***you're taking a new issue that was not reviewed by the trial courts*** … So I want to be perfectly clear on that.
>
> [See 8T 8:12-19 (emphasis added)];
>
> **Judge Galis-Menendez:** ***This burden has nothing to do with me because I didn't review a burden argument***

> and that's just leading to … And that's just leading to an argument. I'm not dealing with that and that – ***if you're going to argue to the Appellate Division burden, that's fine, but you better tell them it was never raised with the trial court.***
>
> [See 8T 29:5-15 (emphasis added).]

Indeed, the State agreed that the legal argument relating to any alleged burden of production was not being argued to the trial court:

> **DAG Valdinoto:** Judge, Mr. Hurley shouldn't speak for the State. ***This is not a burden argument*** … ***We're not making a burden argument.***
>
> [See 8T 13:11-16 (emphasis added).]

Not only does this record speak for itself, but it is confirmed by the State's submission of two (2) letters drafted and provided to the trial court on April 25, 2025 after the Appeal was filed. Upon the State's submission of a Motion to Expand the Record, the Appellate Division denied the Motion on August 4, 2025, thereby invalidating the State's clear attempt to inappropriately shoehorn in undue burden. Da50-51. The State should not be permitted to mislead the tribunal. The trial court made clear that the issue of burden was not raised nor considered by the trial court. 8T 29:4-18. And the State irrefutably acknowledged that undue burden was not being argued. (8T 13:11-16). The Appellate Division has reaffirmed this precise fact upon the denial of the Motion to Expand the Record. Any reference or implication of burden made by the State

should be rejected. The argument was not preserved for consideration at the appellate level.

CONCLUSION

For the reasons set forth herein, the State's Appeal of the March 18 Order should be denied in its entirety or remanded to the trial court directing the State to produce a fulsome privilege log for Defendant to challenge the applications of privilege specific to the discrete intra-agency communications.

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Attorneys for Defendant, Jason O'Donnell

By: ***/s/ Leo J. Hurley, Jr.***
Leo J. Hurley, Jr., Esq.

Dated: October 14, 2025

Superior Court of New Jersey

APPELLATE DIVISION
DOCKET NO. A-2645-24T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Hudson County.
v.	:	Sat Below:
JASON O'DONNELL,	:	Hon. Mitzy R. Galis-Menendez, P.J. Cr.
Defendant-Respondent.	:	

REPLY BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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October 31, 2025

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PRELIMINARY STATEMENT

The trial court in this case ordered the State to produce or log voluminous internal deliberations and work product among prosecutors and investigators without any threshold showing of justification by the defendant. That order is in direct conflict with our Supreme Court's precedent and mandates discovery to which defendant is not entitled under the Wiretap Act. On appeal, defendant claims that the order follows from precedent and court rules, but cannot actually cite any other criminal case where such extraordinary demands were imposed—let alone where such extraordinary demands were upheld on appeal.

Defendant's supplemental appellate brief fails to justify this unwarranted and unprecedented discovery. Initially, defendant claims that these voluminous internal communications are discoverable as "police reports" under Rule 3:13-3 because they contain facts that "should have" appeared in police reports. But that argument has no basis in the Rule or in precedent, and defendant cites no on point cases suggesting these sorts of internal communications fall within it. Instead, defendant's demand falls well outside the Rule; otherwise, trial courts would frequently order (and this Court would frequently see) similar logs.

Nor can defendant establish any other unique basis to break from normal criminal discovery rules—with its open-file discovery and reticulated limits, and its mandates specific to Brady and Giglio—and require wide-ranging production

and privilege log development. Defendant fails to establish that he is entitled to these communications to challenge the consensual intercepts; the State provided documents establishing the intercepts were properly approved, and defendant has provided no sufficient basis under Hernandez to demand more. Defendant also failed to establish entitlement to the remaining documents the trial court directed the State to produce. Absent such threshold showing of relevance, the court erred as a matter of law in ordering the State to review and place thousands of communications on a privilege log when it is defendant's burden to show why he is entitled to discovery outside the parameters of the normal discovery rules. This Court should vacate the relevant portions of the discovery order.

