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SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY/CRIMINAL DIVISION
INDICTMENT NO.: [redacted]

STATE OF NEW JERSEY

CRIMINAL ACTION

v.

NOTICE OF PRETRIAL MOTIONS

[redacted], ET AL.

PLEASE TAKE NOTICE that as soon as counsel may be heard, the undersigned, Frederick P. Sisto, Esq., attorney for the above-captioned defendant, shall apply before the Honorable [redacted], J.S.C., of the Superior Court of New Jersey, Monmouth County, for an Order suppressing all of the evidence against [redacted], or in the alternative, for a Bill of Particulars. In support of the motion the defense will rely upon the attached letter brief and oral argument.

FPS

FREDERICK P. SISTO, ESQ.

DATED: December 26, 2011

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December 26, 2011

Honorable [redacted], J.S.C.

Monmouth County Courthouse

PO Box 1266

Freehold, NJ 07728

Re: State v. [redacted] et al.

Indictment No.: [redacted]

Your Honor:

Please accept this letter brief submitted in support of [redacted] Pretrial Motions.[1]

1 [redacted] reserves the right to move to suppress the contents of intercepted communications and derivative evidence based upon violations of the New Jersey Wiretapping and Electronic Surveillance Control Act. If such additional motions are necessary, they will be made at least 10 days before trial, pursuant to N.J.S.A. 2A:156A-21(c). Additionally, [redacted] reserves the right to supplement this letter brief if and when the materials that are subject to the pending Motion to Compel Discovery are turned over by the State.

STATEMENT OF FACTS

[redacted] stands accused of first degree Leader of a Narcotics Trafficking Network, among other related offenses. The evidence against [redacted] is derived from an investigation involving the extensive wiretapping of numerous facilities.

[redacted]

On December 30, 2008, Detective [redacted] (hereinafter "the affiant") claimed in paragraph 3(B) of his application for wiretap [redacted], that facility [redacted] was a facility known to belong to co-defendant [redacted]. This facility was always owned and utilized by co-defendant [redacted]. In his earlier November 21, 2008 application for [redacted] at paragraph 11(E)(2), the affiant swears that facility [redacted] received ten calls *from* [redacted] facility [redacted]. On December 22, 2008, in the affidavit designated [redacted], in paragraph 11(B) Detective [redacted] again places [redacted] using facility [redacted]. This information was expressly omitted from subsequent affidavits.

The affiant claimed on January 29, 2009, in paragraph 21 of the affidavit designated [redacted] that further investigation has revealed that [redacted] has passed two of his original

telephone facilities to [redacted] and [redacted]. There is no support for this bald assertion in the affiant's sworn statements. There is no indication in the affidavits that the issuing judge made an in camera inquiry regarding the affiant's basis of knowledge.

With regard to co-defendant [redacted], in paragraph 3(B), the affiant claimed that facility [redacted] was known to be [redacted] facility. This facility actually belonged to [redacted], as recognized by the affiant on January 29, 2009, in affidavit [redacted], at paragraph 27.

The alleged association between [redacted] and [redacted] gave rise to the allegation and finding of probable cause for a racketeering conspiracy charge. Without the issuing judge's finding of probable cause for a racketeering charge, the wiretaps could not have continued for six months, but instead would've been limited to a maximum of 40 days.

Regarding paragraph 28 of the affidavit, the affiant claims that on May 30, 2008, CI-2 advised that s/he has seen over 250 to 500 bricks of heroin at [redacted], Neptune. The affiant omits that he was privy to a search of [redacted], Neptune, on that very date. The affiant further omits that no heroin was recovered from the location.

When the affiant submitted affidavit [redacted] at an undisclosed hour on January 7, 2009, he incorporated his affidavit of application for [redacted] at paragraph 12(CC). In paragraph 3(B) of incorporated affidavit [redacted], the affiant swore that facility [redacted] was a facility known to belong to co-defendant [redacted]. The voice of [redacted], not [redacted], was intercepted over facility [redacted], beginning on December 31, 2008.

At paragraph 21 of [redacted], Detective [redacted] swore that he was familiar with [redacted]'s voice from previous investigations. Law enforcement officers assigned to monitor roving intercepts like the one at issue were required to be familiar with the target's voice. [redacted] was the target of multiple roving wiretaps.

[redacted]'s voice is distinguishable from [redacted]'s voice. Moreover, [redacted] speaks with a stutter. [redacted] does not.

On an intercepted call (# 16) the monitor recognizes that [redacted] identifies himself as "Knowledge" on January 6, 2009. Detective [redacted] is aware that [redacted], not [redacted], uses the alias "Knowledge" and/or "Knowledge Supreme". The affiant is familiar with [redacted]'s voice from prior investigations. The

affiant claims to be familiar with all aspects and circumstances surrounding this investigation for which he is personally responsible.

With respect to another intercepted call (# 26), Sergeant [redacted] of the [redacted] Police Department identified [redacted] as "Knowledge Supreme" on January 6, 2009. During call # 74 [redacted] identifies himself as "Knowledge" 14 seconds into the conversation on January 7, 2009 at 1:13pm. [redacted] is identified as "Preme", short for his known alias of "Knowledge Supreme" in the transcription for call # 106, which also occurred on January 7, 2009.

The affiant's sworn statements linked [redacted] to [redacted], regarding the allegation in paragraph 21 that [redacted] was working cooperatively with [redacted] and his narcotics distribution organization/network. Without this alleged association, there would not have been an initial basis to wiretap [redacted]'s facility. It is from the initial wiretap that all of the evidence against [redacted] is derived. Similarly, in paragraph 25 of [redacted], Detective [redacted] claims that on December 24, 2008, Mr. [redacted] used facility [redacted] to contact facility [redacted], which is being utilized by [redacted]. This sworn statement linked [redacted] to [redacted].

In paragraph 25(A) the affiant lets the issuing judge know that he was wrong when he swore under oath that the facility ending in

7413 was utilized by [redacted]. The affiant swears to the issuing judge that on January 5, 2009 the wiretap was terminated once he realized his mistake with regard to the [redacted]7413 facility. The wiretapping of that facility actually continued for dozens, if not hundreds of communications on January 5 and 6, 2009. Then, at least an additional 9 communications were intercepted on January 7, 2009. The intercepts from January 5, 6 and 7 should not exist if the intercept was terminated after briefly listening to the first communication(s) on January 5.

The fact that monitors continued to intercept communications from the [redacted]7413 facility was readily verifiable. As the lead detective, the affiant was responsible for the conduct of the monitors that he repeatedly swore were familiar with the requirements of the New Jersey Wiretapping and Electronic Surveillance Control Act.

In paragraph 45, the affiant claims that an analysis of call detail records demonstrates that [redacted] uses his captioned telephone facility throughout the day and night. This statement is false because this affidavit contained the first request for a communications data warrant (CDW) for any of [redacted]'s facilities. Therefore, Detective [redacted] could not have reviewed [redacted]'s call detail records unless he did so unlawfully and without a warrant.

[redacted]

On January 15, 2009, in paragraph 3(A) of [redacted] the affiant claims that [redacted] has engaged in continuing criminal activity for an undetermined period of time. The fact is that [redacted] was not released from federal prison until September 1, 2008, and not released from a federal halfway house until September 15, 2008.

