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STATE OF NEW JERSEY	:	SUPERIOR COURT OF NEW JERSEY
	:	LAW DIVISION, CRIMINAL PART
Plaintiff,	:	MERCER COUNTY
	:	INDICTMENT NO: 16-08-667-I
	:	PROSECUTOR #: 16-1706-001
	:	
vs.	:	<i>Criminal Action</i>
	:	
EDWARD FORCHION,	:	
	:	
Defendant.	:	MEMORANDUM OF LAW
	:	IN OPPOSITION TO STATE'S
	:	MOTION FOR A PROTECTIVE ORDER

I. INTRODUCTION

The State has filed the within Motion for a Protective Order, seeking an Order prohibiting them from disclosing the name of their cooperating witness. Defendant, Edward Forchion opposes the State's application because the name of the cooperating witness, Zev Lapidus has already been identified publically and discovery related to Mr. Lapidus' involvement in the alleged sale and distribution is essential to Mr. Forchion's defense, especially an entrapment defense.

II. PROCEDURAL HISTORY

On August 19, 2016, Prosecutor, Stephanie Katz filed an ex parte brief with this Court. On August 20, 2016, Defendant, through counsel, Edward Harrington Heyburn, Esq. objected to the State's failure to provide the Defendant with a copy of the brief. On September 15, 2016, Ms. Katz filed a second brief, ex parte with this Court. I continuously objected. This Court Order Ms. Katz to provide the Defendant with a copy of the brief on several occasions. On November 15, 2016, Ms. Katz emailed me two briefs marked as "Redacted Briefs." There were no redaction. It appears that Ms. Katz provided one brief to the Court and another brief to the Defendant.

III. FACTS

That State's discovery indicates that Det. Yolanda Ward and the Mercer County Prosecutor's Office targeted Defendant, Edward Forchion's business for a sting operation. No discovery was provided suggesting that anyone was selling marijuana from this location until Det. Ward's cooperating witness into 320 E. State Street with the purpose of convincing Defendant, Edward Forchion to sell him marijuana. With respect to the allegations related to March 10, 2016, the State's discovery alleges:

On March 10, 2016 we, Detective Yolanda Ward, Detective Ronald Pope and DEA Special Agent Candacy Wint, met with Cooperating Witness (hereinafter referred to as CW) for the purpose of making a controlled purchase of CDS marijuana from 320-322 East

State Street, NJ Weedman's Joint. Detective Pope searched CW and ensured CW to be free of any money and/or contraband. I then supplied CW with a sum of currency obtained from Detective Sergeant Gendron from the Vice Enforcement Unit's Undercover Fund. CW was then fitted with an audio/video recording device and instructed CW to make a controlled purchase of CDS marijuana from 320-322 E. State Street.

After meeting with CW, Mercer County Narcotics Task Force Detective Sergeant Paul Gendron, Lieutenant James Slack, DEA Special Agent Candacy Wint, and I proceeded to the area of 320-322 E. State Street Trenton, NJ to conduct mobile and stationary surveillance. Detective Pope maintained surveillance of CW while en-route to this location, and monitored the audio/video recording device. SSJ/ Acting Detective Joseph Angarone, SSI/ Acting Detective Anthony Abarno, TPD Detective Timothy Long, TPD Detective Daniel Simpkins were positioned in the area and assigned as an extraction team.

Detective Pope advised that CW was actively engaging in alcohol and narcotics related conversation with patrons and employees inside the facility. During the conversation, one of the patrons instructed CW to proceed to the 'Sanctuary' portion of the NJ Weedman's Joint, which is located adjacent 322 E State Street. **According to CW, the "Sanctuary" is accessed through a door labeled "Bathroom" inside the dining area of the NJ Weedman's Joint. Once inside the "Sanctuary"** Detective Pope advised that CW encountered an unknown black male and began to engage in a conversation about obtaining a beer. The unknown black male offered to exchange a beer with CW in return for a donation. After receiving the beer, CW began to engage in conversation with a medium build, light skin black male with blonde hair, who identified himself to CW as "L". Throughout the conversation, "L" offered to sell a quantity of marijuana to CW. After a brief conversation about price, CW exchanged a quantity of US paper currency with "L" in return for an amount of packaged marijuana. During the exchange CW informed "L" that CW would be interested in purchasing additional marijuana. "L" then advised CW that he had