LEGAL ARGUMENT

POINT I

DEFENDANT HAS NOT SHOWN A BASIS FOR DISCOVERY OF ALL THE INTERNAL STATE COMMUNICATIONS "RELATED TO" ALL THE STATE'S CONSENSUAL INTERCEPTS.

Defendant is not entitled to the myriad communications "by, between, and among the State's investigators, DAGs and third parties, that are related to" all relevant consensual intercepts, as Paragraph 3(a) demands. (Sa17). Although defendant makes much of this State's "open-file approach" to discovery, the "metes and bounds of the State's discovery obligation" are limited to what "is found in Rule 3:13-3(b)." State v. Hernandez, 225 N.J. 451, 462 (2016). And

a defendant may only obtain discovery "beyond that mandated by our court rules when doing so will further the truth-seeking function or ensure the fairness of a trial." Id. at 463. This open-file approach also does not entitle a defendant to documents protected by privilege. Defendant's responses fail to establish an entitlement to these communications or overcome their privilege protections.

A. Communications "Related To" All Consensual Intercepts Are Not Discoverable Under Rule 3:13-3(b).

Defendant misconstrues the scope of Rule 3:13-3 in claiming he is entitled to internal communications because they could contain "materials that otherwise might be included in police reports." (Db26). Internal communications are not on the list of discoverable items in Rule 3:13-3. Rule 3:13-3(b)(1)(H) provides that discovery includes "police reports that are within the possession, custody, or control of the prosecutor." Nothing in the plain language of that subsection also requires discovery of material that "might" have been included in a police report. Defendant cites no precedent to support his expansive interpretation of the Rule, and the State is aware of none. And the outcome would be radical: because the facts in any internal prosecution memo (even a plea recommendation to a County Prosecutor) can include supporting facts that can also appear in police reports, such burdensome internal review and privilege logs would become a constant part of New Jersey criminal practice.

The committee report on which defendant relies, (Db25-26), to transform

"work product consisting of internal reports, memoranda or documents" (which is not subject to discovery under Rule 3:13-3(d)) into "police reports" (which indeed are subject to mandatory discovery) undermines his argument. The committee explained that it was retaining the definition of "internal" reports, memoranda, and documents as nondiscoverable work product because "withdrawing police reports from the definition of work product" alone resolved "a major uncertainty surrounding the 'work product' concept." Report of Committee on Criminal Procedure, 96 N.J.L.J. 449, 462 (1973). The committee thus distinguished police reports (discoverable) from internal materials in the course of a criminal investigation (still generally protected by the work product privilege). To accept defendant's argument blending the two would render Rule 3:13-3(b)(1)(H) and Rule 3:13-3(d), which were amended at the same time, inconsistent.

But even if information that "might" have been included in police reports were discoverable under Rule 3:13-3, defendant has not identified information in this case that should have been included in a police report but was not. To support his request, defendant claims the following "should have wound up in a police report": (i) a text message from Detective Maier to MOD stating that she would inform Lieutenant Fallon that MOD was meeting with defendant that evening, and (ii) statements in later internal text messages and emails produced

by the State describing the contributions delivered on April 23 as "a few checks, all of which are legitimate," and noting that the "meeting went off as planned." (Db27-29). But defendant ignores that the information on which he relies was contained in the investigative reports already provided to him—that is, provided to defendant long before the court issued these unprecedented discovery orders. (Da117; Da126).[1] So even if defendant's view of Rule 3:13-3 were correct, defendant has not identified anything in the materials he received to suggest that the State possesses any undisclosed communications with discoverable facts.

B. Defendant Has Not Met His Burden To Establish His Entitlement To All Communications "Related To" All Consensual Intercepts.

Not only do these communications go beyond what is required by Rule 3:13-3, but defendant has not met his burden to establish his entitlement to them to challenge the consensual intercepts. (Db31-39). The "only" two "express statutory requirements" for such intercepts are "(1) consent by [the informant], and (2) prior approval by an authorized person." State v. Martinez, 461 N.J. Super. 249, 269-70, 275 (App. Div. 2019). And while Martinez (as defendant stresses) endorsed the practice that "intercepts should not be pursued unless they are expected to yield relevant information," that "operational standard," id. at

[1] The same is true to the extent defendant alleges that the State previously failed to disclose that the intercept was approved; this information was contained in an investigative report and intercept authorization form. (Da117; Da126).

