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Access to Cellular Phone Records by Defense Counsel

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In many criminal cases, cellular telephone records are an invaluable resource. These records may shed light on whether an alleged victim or witness communicated with someone of importance in a case, and when. There are procedures and statutes in place that provide law enforcement officials a mechanism to obtain cellular phone records. But how can defense counsel seek and obtain cellular phone records? The answer is not an easy one.

New Jersey's broad discovery rules would seemingly require that criminal defendants be given access to cellular phone records when they are relevant to the pending charges, or are essential for the defendant to be able to challenge the credibility of the allegations being made by the alleged victim.

The New Jersey Supreme Court has spoken recently about the broad range of discovery available to the accused in a criminal case, particularly observing that our discovery rule, R. 3:13-3, is not the exclusive source of a defendant's right to pre-trial discovery:

Because of the meaningful role that the disclosure of evidence to a defendant has in promoting the search for truth, pretrial discovery in criminal trials has long received favorable treatment in this state.

To advance the goal of providing fair and just criminal trials, we have adopted an open-file approach to pretrial discovery in criminal matters post-indictment. As codified, the New Jersey Court Rules presently demand that the State will provide an indicted defendant with pretrial access to the evidence against him. *Indeed, consistent with the view that broad pretrial discovery beyond even that which the Court Rules require advances the quest for truth, it is well recognized that "[i]n general, a defendant in a criminal case is entitled to broad discovery."* *State v. D.R.H.*, 127 N.J. 249, 256 (1992) (citing R. 3:13-3) (acknowledging court's ability to provide for discovery, beyond that required by court rule, as justice demands).

State v. Scoles, 214 N.J. 236, 251-252 (2013)(emphasis added); see also *State v. Marshall*, 148 N.J. 89, 269 ("New Jersey courts have the inherent power to order discovery when justice so requires."), cert. denied, 522 U.S. 850 (1997).

Cellular phone records are clearly accessible to the State through a Communications Data Warrant (CDW) authorized by N.J.S.A. 2A:156A-29. However, CDW warrants are available *only to law enforcement agencies*. If the State seeks to obtain cellular phone records, it would be required to demonstrate to an authorized CDW judge:

specific and articulable facts showing that there are reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic communication service or remote computing service or communication common carrier is relevant and material to an ongoing criminal investigation

[N.J.S.A. 2C:156A-29(e)]

Communications data warrants are not subject to the more restrictive procedures and enhanced protections of the New Jersey Wiretapping and Electronic Surveillance Control Act, which include a showing of necessity

because normal investigative procedures have failed. See N.J.S.A. 2A:156A-10. Instead, the standard for a CDW pursuant to N.J.S.A. 2A:156A-29(e) requires only a showing of reasonable grounds to believe that the record or other information pertaining to a subscriber or customer of an electronic communications server is relevant and material to an ongoing criminal investigation. *State v. Finesmith*, 408 N.J. Super. 206 (App. Div. 2009).

When a criminal defendant satisfies the same legal standard that would entitle the State to obtain cellular records through a CDW warrant, defense attorneys should not hesitate in filing a motion with the Court seeking access to the necessary cellular records. The Court can be presented with the option of proceeding in one or both of the following two manners:

1. Issue an Order compelling the alleged victim to obtain her own cellular phone records for the dates in question from her carrier, and to provide true and accurate copies to counsel for the defendant, AND/OR
2. Issue an Order compelling the State to file a proper application for a Communications Data Warrant, and to furnish true and accurate copies of all documents received in response to the CDW Warrant to counsel for the defendant.

In the event the Court were to deny such a motion, a defendant may seek to interpose a constitutional attack on the CDW statute because of its failure to afford criminal defendants a mechanism to obtain the records it authorizes law enforcement agencies to obtain.

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