more marijuana but would have to leave the NJ Weedman's Joint/Sanctuary to access it. CW advised "L" that CW would be willing to wait for the additional marijuana. At this point I observed a light skin black male wearing a light color t-shirt and blue jeans, exit 322 E. State Street with a bicycle. The unknown black male proceeded to ride the bicycle down State Street towards Stockton Street and out of sight. Several minutes later, I observed the unknown light skin black male with blonde hair return on the bicycle and walk into the main entrance of 322 State Street. I noted that the unidentified black male was carrying a black back pack when he returned on the bicycle. A short time later, CW began to engage in a narcotics related conversation with "L". During the conversation "L" explained to CW that he didn't have any additional change to break the large US currency bill CW was attempting to exchange with him. As a result, "L" reached into a black back pack and exchanged and an additional package of marijuana with CW.

After the exchange, and while under constant surveillance, CW proceeded directly to a pre-arranged meet location. While at this location, CW turned over a quantity of suspected CDS marijuana, which CW stated was purchased from a black male known to CW as "L". CW was again searched and found to be free of any money and/or contraband. The suspected CDS was conveyed to the Trenton Police Headquarters where it was then turned over to the Central Evidence Bureau.

During a debriefing of CW while at the meet location, CW relayed that while inside 320-322 E State Street CW observed several surveillance cameras inside and outside the facility. CW relayed that while inside the 'Sanctuary' (320 E. State Street) **CW observed individuals openly smoking marijuana and drinking beer supplied by staff members of the facility in exchange for donations. See audio/video submitted for further details regarding this incident.**

Mercer County Prosecutor's Office Report authored by Trenton Det. Yolanda Ward, dated March 10, 2016 and attached as Exhibit "A" (*emphasis added*). The Confidential Witness was equipped with

an audio/video recorder which should if produced provide the most accurate account of what transpired when the Confidential Witness went inside the Weedman's Joint. Person who allegedly sold the CW marijuana was only identified as "L" but was definitely not Defendant, Edward Forchion. The CDS marijuana was not even at 320 E. State Street as "L" had to go to a different location to obtain it. See Exhibit "A". Nothing in this report implicates Defendant, Edward Forchion in the sale of marijuana.

With respect to the State's allegations related to March 14, 2016, the State's discovery alleges:

On March 14, 2016 we, Detective Ronald Pope and I, met with Cooperating Witness (hereinafter referred to as CW) for the purpose of making a controlled purchase of CDS marijuana from 320-322 East State Street, NJ Weedman's Joint. Detective Pope searched CW and ensured CW to be free of any money and/or contraband. I then supplied CW with a sum of currency obtained from Detective Sergeant Gendron from the Vice Enforcement Unit's Undercover Fund. **CW was then fitted with an audio/video recording device and instructed CW to make a controlled purchase of CDS marijuana from Edward Forchion AKA "Weedman" at 320-322 E. State Street.**

Mercer County Prosecutor's Office Report authored by Trenton Det. Yolanda Ward, dated March 15, 2016 and attached as Exhibit "B" (*emphasis added*).

At this juncture, the State's discovery does not indicate that Defendant, Edward Forchion was involved in any sale or distribution of marijuana. In fact, the Confidential Witness' prior interaction was with a person identified as "L". See

Exhibit "A". Despite Defendant, Edward Forchion's lack of involvement in the sale of marijuana, CW was instructed to make a controlled purchase of CDS marijuana from Edward Forchion AKA "Weedman". See Exhibit "B".

Det. Yolanda Ward's March 15th report further indicates:

Once inside the "Sanctuary", CW began to engage in a narcotics related conversation with another black male, who CW addressed as "L". **During the conversation, CW and "L" began to negotiate the cost of purchasing an amount of marijuana. "L" advised CW that he would have to leave the facility to go get the marijuana, but would return soon.** Almost immediately after the conversation with "L", I observed a younger light skinned black male exit the main entrance of 322 East State Street wearing a red and black long sleeve plaid shirt and dark color pants. The unknown black male seemed to be in a hurry as he scurried down East State Street towards Stockton Street. Mobile surveillance units were able to keep track of the unidentified black male as he proceeded on to Montgomery Street towards East Hanover Street. Due to the high volume of pedestrian traffic, mobile surveillance was unable to maintain watch of the unknown black male. Several minutes later "L" returned to the "Sanctuary" and proceeded to exchange an amount of CDS marijuana with CW in return for US paper currency.