In paragraph 20 of the same affidavit, the affiant swore that [redacted] was released on parole approximately three and one half months before the execution of the affiant's sworn statement. Thus, he made one statement regarding the wiretap necessity requirement, but contradicted himself in furtherance of the probable cause requirement.

In paragraph 3(B), the affiant claims that [redacted] has exhibited a willingness to change his telephone number with the purpose to thwart detection by law enforcement. In support of this claim the affiant references paragraphs 28 through 30, wherein a communication intercepted at 11:12 AM on January 10, 2009 is described. The affiant claimed that during this conversation, [redacted] indicated that he changes his phone number every week and that the other party to the conversation indicated that he has used the same number for 12 years. The transcription of that conversation (session 177), which was prepared by the State, demonstrates that it

was the unknown male who indicated that he changes his number every week. Furthermore, as opposed to indicating a willingness to change his telephone number, [redacted] indicates that he has had the same number for 12 years.

In paragraph 4, the affiant omitted the identities of known participants in the alleged conspiracy. [redacted]s identity was omitted despite her name appearing in the subscriber information from the CDW accompanying the January 7, 2009 wiretap Order designated [redacted]. [redacted]s identity was omitted despite her name appearing in the surveillance log dated January 7, 2009. [redacted]s identity was omitted despite her being identified during an intercepted communication on January 8, 2009. The affiant claimed that the wiretap order was needed to learn the identities of unidentified members of the conspiracy.

In paragraph 4(B), the affiant claims that [redacted] and [redacted] have had contact or involvement in the criminal activities of [redacted]. He goes on to claim that this assertion is supported by subscriber information and criminal history. The fact is that [redacted] has never had any contact with [redacted] or [redacted] and has never spoken to [redacted] or [redacted] over any phone. Moreover, there is no subscriber information connecting him to [redacted] or [redacted]. Additionally, there is no criminal history connection between [redacted] and [redacted] or [redacted].

The affiant's sworn statements indicate that [redacted] was associated with known criminals, including two individuals who were the targets of the first communication data warrants related to this case, on September 2, 2008. The falsity of the statements is demonstrated by the subscriber information and criminal case histories referenced by the affiant.

In paragraph 13 of [redacted], the affiant claims that he knows of no application to any court for authorization to intercept communications involving any of the same persons specified in this application. The fact is that the affiant was part of the wiretap investigation of [redacted] in 2004. While the affiant alludes to partaking in that investigation, he omits the fact that it involved wiretapping. The existence of the prior wiretap invokes a higher standard regarding the probable cause finding, i.e. the issuing judge must also find that there is probable cause to believe that the application is based upon new evidence in addition to the evidence offered to support the prior order. Even if the 2004 investigation is not related to the investigation at hand, the affiant is still required to disclose the existence of the prior wiretap.

The affiant had direct knowledge of the wiretapping of [redacted] in 2004. In paragraph 29 of the affidavit in support of [redacted] the affiant describes his past proffer sessions with [redacted], wherein they discussed deciphering Five percenter terminology during the wiretapping investigation of [redacted] in

2004.

In paragraph 26, the affiant claims to have been present and overheard a narcotics related phone conversation between CI-8 and [redacted]. This conversation never occurred. The call detail records that could verify or dispel the existence of this conversation have not been turned over by the State despite repeated requests and the fact that this case was indicted more than two years ago.

In paragraph 27, the affiant stated that facility [redacted] has been passed to [redacted] and roving interceptions terminated after it was determined that [redacted] was no longer using this facility. This affidavit was submitted on January 15, 2009. The truth is that the interceptions continued for days after January 15, under wiretap [redacted]. The intercepted communication labeled "# 747" was intercepted on January 17, 2009.

Regarding paragraph 28, the affiant claims that during a controlled purchase, he observed an unknown male exit a vehicle that CI-8 claimed contained [redacted]. The affiant claims that after this unknown male exited the vehicle [redacted] provided CI-8 with five bricks of heroin. This transaction never occurred. The fact is that the controlled purchase report from the State, labeled F-00116, describes a different scenario wherein the "unknown male" never exits the vehicle. Additionally, while various reports contain claims that photos were taken of this alleged transaction, the State later

declared that no such photos exist.

In Paragraph 29, the affiant claims that he gathered intelligence about [redacted] from various sources, including eight confidential informants. The fact is that the affiant indicated elsewhere that he only obtained information from two CIs, namely CI-6 and CI-8. The affiant gives no description of his "various sources." Additionally, the affiant provides no indication of CI-6's reliability.

Moreover, most of the CIs were allegedly used at the beginning of the investigation in 2007 and 2008 while [redacted] was still incarcerated in federal prison and unable to participate in the alleged conspiracy. For example, the affiant claims that CI-1 was utilized in July of 2008. CI-2 was utilized in May of 2008. CI-3 was utilized in August of 2008. CI-4 was utilized on September 9, 2008.

Additionally, in paragraph 29 the affiant claims he used physical surveillance to investigate [redacted]. The fact is that the State's surveillance logs demonstrate that surveillance did not begin until January 7, 2009, *after* the State began surreptitiously recording Allen Height's communications.

Again in paragraph 29, the affiant claims that he arrested [redacted] in June of 2004 while working with the D.E.A. Nevertheless, the affiant acknowledges at paragraph 18(B), that he did not work with the D.E.A. until October of 2004.

In paragraph 54, the affiant claims that the following investigative techniques have all been employed: the use of confidential sources, physical surveillance, execution of search and seizure warrants, analysis of data from telephone toll records, dialed number retrievers, in progress traces, utilization of an investigative grand jury, analysis of AMA record searches and or call to destination reports, billing records, customer records, and call detail records. There is no description of these techniques in the discovery and affidavits related to this case.

In paragraph 54(B), the affiant claims that *further* infiltration would permit the continued distribution of narcotics. There is no description of infiltration accounts in all of the discovery and affidavits related to this case.

Regarding the lack of infiltration attempts, the aforementioned CI-8 was an unindicted co-conspirator who was completely trusted by [redacted]. There are more than 200 pertinent conversations involving CI-8 over the course of the wire intercepts. The affiant omitted CI-8's level of involvement in the alleged conspiracy from his affidavits.

The affiant chose not to follow through on [redacted] and CI-8's alleged plan to pool money together in order to jointly purchase heroin from a supplier in Newark. Had this traditional investigative lead been followed, CI-8 could have gone to Newark and subsequently identified Height's source of supply. One of many alternative

options in identifying the source and location of the Newark supplier would have been to use a tracking device attached to Height's car or the money that was to be pooled.

The affiant continues to mislead the judge when he claims in paragraph 54(B) that he is concerned that the length of time required to conduct further infiltration and undercover operations would permit the continued distribution of large quantities of heroin. Still, in paragraph 55, the affiant contradicts himself when he claims that evidence has already been developed to support a successful prosecution of [redacted]. The false statement was made on January 15, 2009. The fact remains that the affiant chose not to arrest [redacted] and to continue surreptitiously monitoring telephonic communications until the end of March 2009, thus undermining his alleged boilerplate concern for the continued distribution of heroin.

In paragraph 54(F), the affiant claims there is no reason to believe that [redacted] would cooperate with the grand jury, even with grants of immunity. The affiant recognizes in paragraph 29 that [redacted] not only conducted numerous proffer sessions with the affiant in the past, but he did so *without* a grant of immunity.