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

Defendant can thus only show that further discovery is warranted if he can "articulate how" the demanded disclosure "will lead to relevant information," Hernandez, 225 N.J. at 462, about a consensual intercept's validity—a burden he cannot meet. That is, defendant must establish a plausible basis to believe relevant information casting doubt on the authorization exists in the State's files. See ibid.; cf. State v. Desir, 245 N.J. 179, 187 (2021) (putting burden on defendant seeking to challenge a search-warrant affidavit to show a "plausible justification that casts reasonable doubt on" the affidavit). But there is no serious dispute that the consensual intercept had consent and prior approval of a supervisor: the State already provided defendant the authorization form and an email showing that the April 23 intercept was authorized that afternoon, prior to the intercept that evening. (Da126; Da107).

Because there was clearly prior approval, defendant argues there was an insufficient basis for that approval since there was no preexisting "file open" or "any open investigation into" defendant, (Db35-37), let alone one that already uncovered some evidence "indicating that defendant had engaged or planned to engage in any criminal conduct," (Db20). But as a matter of law there is no

requirement of a preceding investigation. Indeed, if an individual comes forward with new information about a potential crime and an offer to record their conversations about that crime, the State need not ignore them (or deny the consensual intercept) simply because there was no pre-existing investigation about it. Just the opposite. As defendant acknowledges, the Legislature amended the Wiretap Act to specifically "remove[] the reasonable suspicion standard" for consensual intercepts. (Db33). At most, all that is left is the possibility that a consensual intercept may be challenged based on bias or animus, see Martinez, 461 N.J. Super. at 276 (reserving the question of whether "proven animus" could justify invalidation of a consensual intercept), but defendant's sole claim that there was no preexisting investigation is insufficient to plausibly support an animus argument to justify this fishing expedition.[2]

Not only does defendant err as a matter of law, but he badly misstates the facts—based on records already long produced. As the State laid out (Sb15), the evidence provided in investigative reports makes clear that, on February 1 and 21, 2018, more than two months before the first consensual intercept was approved, defendant asked MOD for $10,000 in "street money cash." (1T23-23 to 24-5; 1T25-12 to 19; 1T29-7 to 12; Da5; Da72). That information was already

[2] And defendant does not even seriously try to justify the trial court's decision to allow discovery as to communications relating to all consensual intercepts—not just the April 23 intercept he challenges.

known to the supervisor who authorized the consensual intercepts even before he signed the authorization. (6T6-18 to 8-22). Cash contributions in excess of $200 are a violation of New Jersey election law. N.J.A.C. 19:25-10.6. This was more than enough to show the intercept was "expected to yield relevant information," Martinez, 461 N.J. Super. at 275, and disproves the need for a fishing expedition as to the intercept's "basis."

Defendant's reliance on this Court's unpublished opinion in State v. Thomas, A-1472-23, A-1473-23, A-1474-23, 2025 WL 87963 (App. Div. Jan. 14, 2025) (Sa47-79; Db37-39), does not help him. Defendant argues that he is entitled to these communications because they "bear upon a core defense: that the consensual intercept authorizations were wrongfully issued." (Db38). But, as explained, defendant has established no plausible basis to believe the State is in possession of any information casting doubt on the authorization. Hernandez, 225 N.J. at 462. In Thomas, by contrast, the defendant requested only the core foundational documents (not all communications) reflecting the information that provided the basis for authorizing a consensual intercept because he argued that he was unfairly targeted for investigation, (Sa75-76), which this Court held were "relevant to the State's ability to admit the intercepted communications into evidence and defendants' challenges to the lawfulness of the intercepts," (Sa78). Nothing in Thomas supports defendant's claim to all communications, including

internal communications, when he has made no threshold showing that they have relevant information undermining the consensual intercepts. That is fatal.

C. Internal Communications "Related To" Consensual Intercepts Are Protected By Work-Product And Deliberative-Process Privileges.