Mercer County Prosecutor's Office Report authored by Trenton Det. Yolanda Ward, dated March 15, 2016 and attached as Exhibit "B" (*emphasis added*). Once again, the alleged marijuana transaction was between the CW and an unknown person only identified as "L".

With respect to the allegations related to March 22, 2016, the State's discovery alleges:

On March 22, 2016 we, Detective Ronald Pope and I, met with **Cooperating Witness** (hereinafter referred to as CW) for the purpose of making a controlled purchase of CDS marijuana from 320-322 East State Street, NJ Weedman's Joint. Detective Pope searched CW and ensured CW to be free of any money and/or contraband. I then supplied CW with a sum of currency obtained from Detective Sergeant Gendron from the Vice Enforcement Unit's Undercover Fund. **CW was then fitted with an audio/video recording device and instructed CW to make a controlled purchase of CDS marijuana from Edward Forchion a/k/a "Weedman" at 320-322 E. State Street.**

Mercer County Prosecutor's Office Report authored by Trenton Det. Yolanda Ward, dated March 22, 2016 and attached as Exhibit "C" (*emphasis added*). Again Det. Ward and the other law enforcement officers directed the CW to target Edward Forchion to purchase marijuana despite the fact that the prior interactions did not involve Mr. Forchion.

Once inside the Sanctuary **CW began to engage in a narcotics related conversation with a black male that CW addressed as "Ed"**. During the conversation "Ed" exchanged an amount of CDS marijuana with CW in return for US paper currency. After the exchange, and while under constant surveillance, CW proceeded directly to a pre-arranged meet location. While at this location, CW turned over a quantity of suspected CDS marijuana in an orange tinted plastic container, which CW stated was purchased from a black male known to CW as "Ed" a/k:/a "Weedman".

Mercer County Prosecutor's Office Report authored by Trenton Det. Yolanda Ward, dated March 22, 2016 and attached as Exhibit "C" (*emphasis added*). While Det. Ward's report indicates that the CW purchased marijuana from Edward Forchion, the State has

not provided the video tape with audio of the alleged transaction. There are a number of circumstance where such a videotape can exonerate a defendant facing these charges.

Based on the above investigation, the Mercer County Prosecutor's Office present the case to a grand jury. The grand jury returned an indictment. The Indictment charged as follows:

COUNT I - POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
(FOURTH DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about **March 14, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or purposely possess, actually or constructively, a controlled dangerous substance, to wit: more than fifty grams of marijuana, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-10a(3), and against the peace of the State, the Government and dignity of the same.

COUNT II - POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
(FOURTH DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about **March 15, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or purposely possess, actually or constructively, a controlled dangerous substance, to wit: more than fifty grams of marijuana, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-10a(3), and against the peace of the State, the Government and dignity of the same.

COUNT III - POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
(FOURTH DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about March 22, 2016, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or purposely possess, actually or constructively, a controlled dangerous substance, to wit: more than fifty grams of marijuana, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-10a(3), and against the peace of the State, the Government and dignity of the same.

COUNT IV - POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
(FOURTH DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about **March 30, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or purposely possess, actually or constructively, a controlled dangerous substance, to wit: more than fifty grams of marijuana, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-10a(3), and against the peace of the State, the Government and dignity of the same.

COUNT V DISTRIBUTION OF A CONTROLLED DANGEROUS
SUBSTANCE (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about dates of **March 14, 2016 and/or March 15, 2016 and/or, March 22, 2016 and/or March 30, 2016 and/or April 15, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did, knowingly or purposely distribute a controlled dangerous substance, to wit: marijuana, in a quantity of one ounce or more but less than five pounds, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-5a(1) and 2C:35-5b(11), and against the peace of the State, the Government and dignity of the same.

COUNT VI- POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE
WITH INTENT TO DISTRIBUTE (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about dates of **March 14, 2016 and/or March 15, 2016 and/or, March 22, 2016 and/or March 30, 2016 and/or April 15, 2016, and/or April 27, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did knowingly or purposely possess or have under his control with intent to distribute a controlled dangerous substance, to wit: marijuana, in a quantity of one ounce or more but less than five pounds, including any adulterants or dilutants, contrary to the provisions of N.J.S. 2C:35-5a(1) and 2C:35-5b(11), and against the peace of the State, the Government and dignity of the same.