[redacted]

Regarding the January 29, 2009 affidavit of application for [redacted], in paragraph 21 the affiant claims that [redacted] has passed facility [redacted] to [redacted]. [redacted] was not a party to the vast majority of numerous communications involving [redacted] over this roving wiretap that was supposed to be targeting [redacted]. The related call detail records have been requested multiple times, but have not been turned over by the State.

[redacted]

Regarding the March 13, 2009 affidavit in support of [redacted], at paragraph 24 the affiant claims that between February 26, 2009 and March 2, 2009, that there were 1,175 calls logged to/from wireless telephone facility [redacted], and that 71 pertained to narcotics trafficking and other related criminal activity.

The alleged number of logged calls is misleading because each interception is not actually a phone call. With the use of the push-to-talk function, wherein the phone functions like a walkie-talkie, each exchange of information is tallied as if it were a separate phone call. The affiant understood that each push to talk exchange was not the equivalent of a separate phone call. Nevertheless, he

misled the judge into believing that separate conversations had occurred.

The affiant provided contradictory statements with regard to material issues at the motion to suppress the physical evidence related to this case. Regarding the circumstances surrounding the physical evidence, the affiant swore that Officer [redacted] told Special Agent [redacted], who in turn told the affiant that the evidence at issue was found in plain view. The affiant admitted under oath that he omitted this alleged involvement of [redacted] in his sworn statement to the wiretap judge. Despite defense counsel's attempt to subpoena [redacted] as a witness at the motion to suppress, the federal authorities refused to acknowledge the writ that was faxed to the D.E.A.'s Newark Office.

At the suppression hearing, the affiant contradicted his previous sworn statement regarding a plain view seizure when he testified that he previously swore to the issuing wiretap judge that it was not just a search, but a secondary "further search" that revealed the presence of the suspected heroin. The affiant had previously distinguished between search warrants, consent searches, and plain view seizures.

In paragraph 25(A) of the January 7, 2009 affidavit designated [redacted], the affiant admitted that facility [redacted] was

the subject of a roving wiretap despite the fact that it was not used by its target, [redacted]. After claiming that the intercept terminated after briefly listening to conversations, the affiant sought authorization to specifically wiretap facility [redacted], i.e. to intercept communications whether or not the alleged target, [redacted], was recognized as a party to them. The affiant did not provide the issuing judge with information regarding who the afiant then alleged was utilizing this facility.

The indictment charges [redacted] with first-degree leader of a narcotics trafficking network (count two). The indictment does not particularly disclose the identities of the alleged co-conspirators relating to this count. This charge requires the State to prove that [redacted] was an organizer, supervisor, or manager of at least one other person. The indictment does not disclose the identity of this additional person. Similarly, the indictment does not disclose the identities of the other persons over whom [redacted] occupied a position of superior authority or control in the drug trafficking conspiracy.

LEGAL ARGUMENT

I. THE EVIDENCE AGAINST [redacted] SHOULD BE SUPPRESSED BECAUSE THE WIRETAP AFFIDAVITS CONTAIN MATERIAL OMISSIONS AND FALSE STATEMENTS MADE WITH RECKLESS DISREGARD FOR THE TRUTH.

Where the accused demonstrates that a search warrant affidavit contains material misstatements made with reckless disregard for the truth, he must be allowed to inquire further into the veracity of the affidavit. State v. Howery, 80 N.J. 563, 566 (1979). If the accused then proves such falsity by a preponderance of the evidence at a Franks hearing, the evidence seized must be suppressed. Id.

A facially insufficient affidavit can not be saved by additional inculpatory evidence introduced at a Franks hearing. State v. Altenburg, 223 N.J. Super. 289, 296 (App. Div. 1988). Material omissions in the affidavit also invalidate the warrant. State v. Stelzner, 257 N.J. Super. 219, 235 (App. Div. 1992).

Regarding the interplay between material omissions in a wiretap affidavit and the necessity requirement of N.J.S.A. 2A:156A-9(c)(6), a court must evaluate the hypothetical effect of knowledge of the existence of the omitted facts on the original judge's determination that a wiretap was necessary. U.S. v. Landeros-Lopez, 718 F. Supp. 2d 1058, 1062-63 (D. Ariz. 2010).

LML-MON-35-WT-08

On December 30, 2008, Detective [redacted] (hereinafter "the affiant") claimed in paragraph 3(B) of his application for wiretap [redacted], that facility [redacted] was a facility known to belong to co-defendant [redacted]. This affidavit is found on the enclosed disc labeled "MCPO ST v. [redacted] ET. AL.; CASE # 09-01315"[2]. This facility was always owned and utilized by co-defendant [redacted]. See Certification of [redacted](I); Certification of [redacted] (EXHIBIT A).

This false statement was made with reckless disregard for the truth. The truth was implicitly recognized by the affiant in his earlier November 21, 2008 application for [redacted] at paragraph 11(E)(2)[3], where he swears that facility [redacted] received ten calls *from* [redacted] from facility [redacted]. (emphasis added).

Logic dictates that facility [redacted] was not [redacted]'s facility, because [redacted] could not be simultaneously placing and receiving calls from himself. The omission of this expressed information from subsequent wiretap applications further demonstrates that it was omitted with reckless disregard for the truth. The affiant makes no attempt to explain

2 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "[redacted]".

3 This affidavit is enclosed in paper format because it was not included in the above-referenced discovery disc labeled "MCPO ST v. [redacted] ET. AL.; CASE # 09-01315" (EXHIBIT B).

this. This false statement was material[4] because there was no basis for wiretapping any facility used by [redacted]. Thus, the wiretap application would have been denied without the false statement.

Additionally, on December 22, 2008, in the affidavit designated [redacted][5], in paragraph 11(B) Detective [redacted] again places [redacted] using facility [redacted]. This false information was also omitted from subsequent affidavits. The logical inference is that Detective [redacted] realized that his false assertions were demonstrably false, and he tried to conceal them by not repeating them.[6] Still, failing to expressly alert the issuing judge of the previous false assertions constitutes material omissions made with reckless disregard for the truth in subsequent affidavits.

The affiant tries to conceal his false assertions by claiming on January 29, 2009, in paragraph 21 of the affidavit designated [redacted][7] that further investigation has revealed that [redacted] has passed two of his original telephone facilities to

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4 All of the false statements referenced are material, if not by themselves then in the aggregate along with the other false statements detailed in this brief. Note that the affiant incorporates each of his false statements into every subsequent affidavit, beginning with the December 30, 2008 false statements in [redacted] and ending 20 affidavits later with the March 13, 2009 affidavit in support of [redacted]

5 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Third Renewal Aff of Appl [redacted]". Note that the title of the digital file does not match the title of the referenced affidavit because the applications and digital files usually contain multiple requests for different wiretaps and/or CDWs.

6 Still, these false assertions were incorporated by reference to all previous affidavits.

7 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Renewal Aff of App [redacted].pdf"

[redacted] and [redacted]. Nevertheless, this bald assertion is not even supported by the inherently suspect word of a confidential informant[8], as the affiant does throughout his affidavits. While this uncorroborated assertion does trigger the issuing judge's duty to inquire in camera as to additional information concerning the affiant's basis, the affidavit contains no indication that any such inquiry was made. See N.J.S.A. 2A:156A-10(f).