Even if these internal communications were somehow relevant (and the lack of relevance is a dispositive flaw that requires reversing Paragraph 3(a)), defendant cannot overcome the governing privileges. Communications among prosecutors and investigators concerning an investigation are protected work product under Rule 3:13-3(d). See State v. Mitchell, 164 N.J. Super. 198, 202 (App. Div. 1978). And many also reflect deliberations concerning prosecutorial decisions and thus are protected by the deliberative-process privilege. See In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 84-84 (2000).

First, defendant errs in arguing that these privileges do not apply to these materials at all. Defendant says messages "exchanged between the investigators before the consensual intercept was authorized" are not protected because they are just "facts and impressions"—that is, that "they are the underlying basis for a justification as to whether the intercept would proceed." (Db44-45; see Db51). But the investigators' messages discussing the basis for the consensual intercept, by their very nature, reflect their thoughts, impressions, and opinions. The email among prosecutors that "they decided to move forward" with the intercept, see (Db46), is not "purely factual material," but instead reflects their deliberations.

And facts cited in the communications "are so interwoven with the professional judgments relating to [the] case, strategy and tactics that they may be said to share the characteristics of an attorney's 'work product,'" State v. Williams, 80 N.J. 472, 479 (1979), and to likewise still fall within the deliberative process privilege, see Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 139 (App. Div. 2012) (internal messages do not "lose their protection … merely because they may [also] contain ... information used in the development of, or deliberation on, a possible governmental course of action." (quoting Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 295 (2009))). Said simply, even if "[p]urely factual material" does not itself "reflect deliberative processes," Integrity, 165 N.J. at 85, a record that "involves factual components, is entitled to deliberative-process protection" when used in deliberations and "disclosure would reveal deliberations that occurred during that process," Educ. Law Ctr., 198 N.J. at 280. A prosecutor's plea recommendation can cite facts but is still privileged in toto (though the State must still satisfy Brady). So it is here.

Defendant's claim that these same internal communications lack privilege since they "are kept in the normal course of an investigation," (Db46), similarly misunderstands this privilege. Work-product privilege specifically protects materials prepared "in anticipation of litigation." State v. DeMarco, 275 N.J. Super. 311, 316 (App. Div. 1994). While this Court has instructed that the

privilege does not protect materials "prepared in the normal course of business," Paladino v. Auletto Enters., Inc., 459 N.J. Super. 365, 375 (App. Div. 2019) (emphasis added), Rule 3:13-3(d) makes clear that materials prepared as part of a criminal investigation are by their nature prepared in anticipation of possible litigation—a prosecution. Internal communications among the prosecutors and investigators in the course of this investigation are classic work product.

Nor does defendant get further denying the applicability of deliberative-process privilege to communications after the State decided to proceed with the initial April 23 intercept. (Db51). "Documents dated after one decision has been made 'may still be predecisional and deliberative with respect to other, nonfinal agency [decisions].'" Jud. Watch v. U.S. Dep't of Homeland Sec., 841 F. Supp. 2d 142, 163 (D.D.C. 2012) (quoting Jud. Watch v. FDA, 449 F.3d 141, 151 (D.C. Cir. 2006)). A contrary rule would "hinder frank and independent discussion regarding contemplated policies and decisions." Integrity, 165 N.J. at 85-86. Here, as the investigation proceeded, the prosecutors and investigators continued to deliberate regarding each next step in the investigation—including subsequent consensual intercept authorizations, indictments and charges, plea offers, and whether to bring this appeal. The privilege thus still applies.[3]

[3] Finally, defendant is also wrong to argue that the State has waived any privilege by producing some documents over which it claims privileges. N.J.R.E. 530

Second, defendant errs in claiming that—even assuming privileges apply to these internal communications—he can pierce these privileges because he has "demonstrated substantial need" for them. (Db47). Initially, it does not appear that almost any amount of alleged need allows a criminal defendant to pierce the prosecutor's mental impressions and deliberations—the criminal rules notably lack an exception for substantial need that the civil rules have. Compare R. 4:10-2(c) (civil rule, endorsing a substantial need exception for materials that cannot be obtained "by other means" "without undue hardship"), with R. 3:13-3(d) (criminal rule lacking such exception). Were the rule otherwise, given a defendant's reciprocal discovery obligation, "a defendant's constitutional right to the effective assistance of counsel" may be infringed "because of the chilling effect it would have on defense investigation." Williams, 80 N.J. at 478. Moreover, a prosecutor is bound by Brady obligations, and it is hard to fathom what need could exist to access the prosecutor's impressions beyond exculpatory facts. And even the civil rules completely protect mental impressions. See R. 4:10-2(c); Pfender v. Torres, 336 N.J. Super. 379, 390 (App. Div. 2001).