COUNT VII- DISTRIBUTION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE ON OR NEAR SCHOOL PROPERTY (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about dates of **March 14, 2016 and/or March 15 2016 and/or, March 22, 2016 and/or March 30, 2016 and/or April 15, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did, within one thousand feet of school property, namely, Daylight/Twilight High School, 501 Edgewood Avenue, Trenton, New Jersey, knowingly or purposely distribute a controlled dangerous substance, to wit: marijuana, contrary to the provisions of N.J.S. 2C:35-7, 2C:35-5a(1) and 2C:35-5b(11) and against the peace of the State, the Government and dignity of the same.

COUNT VIII -POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE WITHIN A SCHOOL ZONE (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about dates of **March 14, 2016 and/or March 15,2016, and/or, March 22, 2016 and/or March 30, 2016 and/or April 15, 2016, and/or April 27, 2016**, in the City of Trenton, in the County aforesaid,

and within the jurisdiction of this Court, did knowingly or purposely possess or have under his control with intent to distribute a controlled dangerous substance, to wit: marijuana, within 1000 feet of school property, namely, Daylight/Twilight High School, 501 Edgewood Avenue, Trenton New Jersey, contrary to the provisions of N.J.S. 2C:35-7; N.J.S. 2C:35-5a(1); and N.J.S. 2C:35-5b(11) and, and against the peace of the State, the Government and dignity of the same.

COUNT IX- MAINTAINING A NARCOTIC NUTSANCE (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that EDWARD FORCHION between the dates of **March 14, 2016 and April 27, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did at 320-322 East State Street, Trenton, New Jersey, knowingly keep or maintain a dwelling house, building or any place whatever, which is used for the keeping or selling of controlled dangerous substances in violation of the New Jersey Code of Criminal Justice, contrary to the provisions of N.J.S. 24:21-21a(6), and against the peace of this State, the Government and dignity of the same.

COUNT XI - MAINTAINING A FORTIFIED STRUCTURE (THIRD DEGREE)

The Grand Jurors of the State of New Jersey, for the County of Mercer, upon their oaths, present that, EDWARD FORCHION, on or about the date of **April 27, 2016**, in the City of Trenton, in the County aforesaid, and within the jurisdiction of this Court, did violate N.J.S. 2C:35-5 or N.J.S. 2C:35-7 in a structure, to wit: 320-322 East State Street, Trenton, Trenton, New Jersey, which he owned, leased, occupied or controlled and which had been fortified, contrary to the provisions of N.J.S. 2C:35-4.1c and against the peace of the State, the Government and dignity of the same.

Indictment No. 16-08-0667-I (August 5, 2016) attached as Exhibit "D".

The Counts are predicated on the allegation the Defendant, Edward Forchion sold marijuana to a "cooperating witness." The unidentified witness is Zed Lepidus. Mr. Lepidus is depicted on Mr. Forchion's surveillance video which the State refuses to return to the video to Mr. Forchion. Essentially the State's case is that Mr. Forchion sold drug to a person, the State does not have to identify the name of the person it is alleged to have purchased the drugs and Mr. Forchion is not entitled to see a copy of his own surveillance video which depicts the alleged crimes.

IV. LEGAL ARGUMENT

A. DEFENDANT, EDWARD FORCHION, HAS A 6TH AMENDMENT RIGHT TO CONFRONT WITNESSES WHO ACCUSE HIM OF A CRIME

The State seeks not only to withhold discovery from the Defendant but intends to use the withheld evidence at the time of trial. This unusual tactic violates the United States Constitution in several aspects.

BRADY VIOLATION

In Brady v. Maryland, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution". Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218

(1963). "The Brady rule applies even where defendant makes no formal request for Brady material." State v. Nelson, 330 N.J. Super. 206, 212 (2000) (citing United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342, 351-52 (1976); State v. Martini, 160 N.J. 248, 268, 734 A.2d 257 (1999); State v. Knight, 145 N.J. 233, 245, 678 A.2d 642 (1996)). The State has asked the Court to do what the State is not permitted to do itself under Brady, hide evidence from the defendant.