With regard to [redacted], in that same paragraph 3(B), the affiant claimed that facility [redacted] was known to be [redacted]'s facility. This false statement was made with reckless disregard for the truth that this facility actually belonged to co-defendant [redacted], as recognized by Detective [redacted] on January 29, 2009, in affidavit [redacted][9], at paragraph 27.

This false statement was material because it was used to associate [redacted] with [redacted]. Without this alleged association, there would not have been an initial basis to wiretap [redacted]'s facilities, i.e. it is this initial wiretapping of [redacted], for whom there was no probable cause or necessity to wiretap, under the guise of the facility belonging to [redacted]

8 It is common knowledge that confidential informants have criminal backgrounds, are under serious criminal charges, and are acting in a manner to gain a benefit for themselves with respect to their pending charges. See State v. Worthy, 141 N.J. 368, 391 (1995).

9 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Renewal Aff of App [redacted]."

[redacted], from which all of the evidence against [redacted] is derived.

Additionally, it is this alleged association between [redacted] and [redacted] which gave rise to the allegation and finding of probable cause for a racketeering conspiracy charge. See Detective [redacted]'s January 7, 2009 application for [redacted], at paragraphs 2, 3(A), 25, 30 and 35[10]. Without the issuing judge's finding of probable cause for a racketeering charge, the wiretaps could not have continued for six months, but instead would've been limited to a maximum of 40 days (20 days, with a maximum of two renewals, not to exceed 10 days each). See N.J.S.A. 2A:156A-12.

Regarding paragraph 28 of the affidavit and the inherently suspect assertions of confidential informants, the affiant claims that on May 30, 2008, CI-2 advised that s/he has seen over 250 to 500 bricks of heroin at [redacted], Neptune. The affiant omits that he was privy to a search of [redacted], Neptune, on that very date. See Certification of [redacted]. The affiant further omits that no heroin was recovered from the location. See Certification of [redacted]; Investigator [redacted]'s 12W/20/11 Report (EXHIBIT D).

These omissions are material in light of their tendency to

10 This affidavit is enclosed in paper format because it was not included in the above-referenced initial discovery disc labeled "MCPO ST v. [redacted] ET. AL.; CASE # 09-01315" (EXHIBIT C).

undermine the already suspect reliability of CI-2, thus undermining the findings of probable cause and necessity which were based upon CI-2's allegations. These omissions were made with reckless disregard for the truth because Detective [redacted] was privy to the execution of the search warrant and therefore had first-hand knowledge of the information that he chose to conceal from the issuing judge.

It was the wiretap designated [redacted] (the first wiretap application) that led to the interception of communications involving [redacted]. It is the initial wiretapping of [redacted]'s facility from which all subsequent wiretaps targeting [redacted]'s facilities derived. Therefore, all of the evidence against [redacted] should be suppressed.[11]

[redacted][12]

When the affiant submitted affidavit LML-MON-4-WT-09 at an undisclosed hour on January 7, 2009, he incorporated his affidavit of application for LML-MON-35-WT-08 at paragraph 12(CC). In paragraph 3(B) of incorporated affidavit LML-MON-35-WT-08, the affiant swore that facility 973-782-3642 was a facility known to belong to co-defendant [redacted]. Detective [redacted] recklessly disregarded

11 Note that the New Jersey Wiretapping and Electronic Surveillance Control Act does not permit application of the "inevitable discovery" rule. State v. Worthy, 141 N.J. 368, 389 (1995).

12 This affidavit is enclosed in paper format because it was not included in the above-referenced initial discovery disc labeled "MCPO ST v. [redacted] ET. AL.; CASE # 09-01315".

the truth that this facility actually belonged to [redacted] because it is clear that the voice of [redacted], not [redacted], was intercepted over facility [redacted], beginning on December 31, 2008.

At paragraph 21 of [redacted], Detective [redacted] swore that he was familiar with [redacted]'s voice from previous investigations. Additionally, law enforcement officers assigned to monitor roving intercepts were required to be familiar with the target's voice. See, for just one example, paragraph 11(C) of [redacted][13]. It is noteworthy that [redacted] was the target of multiple roving wiretaps.

Moreover, [redacted]'s voice is easily distinguishable from [redacted]'s voice in all respects, including the fact that only [redacted] speaks with a stutter. See the enclosed transcript of Call # 31 for just one example. Note that the party designated "UM" is [redacted], as evidenced by the date and target number listed at the top of the page. See the enclosed disc labeled "[redacted]; NG08-00082; KNOWLEDGE [redacted]; ALL CALLS & TRNS" containing the audio[14] (and transcription) of the intercepted communication. See also the enclosed disc labeled "[redacted], NG08-00082; [redacted] 5060; ALL CALLS & TRNS" and the

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13 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Aff of App [redacted] - [redacted].pdf"

14 Double click "[redacted]". Next, double click "audio". Next, double click "T3642W". Then, double click "00000031" for the audio.

corresponding enclosed transcript of session 1214[15] (EXHIBIT E) for examples of [redacted]'s clearly distinguishable voice.

On call # 16 the monitor recognizes that [redacted] identifies himself as "Knowledge" on January 6, 2009. See the enclosed transcript (EXHIBIT F). Detective [redacted] is further aware that [redacted], not [redacted], uses the alias "Knowledge" and/or "Knowledge Supreme". See the January 29, 2009, affidavit in support of [redacted][16], paragraph 21, wherein the affiant admits to being familiar with [redacted]'s voice from prior investigations. See also the December 30, 2008, affidavit in support of [redacted], paragraph 2, wherein the affiant claims to be familiar with all aspects and circumstances surrounding this investigation for which he is personally responsible. Recall that this sworn statement was incorporated into all subsequent affidavits.

Moreover, with respect to call # 26, Sergeant [redacted] of the [redacted] Police Department identified [redacted] as "Knowledge Supreme" on January 6, 2009. See the attached transcription (EXHIBIT G). Again, on call # 74[17] [redacted] clearly identifies himself as "Knowledge" 14 seconds into the

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15 Double click "job_052". Next, double click "[redacted]". Next, double click "audio". Next, double click "N5060WPTT". Then, double click "00001214" for the audio.

16 Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Aff of App [redacted]"

17 See the enclosed disc labeled "[redacted]; NG08-00082; KNOWLEDGE [redacted]; ALL CALLS & TRNS". Double click "job_053". Then, double click "[redacted]". Then, double click "audio". Then, double click T3642W. Last, double click "00000074" for the audio.

conversation on January 7, 2009[18] at 1:13pm, notwithstanding the absence of this identification in the monitor's transcript[19]. Similarly, [redacted] is identified as "Preme", short for his known alias of "Knowledge Supreme" in the transcription for call # 106, which also occurred on January 7, 2009. See the enclosed transcription (EXHIBIT H).

These false statements are material because they linked [redacted] to [redacted], regarding the allegation in paragraph 21 that [redacted] was working cooperatively with [redacted] and his narcotics distribution organization/network. Without this alleged association, there would not have been an initial basis to wiretap [redacted]s facility. It is from the initial wiretap that all of the evidence against [redacted] is derived.

Similarly, in paragraph 25 of [redacted], Detective [redacted] claims that on December 24, 2008, [redacted] used facility [redacted] to contact facility [redacted], which is being utilized by [redacted]. This misstatement was again material because it falsely linked [redacted] to [redacted].