In any event, defendant cannot show that he lacks the ability to access the

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requires that waiver of the work-product privilege be intentional, and that waiver of the deliberative process privilege be "without coercion." But here, when the State produced a document for which it claimed privilege, it did so to comply with a court order while reserving its rights. (2T22-3 to 4).

relevant information "by other means" and "without undue hardship." Far from it: the information contained in these emails and texts was in fact contained in the investigative reports already provided to defendant in discovery. (Da117; Da126). Defendant responds in circular fashion: he argues he wants to know what the investigatory team was saying and when they were saying it, and thus needs those emails and texts. But those are precisely the kinds of questions at the heart of the privilege, and he made no threshold showing that such questions are relevant to a cognizable challenge to the intercept, let alone a substantial need for them. See supra Point I(b). So he cannot pierce bedrock privileges.

Relatedly, because defendant has provided no plausible basis to challenge the intercept authorizations entitling him to these communications in the first place, the trial court erred in ordering the State to undergo the burden of creating a privilege log of these communications. See (Sb20-21). Defendant misreads the record in claiming the State failed to preserve its argument that requiring it to do so would be unduly burdensome. (Db51-54). Although the trial judge stated at one hearing that the State had not preserved this argument, see (8T7-5 to 15; 8T8-12 to 19; 8T16-5 to 8; 8T12-18 to 13-2; 8T14-14 to 18; 8T29-6 to 7), the State did raise this issue, and the judge acknowledged as much on two prior occasions. See (2T44-2 to 9) (noting State had argued "a privilege log would be too burdensome"); (6T43-9 to 10) (acknowledging "State's concerns about

the potential scope of production"). Moreover, as noted, the State's attempt to seek reconsideration and/or clarification only underscores the point. See (Sa19-20).

In any event, even setting burden aside, a defendant must establish as a threshold matter that privileged documents "'will lead to relevant' information," Hernandez, 225 N.J. at 461 (quoting State v. Ballard, 331 N.J. Super. 529, 538 (App. Div. 2000)), before the State can be required to undertake the process of creating the privilege log. Because defendant has not met that burden, there was no basis to require the State to take the extraordinarily unusual step in a criminal case of canvassing its communications and creating a privilege log of them.

POINT II

DEFENDANT HAS SHOWN NO BASIS TO OBTAIN INTERNAL INVESTIGATOR COMMUNICATIONS.

For similar reasons, defendant fails to support his entitlement to "intra-agency communications ... between and among State investigators ... related to" defendant "and/or [MOD's] cooperation and any potential benefit that MOD could potentially or did in fact derive therefrom" under Paragraph 3(b). (Sa17). To the extent defendant claims these communications are relevant to the validity of the consensual intercept, that fails for the reasons discussed above—he has shown no basis for this further fishing expedition. See supra Point I(a)-(b). And even if he had some basis, internal communications among investigators are

protected by the work-product and deliberative-process privileges. See supra Point I(c). Defendant thus cannot compel the State to prepare a privilege log or produce these communications for in camera review without meeting his threshold burden to establish they are discoverable in the first place. (Sb24-30).

POINT III

DEFENDANT HAS SHOWN NO BASIS TO OBTAIN ALL "INTERNAL ASSESSMENTS" ABOUT MOD.

Nor has defendant established an entitlement to "internal assessments" related to MOD under Paragraph 3(c). (Sa17). And as discussed supra Point I(b), defendant has provided no threshold basis to challenge any of the consensual intercepts, so he cannot rely on this unsupported suspicion to obtain these assessments. Such internal assessments are classic work product and, absent any such threshold showing, the court erred in ordering the State to create a privilege log of them. See (Sb32).

CONCLUSION

This Court should vacate all non-moot aspects of Paragraphs 3(a)-(c).

Respectfully submitted,

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