(CONFRONTATION CLAUSE)

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him;** to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (*emphasis added*). "The Sixth Amendment to the United States Constitution provides in part that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.' The Clause is applicable to the States by virtue of the Fourteenth Amendment." State v. Michaels, 219 N.J. 1, 15 (2014) See Pointer v. Texas,

380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923, 926 (1965).

In Crawford v. Washington, the United States Supreme Court held unconstitutional the practice of admitting of an out-of-court "testimonial" statement permitted by state hearsay rules, unless the person who made the statement is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine that person. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (followed by In the Interest of J.A., 195 N.J. 324 (2008)).

An out-of-court testimonial statement is the equivalent of 'bear[ing] testimony' against an accused. Crawford, supra, 541 U.S. at 51, 124 S.Ct. at 1364, 158 L.Ed.2d at 192-93 (*citation and internal quotation marks omitted*). The Court made clear that the ultimate goal of the Confrontation Clause is to test the reliability of testimonial evidence in "the crucible of cross-examination." Id. at 61, 124 S.Ct. at 1370, 158 L.Ed.2d at 199; see also J.A., supra, 195 N.J. at 342-43, 949 A.2d 790. **The Court reasoned that the Clause "reflects a judgment, not only about the desirability of reliable evidence ..., but about how reliability can best be determined."** Crawford, supra, 541 U.S. at 61, 124 S.Ct. at 1370, 158 L.Ed.2d at 199.

State v. Basil, 202 N.J. 570, 590 (2010) (*emphasis added*). The Sixth Amendment's Confrontation clause is indelibly intertwined with a defendant's right to test the test the reliability of the State's evidence whether that Statement is made in or out of Court. Our legal system has long recognized that cross-examination is the "greatest legal engine ever invented for the

discovery of truth." California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489, 497 (1970) (*citation and internal quotation marks omitted*).

Accordingly, it is axiomatic that a defendant in a criminal case have a Constitutional right to challenge statements made both in and out of court. The question becomes how can a defendant confront a statement when the State purposely withhold that statement applies.

In Brady v. Maryland, the United States Supreme Court held that 'the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution'". Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963). The Brady rule applies even where defendant makes no formal request for Brady material. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342, 351-52 (1976); State v. Martini, 160 N.J. 248, 268, 734 A.2d 257 (1999); State v. Knight, 145 N.J. 233, 245, 678 A.2d 642 (1996).

State v. Nelson, 330 N.J.Super. 206, 212 (2000). Here the State seeks a judicial order permitting it to violate Brady v. Maryland, by denying Defendant access to his own surveillance video and the identity of the accuser who is the predicate for not only the State's Affidavit of Probable Cause but the Counts in the Indictment.

B. EXEMPTION TO THE PRIVILEGE APPLIES

"What is usually referred to as the informer's privilege is in reality, the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 176, 83 L.Ed. 151; In re Quarles and Butler, 158 U.S. 532, 15 S.Ct. 959, 39 L.Ed. 1080; Vogel v. Gruaz, 110 U.S. 311, 316, 4 S.Ct. 12, 14, 28 L.Ed. 158. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." Roviaro v. United States, 353 US 53, 59 (1957). The Roviaro Court held:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action. Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential

communication.

Id. At 60-61. The Supreme Court cut to the heart of the matter noting that withholding the identity of the informant is particularly problematic in cases where probable cause has been bootstrapped by information provided by the informant. The Court held "...that the identity of such an informer must be disclosed whenever the informer's testimony may be relevant and helpful to the accused's defense." Id. at 61-62.

The New Jersey Rules of Evidence have codified the privilege: Rule 516. Identity of Informer, N.J.S.A. 2A:84A-28 provides:

A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a representative of the State or the United States or a governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that **(a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues.**

N.J.R.E. 516 (Current New Jersey Rules of Evidence) (*emphasis added*).

Conversely, the State unfairly argues that it had probable cause based on information provided by a confidential informant but refuses to allow the defendant to know who provided the information or otherwise test the veracity of the information

provided. The State's position is contrary to the United States Supreme Court's holding and the notion of fundamental fairness. While the Court has an obligation to protect the safety of witnesses, this cannot be done by disregarding Mr. Forchion's basic Constitutional Rights and protections. Accordingly, this Court must Order the State to disclose the identity of the "confidential informant" or in the alternative, dismiss the charges against Mr. Forchion. In either case, Mr. Forchion is entitled to a hearing on the issue of probable cause pursuant to Delaware v. Franks.