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18 Because Detective [redacted] and the issuing judge did not disclose the hour at which the affidavit in support of [redacted] was executed, it is unclear if actual knowledge of this call can be imputed to Detective [redacted] and/or the monitors for which he was responsible. Nevertheless, Detective [redacted] incorporated his affidavit in support of [redacted] into all future affidavits. Thus, even if he did not make material false statements with reckless disregard for the truth in the application for [redacted], he did make false statements with reckless disregard for the truth in all of the subsequent affidavits related to this case. Moreover, in analyzing this inquiry, familiarity with all the January 7, 2009 intercepted communications should be imputed to Detective [redacted] since it was he who omitted the time of the affidavit.

19 Note that most of the referenced transcripts can also be found on the enclosed corresponding audio discs.

In paragraph 25(A), the affiant lets the issuing judge know that he was wrong when he swore under oath that the [redacted] facility was utilized by [redacted]. Nevertheless, the affiant continues to make false statements when he swears to the issuing judge that on January 5, 2009 the wiretap was terminated once he realized his "mistake" with regard to the [redacted] facility.

This statement was made with reckless disregard for the truth because the wiretapping of that facility actually continued for dozens, if not hundreds of communications on January 5, 6, and 7, 2009. Then, at least an additional 9 communications were intercepted on January 7, 2009. See the enclosed four discs labeled "[redacted]; NG08-00082; [redacted]7413; ALL CALLS & TRNS" (1 of 4 through 4 of 4)[20]. The intercepts from January 5, 6 and 7[21] should not exist if the intercept was terminated after briefly listening to the first communication(s) on January 5.

These misstatements were made with reckless disregard for the truth because the fact that monitors continued to intercept communications from the [redacted] facility was readily verifiable. Indeed, as the lead detective, the affiant was responsible for the

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20 On each of the four discs, Double click on "job_046". Then, Double click on "[redacted] 7413". Then, double click on "html". Then double click on "Main". Scroll down to view the technical data of the communications intercepted on January 5 through 7, 2009. Note that each disc contains most of the corresponding audio files and transcriptions. To find the corresponding files, note the call number (Call No.) in the upper left hand corner and find the audio and/or transcript with the corresponding number.

21 The reader is referred to the argument above at footnote 18, regarding the affiant's failure to list the time that his affidavit was executed on January 7, 2009.

conduct of the monitors that he repeatedly swore were familiar with the requirements of the New Jersey Wiretapping and Electronic Surveillance Control Act. See one example at paragraph 10 of LML-MON-5-WT-09. These misstatements were material because, among other reasons, the judge would not have issued an additional wiretap order to an affiant who was responsible for a continuing and patently unlawful intercept.

In paragraph 45, the affiant claims that an analysis of call detail records demonstrates that [redacted] uses his captioned telephone facility throughout the day and night. This statement is false because this affidavit contained the first request for a communications data warrant (CDW) for any of [redacted]'s facilities. Therefore, Detective [redacted] could not have reviewed [redacted]'s call detail records unless he did so unlawfully and without a warrant. This false statement is made with reckless disregard for the truth because the truth is verified by the lack of any previous requests for [redacted]'s call detail records. The statements are material because they were instrumental in the probable cause determination which lead to the issuance of a 24-hour, seven day per week wiretap. They were also material to the concomitant finding of necessity for a 24-hour, seven day per week wiretap.

[redacted]

On January 15, 2009, in paragraph 3(A) the affiant claims that [redacted] has engaged in continuing criminal activity for an undetermined period of time. The fact is that [redacted] was not released from federal prison until September 1, 2008, and not released from a federal halfway house until September 15, 2008. See the attached "Petition for Warrant or Summons for Offender Under Supervision" (EXHIBIT I).

This false statement was made with reckless disregard for the truth because the affiant himself recognized this truth in paragraph 20 of the same affidavit, where he swore that [redacted] was released on parole approximately three and one half months ago. Thus, he made a false statement in furtherance of his statements regarding the necessity requirement, but contradicted himself in furtherance of his statements regarding the probable cause requirement. These false statements were material because they go to the heart of the probable cause and necessity findings, i.e. they tend to bolster the assertions that [redacted] is engaged in the enumerated unlawful conduct and that a wiretap is necessary if the State's investigation is to be successful.

Regarding paragraph 3(B), the affiant claims that [redacted] has exhibited a willingness to change his telephone number with the

purpose to thwart detection by law enforcement. In support of this claim the affiant references paragraphs 28 through 30, wherein a communication intercepted at 11:12 AM on January 10, 2009 is described. The affiant claimed that during this conversation, [redacted] indicated that he changes his phone number every week and that the other party to the conversation indicated that he has used the same number for 12 years.

The attached transcription of that conversation (session 177), which was prepared by the State, demonstrates the exact opposite (EXHIBIT J). The fact is that it was the unknown male who indicated that he changes his number every week. Furthermore, as opposed to indicating a willingness to change his telephone number, [redacted] indicates that he has had the same number for 12 years. These false statements were material because they go to the heart of the required findings regarding probable cause, necessity, and necessity regarding roving wiretaps. They were made with reckless disregard for the truth because the truth is clearly described by the plain language in the State's transcription.

In paragraph 4, the affiant omitted the identities of known participants in the alleged conspiracy. [redacted]'s identity was omitted despite her name appearing in the subscriber information from the CDW accompanying the January 7, 2009 wiretap Order designated [redacted]. See the enclosed disc labeled "[redacted]

[redacted], 1 of 1; NG08-00082/NG09-00008; [redacted] 6997; All Calls & Trns"[22].

[redacted]s identity was omitted despite her name appearing in the surveillance log dated January 7, 2009[23]. [redacted]'s identity was omitted despite her being identified during an intercepted communication on January 8, 2009. See the affiant's enclosed synopsis of this communication (paragraph 27 of the affidavit in support of the arrest of co-defendant [redacted] (EXHIBIT K).

These omissions are material to the necessity finding because the affiant claimed that this wiretap order was needed to learn the identities of unidentified members of the conspiracy. See paragraphs 9, 45, 48, 54, and 62, among others. The supporting documentation demonstrates that at a minimum, the affiant recklessly disregarded the known identities of the members of this conspiracy.

In paragraph 4(B), the affiant claims that [redacted] and [redacted] have had contact or involvement in the criminal activities of [redacted]. He goes on to claim that this assertion is supported by subscriber information and criminal history. The

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22 Double-click "job_041". Double-click "[redacted]". Double-click "[redacted]" again. Scroll down to "Call No: 145". Note the Subscriber "[redacted]" in the bottom left corner of the technical data related to this communication intercepted on January 9, 2009, along with the subsequent call numbers relating to this subscriber.

23 Double click "[redacted]" on the main discovery disc. Double click "Surveillance Logs". Double click "Activity Log 01-07-09 thru 01-27-09". Scroll down to the page labeled "F - 04662".

fact is that [redacted] has never had any contact with [redacted] or [redacted] and has never spoken to [redacted] or [redacted] over any phone. See Certification of [redacted] (I). Moreover, there is no subscriber information connecting him to [redacted] or [redacted]. Additionally, there is no criminal history connection between [redacted] and [redacted] or [redacted].