**(The Identity of The Person Furnishing the Information Has
Already Been Otherwise Disclose)**

Defendant, Edward Forchion has already publically identified the State's confidential witness. His name is Zev Lapidus. In Court, Mr. Forchion (over my objection) presented the prosecutor, with a picture of Mr. Lapidus. (See Exhibit "E"). Based on information and belief, Mr. Lapidus has a criminal history of scams. A local newspaper ran a story with his picture in connection with a police investigation of him selling counterfeit football tickets. (See Exhibit "F"). Pennsylvania court records confirm that Mr. Lapidus was admitted into ARD (Pennsylvania version of PTI) for this incident. (See Exhibit "G"). Thereafter, Mr. Lapidus was arrested for shoplifting. (See Exhibit "H"). Accordingly, the issue is not

whether Zev Lapidus' identity will be revealed, it is whether the State will be permitted to withhold exculpatory evidence from the defendant.

C. THE IDENTITY OF THE COOPERATING WITNESS AS WELL AS THE AUDIO AND VIDEO TAPES OF THE ALLEGED TRANSACTIONS ARE NECESSARY TO AN ENTRAPMENT DEFENSE

"The essence of due process entrapment inheres in the egregious or blatant wrongfulness of the government conduct." State v. Johnson, 127 N.J. 458, 470, 606 A.2d 315 (1992). "Due process entrapment ... is an 'involvement-based' doctrine, which focuses on the extent of the government's involvement in the crime, not merely on whether that conduct objectively and subjectively induced or caused the crime." Id. "The court, rather than the jury, must resolve the issue of due process entrapment, and '[t]he State [has the burden of] ... disprove[ing] due process entrapment by 'clear-and-convincing' evidence.'" State v. Brooks, 366 N.J. Super. 447, 455 (2004) (citing State v. Florez, 134 N.J. 570, 590, 636 A.2d 1040 (1994)).

The audio and video tapes are significant of "the extent of the [State's] involvement in the crime, not merely on whether that conduct objectively and subjectively induced or caused the crime." See Brooks at 455. It is clear from the Det. Yolanda Ward's report, that she and the other law enforcement directed the Cooperating Witness to target Edward Forchion and despite

their instructions, Mr. Forchion does not sell any marijuana to the Cooperating Witness on March 14th or March 15. Despite the lack of any criminal behavior on Mr. Forchion's part, the police continue to target him as part of this undercover investigation. Defendant, Forchion needs the audio and video tapes to make the appropriate entrapment argument. As this Court knows, in determining whether due process entrapment has occurred, the court must consider: (1) whether the government or the defendant was primarily responsible for creating and planning the crime; (2) whether the government or the defendant primarily controlled and directed the commission of the crime; (3) whether objectively viewed the methods used by the government to involve the defendant in the commission of the crime were unreasonable; and (4) whether the government had a legitimate law enforcement purpose in bringing about the crime." Brooks at 455 (*citing Johnson, supra*, 127 N.J. at 474).

The State, by seeking a protective order, in effect seeks to prevent the Defendant from having the necessary evidence to make the appropriate entrapment argument and the Court from having the necessary information to decide if the State's conduct rose to the level of entrapment. "The primary factors governing due process entrapment are: (1) "the justification for the police in targeting the defendant as a criminal suspect;" and (2) "the nature and extent of the government's actual

involvement in bringing about the crime." Id. at 474-75. The discovery related to Zev Lapis is essential in an entrapment defense. The defendant and ultimately a jury must decide if the Trenton Police Department entrapped Mr. Forchion. If the State is not compelled to turn over this discovery, any conviction will likely be overturned on appeal.

V. CONCLUSION

For the reasons expressed above, Defendant, Edward Forchion respectfully requests that this Court Deny the State's Motion for a Protective Order and Order that the State release all of the discovery as required under Rule 3:13-3(b) (1) immediately, including the identity, audio and video of the cooperating witness, Zev Lapidus.

Respectfully submitted,

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