These false statements are material to the probable cause finding, i.e. they demonstrate [redacted] to be associated with known criminals, including two individuals who were the targets of the first communication data warrants related to this case, on September 2, 2008. See paragraphs 12(A) and (F). These statements were made with reckless disregard for the truth because the falsity of the statements is clearly demonstrated by objective facts, namely the subscriber information and criminal case histories referenced by the affiant.

In paragraph 13 of [redacted] the affiant misleads the judge when he claims that he knows of no application to any court for authorization to intercept communications involving any of the same persons specified in this application.[24] The fact is that the affiant was part of the wiretap investigation of [redacted] in 2004. While the affiant alludes to partaking in that investigation, he omits the fact that it involved wiretapping. These false statements/omissions

24 These false assertions were echoed by [redacted], as referenced in paragraph 15.

are material because the existence of the prior wiretap invokes a higher standard regarding the probable cause finding, i.e. the issuing judge must also find that there is probable cause to believe that the application is based upon new evidence in addition to the evidence offered to support the prior order. See N.J.S.A. 2A:156A-9(e); N.J.S.A. 2A:156A-10(f). Note that even if the 2004 investigation is not related to the investigation at hand, the affiant is still required to disclose the existence of the prior wire tap. See U.S. v. Bellosi, 501 F.2d 833, 836 (D.C. Cir. 1974). See also U.S. v. Gambino, 734 F. Supp. 1084, 1095 (S.D. N.Y. 1990).[25] Note that this information regarding the prior wiretap investigation must be contained within the four corners of the affidavit. See Altenburg, at 296.

These false statements/omissions were made with reckless disregard for the truth because the affiant had direct knowledge of the wiretapping of [redacted] in 2004. See paragraph 29 of the affidavit in support of [redacted], wherein the affiant describes his past proffer sessions with [redacted] and how they discussed deciphering Five percenter terminology during the wiretapping investigation of [redacted] in 2004.

25 The less exacting federal case law standards are cited throughout this brief in light of the relative lack of state precedent. Note that New Jersey's wiretapping restrictions are not only intended to be more stringent than federal standards, but they can never be less stringent. State v. Barber, 169 N.J. Super. 26, 30 (Law Div. 1979).

In paragraph 26 the affiant claims to have been present and overheard a narcotics related phone conversation between CI-8 and [redacted]. This conversation never occurred. See Certification of [redacted] (I). The call detail records that could verify or dispel the existence of this conversation have not been turned over by the State despite repeated requests and the fact that this case was indicted more than two years ago.

These false statements were material to the probable cause finding. They were made with reckless disregard for the truth because the affiant claimed to have personal knowledge of this alleged conversation. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of others.

The affiant misled the issuing judge in paragraph 27 when he stated that facility [redacted] has since been passed to [redacted] and roving interceptions terminated after it was determined that [redacted] was no longer using this facility. This affidavit was submitted on January 15, 2009. The truth is that the interceptions continued for days after January 15, under wiretap [redacted]. See the enclosed disc labeled "[redacted]; 1 of 1; NG08-00082; Knowledge [redacted] 3642; All Calls & Trns". On this disc, the word document for session 747[26] indicates that this

26 Double click on "job_053". Then, Double click on "[redacted] 3642". Then,double-click on "Transcripts". Scroll to the bottom of the page and double-

session was intercepted on January 17, 2009. The sessions continue in chronological order and include a subsequent session 868, although the exact date of session 868 remains unclear.

These misstatements are material because, among other reasons, the judge would not have issued an additional wiretap order to an affiant who was the lead detective in an investigation involving a continuing and patently unlawful intercept. These statements were made with reckless disregard for the truth because once again, the fact that monitors continued to intercept communications from the [redacted] facility was readily verifiable.

Regarding paragraph 28, the affiant claims that during a controlled purchase, he observed an unknown male exit a vehicle that CI-8 claimed to contain [redacted]. The affiant claims that after this unknown male exited the vehicle [redacted] provided CI-8 with five bricks of heroin. This transaction never occurred. The fact is that the controlled purchase report[27] from the State, labeled F-00116, describes a completely different scenario wherein the "unknown male" never exits the vehicle. Additionally, while various reports[28] contain claims that photos were taken of this alleged transaction,

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click on the document titled "00001_T3642W_000747_2009-01-17_18-07-55.doc."

27 See the enclosed main discovery disc labeled "MCPO ST v. [redacted] ET. AL. CASE # 09-01315". Double-click on "[redacted]". Double click on "[redacted]". Double-click on "Supp Control Purchase". Scroll down to page 2 of 3.

28 See the enclosed disc labeled "MCPO ST v. [redacted] ET. AL. CASE # [redacted]". Double-click on "[redacted]". Double click on "[redacted]". Double click on "Evid Prop Rcpt". Scroll down to page 8 and the document labeled "F - 00105".

the State later declared that no such photos exist. See page two of the enclosed two-page letter from the State dated December 6, 2011 (EXHIBIT L). For context, see also item # 34 and the referenced photo disc of [redacted]s August 30, 2011 brief in support of his Motion to Compel Additional Discovery, both on file with the Court.

These inconsistencies and diametrically opposed accounts demonstrate that this alleged transaction was fabricated. These false statements were material to the probable cause finding. They were made with reckless disregard for the truth because the affiant claims to be an eyewitness to this alleged transaction. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of others.

In Paragraph 29, the affiant makes several false statements. First, he claims that he gathered intelligence about [redacted] from various sources, including eight confidential informants. The fact is that the affiant indicated elsewhere that he only obtained information from two CIs, namely CI-6 and CI-8. See the affidavit in support of [redacted], paragraph 46, wherein the affiant describes information allegedly provided by CI-6. See also the argument above regarding the alleged dealings with CI-8. The affiant gives no description of his "various sources." Additionally, the affiant provides no indication of CI-6's reliability. See paragraph 46 of [redacted].

Moreover, most of the CIs were allegedly used at the beginning of the investigation in 2008 while [redacted] was still incarcerated in federal prison and unable to participate in the alleged conspiracy. For example, the affiant claims that CI-1 was utilized in July of 2008. See paragraph 21 of [redacted]. CI-2 was utilized in May of 2008. See paragraph 28 of [redacted]. CI-3 was utilized in August of 2008. See paragraph 29 of [redacted]. CI-4 was utilized on September 9, 2008. See paragraph 37 of [redacted].

These false statements are material to the probable cause finding. They were made with reckless disregard for the truth because the affiant claims to have personal knowledge of the events. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of others.

Additionally, in paragraph 29 the affiant claims he used physical surveillance to investigate [redacted]. The fact is that the surveillance logs[29] demonstrate that surveillance did not begin until January 7, 2009, *after* the State began surreptitiously recording [redacted]'s communications. These false statements are material to the required findings of probable cause and necessity. These false statements were made with reckless disregard for the

29 See the enclosed disc labeled "MCPO ST v. [redacted] ET. AL. CASE # [redacted]". Double-click on "[redacted]". Double click on "[redacted]". Double click on "Surveillance Logs".

truth because the affiant claims to have personal knowledge of the events which are verified by objective evidence, namely, the State's own reports. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of others.

Again in paragraph 29, the affiant claims that he arrested [redacted] in June of 2004 while working with the DEA. Nevertheless, the affiant acknowledges at paragraph 18(B), that he did not work with the DEA until October of 2004. These false statements are material to the finding of probable cause, i.e. they lend support to the affiant's alleged bases of knowledge. These false statements were made with reckless disregard for the truth as evidenced by the fact that the affiant acknowledged the truth elsewhere in the lengthy affidavit, at paragraph 18(B).

In paragraph 54, the affiant claims that the following investigative techniques have all been employed: the use of confidential sources, physical surveillance, execution of search and seizure warrants, analysis of data from telephone toll records, dialed number retrievers, in progress traces, utilization of an investigative grand jury, analysis of AMA record searches and or call to destination reports, billing records, customer records, and call detail records. The fact is that the affiant did not try all of

these techniques against [redacted] as evidenced by the lack of a description of the techniques in all of the discovery and affidavits related to this case. See paragraph 42(c) of [redacted] regarding the use of physical surveillance. See paragraph 42(d) of [redacted] regarding the use of search warrants. Note that these two paragraphs contain boilerplate language that appears to have been cut-and-pasted from affidavit [redacted], an affidavit that pre-dates [redacted]'s alleged involvement in the alleged conspiracy. See also the balance of the enclosed affidavits on the main discovery disc ("MCPO ST v. [redacted] ET. AL. CASE # [redacted]"). These false statements are material to the required findings of probable cause and necessity.

In paragraph 54(B), the affiant implies that infiltration of [redacted]'s alleged organization has occurred when he claims that *further* infiltration would permit the continued distribution of narcotics (emphasis added). The fact is that law enforcement never attempted to infiltrate [redacted]'s alleged organization as evidenced by the absence of any such accounts in all of the discovery and affidavits related to this case. These false statements are material to the required findings of probable cause and necessity. These false statements were made with reckless disregard for the truth because the affiant claims to have personal knowledge of the events. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of

others.

Regarding the lack of infiltration attempts, the aforementioned CI-8 was an unindicted co-conspirator who was completely trusted by [redacted]. See Certification of [redacted] (II) (EXHIBIT M). This trust is further demonstrated by the contents of more than 200 pertinent conversations involving CI-8 over the course of wire intercept. Id. The affiant omitted CI-8's level of involvement in the alleged conspiracy from his affidavits.

The affiant chose not to follow through on [redacted] and CI-8's alleged plan to pool money together in order to jointly purchase heroin from the supplier in Newark. See paragraph 22 of [redacted]. Had this traditional investigative lead been followed, CI-8 could have gone along on the trip to Newark and subsequently identified or at least aided in the identification Height's source of supply. One of many alternative options in identifying the source and location of the Newark supplier would have been to use a tracking device attached to [redacted]'s car or the money that was to be pooled. Thus, these omissions regarding the nature of CI-8's relationship with [redacted] are material because if the issuing judge was aware of CI-8's deep involvement, he would not have found necessity for the wiretap order(s).

Applying the Franks analysis, the Court must either delete the falsity from the original affidavit, or in this particular instance

insert the finding of the reviewing court into the original affidavit, i.e. that there was an informant who had great potential for uncovering the entirety of the conspiracy under investigation. See U.S. v. Ippolito, 774 F.2d 1482, 1486-1487 (9th Cir. 1985). See also U.S. v. Aileman, 986 F. Supp. 1228 (N.D. Cal. 1997). These omissions were made with reckless disregard for the truth because the affiant had direct knowledge of the circumstances surrounding his informant, CI-8, along with knowledge of the intercepted communications between CI-8 and [redacted].

The affiant continues to mislead the judge when he claims in paragraph 54(B) that he is concerned that the length of time required to conduct further infiltration and undercover operations would permit the continued distribution of large quantities of heroin. Still, in paragraph 55, the affiant contradicts himself when he claims that evidence has already been developed to support a successful prosecution of [redacted]. The false statement was made on January 15, 2009. The fact remains that the affiant chose not to arrest [redacted] and to continue surreptitiously monitoring telephonic communications until the end of March 2009, thus undermining his alleged boilerplate concern for the continued distribution of heroin.

These false statements are material to the required findings of probable cause and necessity. They were made with reckless disregard

for the truth because the affiant recognizes in his sworn statement that there is already enough evidence to successfully prosecute [redacted]. Thus, any false statements can not be attributed to honest and reasonable mistakes or negligently relying on the accounts of others.

In paragraph 54(F), the affiant claims there is no reason to believe that [redacted] would cooperate with the grand jury, even with grants of immunity. The truth is that the affiant had every reason to believe that [redacted] would cooperate, especially if given a grant of immunity. The affiant himself recognizes in paragraph 29 that [redacted] not only conducted numerous proffer sessions with the affiant in the past, but he did so *without* a grant of immunity. This false statement is material to the required finding of necessity. This false statement is made with reckless disregard for the truth because the affiant himself recognizes the truth in paragraph 29.

[redacted]

Regarding the January 29, 2009 affidavit of application for [redacted], in paragraph 21 the affiant claims that [redacted] has passed facility [redacted] to [redacted]. This false statement is material because it is made to conceal the fact that

monitors were unlawfully intercepting [redacted] by way of [redacted]'s roving wiretap. [redacted] was not a party to the vast majority of numerous communications involving [redacted]. The instances wherein [redacted] was revealed to be speaking with Frizell Johnson over the target facility, while using a distinct facility further demonstrate that the target facility belonged to [redacted] alone.

This false statement is material because if the issuing judge knew of this illegal wiretapping that occurred at the behest of the affiant, additional wiretaps would not have been granted. This is so not just because the judge would have had good reason to question the affiant's credibility, but also because the additional wiretaps contain evidence that is subject to suppression as derivative evidence from the previous illegal wiretaps, i.e. the judge would have been issuing wiretap orders to gather evidence that should ultimately be suppressed. This false statement is made with reckless disregard for the truth because the truth can be verified by a review of the call detail records which the affiant claims to have reviewed himself pursuant to the original affidavit in support of [redacted], on December 30, 2008. Note that these call detail records have been requested multiple times, but have not been turned over by the State.

[redacted]

Regarding the March 13, 2009 affidavit in support of [redacted],[30] the affiant misleads the issuing judge regarding the amount of phone calls between defendants. At paragraph 24 he claims that between February 26, 2009 and March 2, 2009, that there were 1,175 calls logged to/from wireless telephone facility [redacted], and that 71 pertained to narcotics trafficking and other related criminal activity.

The alleged number of logged calls is misleading because each interception is not actually a phone call. With the use of the push-to-talk function, wherein the phone functions like a walkie-talkie, each exchange of information is tallied as if it were a separate phone call. See the enclosed disc labeled "[redacted] 3 of 3; NG08-00082/NG09-00008; [redacted] 4430; All Calls & TRNS"[31], containing the transcriptions for sessions 2717 through 2720. The transcriptions demonstrate that these session numbers and times were all part of the same phone call beginning at 8:03:15 pm. In reality, many exchanges occur within a single call. Nevertheless, the affiant counts each exchange as a separate call.

The false statements regarding these calculations are material

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30 See the disc labeled "MCPO ST v. [redacted] ET. AL.; CASE # [redacted]". Double click on "[redacted]". Next, double click on "WIRETAPS". Then, double click on "Second Renewal Aff of App [redacted]".

31 Double click "job_043". Double click "[redacted]". Double click "transcripts". Scroll down to the corresponding session numbers.

because they were used to establish the associations that form the basis for the wiretap order. Moreover, they form the basis for a finding of probable cause for racketeering, which allowed the monitors to continue intercepting for nearly 6 months, as opposed to limiting the duration of the wiretap to 20 days.

These false statements were made with reckless disregard for the truth because any lead detective who is trained with respect to wiretapping technology would understand how the push to talk feature works. See the affiant's explanation at paragraph 5(D). Therefore, the affiant understood that each push to talk exchange was not the equivalent of a separate phone call. Nevertheless, he misled the judge into believing that separate conversations had occurred.

Lastly, with regard to the showing of material false statements and omissions necessitating a Franks hearing, it is noteworthy that the affiant provided contradictory statements with regard to material issues at the motion to suppress the physical evidence related to this case. At page 110 of the enclosed April 19, 2011 transcripts (EXHIBIT N), the affiant swore that Officer [redacted] told Special Agent [redacted], who in turn told the affiant that the evidence at issue was found in plain view. At pages 121-122 of the transcripts, the affiant admits that he omitted this alleged involvement of [redacted] in his sworn statement to the wiretap judge.

Despite defense counsel's attempt to subpoena [redacted] as a witness

at the motion to suppress, the federal authorities refused to acknowledge the writ that was faxed to the D.E.A.'s Newark Office[32]. The reasonable inference is that the affiant was making these claims regarding [redacted] for the first time at the suppression hearing once he knew he was caught in a lie. As this was day three of the hearing that was coming to an end, he knew that [redacted] would not be called as a defense witness. Therefore, he knew that any claims that he made regarding [redacted]'s statements would be insulated from direct impeachment.

Still, the affiant was forced to concede that he omitted material information regarding [redacted]'s involvement from the judge who issued the related wiretap order. Moreover, the affiant contradicted his previous sworn statement regarding a plain view seizure at page 110, when he testified that he previously swore to the issuing wiretap judge that it was not just a search, but a secondary "further search" that revealed the presence of suspected heroin. See pages 122-123.

It is clear that no search is required if contraband is found in plain view, let alone multiple searches. This is crystal clear to the affiant who is an experienced narcotics detective with vast

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32 I, attorney Frederick P. Sisto, Esq., was contacted by a U.S. attorney from Washington, D.C. and informed that the subpoena would have to be sent to the D.E.A.'s Washington, D.C. office and a subsequent motion would have to be contested before the federal authorities would recognize the subpoena. Since Special Agent [redacted] was not considered an essential witness at the time, no additional efforts were made to compel his appearance at the motion to suppress. I certify that these statements are true. I am aware that if they are willfully false, I am subject to punishment.

experience (19 years) and training with regard to search and seizure law. See pages 102; 123-124. Indeed at page 105, the affiant himself distinguished between search warrants, consent searches, and plain view seizures.

II. ALL OF THE EVIDENCE DERIVED FROM THE WIRETAP DESIGNATED [redacted] SHOULD BE SUPPRESSED BECAUSE THE AFFIANT FAILED TO PROVIDE THE JUDGE WITH SUFFICIENT FACTS TO MAKE AN INDEPENDENT PROBABLE CAUSE DETERMINATION.

When a search or seizure is made pursuant to a warrant, the probable cause determination must be made based on the information contained within the four corners of the supporting affidavit, as may be supplemented by sworn testimony before the issuing judge that is recorded contemporaneously. State v. Marshall, 398 N.J. Super. 92, 101 (App. Div. 2008). An otherwise insufficient affidavit cannot be rehabilitated by testimony at a hearing concerning information not disclosed by the affiant when he sought the warrant. Id. A contrary rule would render the requirements of the Fourth Amendment and Article I, Paragraph Seven meaningless. Id. Probable cause is not established by conclusory information that fails to provide a judge with sufficient facts to make an independent determination. State v. Macri, 39 N.J. 250, 257 (1963).

In paragraph 25(A) of the January 7, 2009 affidavit designated [redacted], the affiant admitted that facility [redacted] was

the subject of a roving wiretap despite the fact that it was not used by its target, [redacted]. After falsely claiming that interceptions terminated after briefly listening to conversations, the affiant sought authorization to specifically wiretap facility [redacted], i.e. to intercept communications whether or not the alleged target, [redacted], was recognized as a party to them.

The affiant does not provide the issuing judge with any information regarding who he then alleged was utilizing this facility. Additionally, the affiant fails to provide any basis for the required predicate findings for a wiretap order regarding this mystery target[33], including probable cause and necessity. Therefore, probable cause and necessity were not established for the wiretap order. Thus, the wiretap's direct and derivative evidence should be suppressed.

III. A BILL OF PARTICULARS SHOULD BE ORDERED BECAUSE THE INDICTMENT IS NOT SUFFICIENTLY SPECIFIC TO ENABLE [redacted] TO PREPARE A DEFENSE.

A bill of particulars shall be ordered by the court if the indictment is not sufficiently specific to enable the defendant to prepare a defense. N.J.Ct.R. 3:7-5. The prosecutor shall furnish the bill of particulars within ten days of the court order. Id.

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33 It was ultimately revealed that the facility belonged to co-defendant [redacted], not [redacted].

Further particulars may be ordered if a demand is promptly made. Id. The State should not be allowed to change theories if what the evidence is purported to be in the bill of particulars does not bear out at trial. State v. Menter, 293 N.J. Super. 330, 348 (Law Div. 1995).

A person is a leader of a narcotics trafficking network if he conspires with two or more other persons in a course of conduct to distribute any controlled dangerous substance as a financier, or as an organizer, supervisor or manager of at least one other person. N.J.S.A. 2C:35-3. The indictment charges [redacted] with first-degree leader of a narcotics trafficking network (count two). See the enclosed relevant portion of the indictment (EXHIBIT O).

In order to convict [redacted] of the charge, the State must prove that he conspired with two or more persons. Regarding count two, the indictment does not disclose the identities of these alleged co-conspirators. Thus, the indictment is not sufficiently specific to enable the defendant to prepare a defense.

Furthermore, the State must prove that [redacted] was an organizer, supervisor, or manager of at least one other person. The indictment does not disclose the identity of this additional person. Therefore, the indictment is again not sufficiently specific to enable the defendant to prepare a defense.

Lastly, the State must prove that [redacted] occupied a high level position in the conspiracy. In other words, the State must

prove that the defendant occupied a position of superior authority or control over other persons in a scheme of drug distribution and that in that position the defendant exercised supervisory power or control over others engaged in the drug trafficking conspiracy. See New Jersey Criminal Jury Charges, 2C:35-3. The indictment does not disclose the identities of the other persons over whom [redacted] occupied a position of superior authority or control in the drug trafficking conspiracy. Thus, once again the indictment is not sufficiently specific to enable the defendant to prepare a defense.

CONCLUSION

In light of the foregoing, all of the evidence against [redacted] should be suppressed. Alternatively, a Bill of Particulars should be ordered.

Respectfully submitted,

Frederick P. Sisto, Esq.

Enclosures: Referenced Exhibits

Copy: [redacted]

Assistant Prosecutor [redacted]

[redacted], Esq., Attorney for [redacted]

[redacted], Esq., Attorney for [redacted]