SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0244-22

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

SHLAWRENCE ROSS,

Defendant-Respondent.

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Argued November 29, 2022 – Decided January 4, 2023

Before Judges Susswein and Berdote Byrne.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Camden County, Indictment No. 18-02-0435.

Maura Murphy Sullivan, Assistant Prosecutor, argued the cause for appellant (Grace C. MacAulay, Camden County Prosecutor, attorney; Maura Murphy Sullivan, of counsel and on the brief).

Monika T. Mastellone argued the cause for respondent (Law Offices of Robin Kay Lord, LLC, attorneys; Robin Kay Lord, on the brief).

PER CURIAM

This matter presents a novel question concerning the prosecutor's authority to gain possession of a bullet that was involved in a police shooting incident and subsequently removed from defendant's body through elective surgery. Defendant is charged with multiple counts of attempted murder relating to the shooting episode. By leave granted, the State appeals the September 7, 2022 Law Division order denying its applications for: (1) a search warrant for the bullet, which is presently in the possession of Cooper University Hospital in Camden (Cooper); and (2) a Dyal[1] subpoena for Cooper medical records pertaining to the elective surgery to remove the bullet.

The motion judge found the bullet was available for forensic examination solely because of defendant's conscious litigation decision to undergo elective surgery to remove it. The judge reasoned the State's search warrant application was tantamount to a motion to compel defendant to turn over potentially incriminating evidence and allowing the State to obtain the bullet in these circumstances would violate defendant's Sixth Amendment right to conduct a

[1] State v. Dyal, 97 N.J. 229 (1984). A Dyal application is a request for a court-issued subpoena of medical records. Id. at 240. Due to the doctor-patient privilege, see N.J.S.A. 2A:84A(22.2), a subpoena for medical records is treated "as the functional equivalent of a search warrant" and thus requires a showing of probable cause presented to a judicial officer. Dyal, 97 N.J. at 240.

confidential defense investigation. The judge ultimately concluded defendant is entitled to shield the bullet from the prosecutor unless and until the defense chooses to introduce it as evidence at trial.

After carefully reviewing the record, relevant precedents, and arguments of the parties, we reverse. The issue before the motion judge was whether there was a lawful basis to issue a search warrant for physical evidence believed to be at a specific location and in the custody of a hospital, not whether defendant could be compelled to turn the bullet over to the prosecution. The motion judge erred by treating the search warrant application as if it were the functional equivalent of a motion to compel reciprocal discovery.

The reciprocal discovery process implicates different constitutional rights and concerns than those raised by the issuance and execution of a search warrant. In the absence of any compulsion, we decline to create a new categorical rule under which the bullet would be placed beyond the reach of a search warrant simply because it had been surgically removed pursuant to the defense investigation/litigation strategy. Defendant's Sixth Amendment right to conduct an uninhibited defense investigation does not foreclose the State from obtaining a search warrant to seize tangible evidence related to a crime that is in the

custody of a third party that alerted the prosecution that the evidence was in its possession.

We remand for the motion judge to determine whether the State's application for a search warrant established probable cause to believe evidence of a crime is at the place sought to be searched.[2]

I.

We discern the following pertinent facts and procedural history from the record. On December 3, 2017, defendant was shot during an exchange of gunfire with Camden County Metropolitan Police Department (CCMPD) officers. He was taken to Cooper for treatment of gunshot wounds. His treatment included emergency surgery.

In February 2018, defendant was charged by indictment with three counts of first-degree attempted murder, N.J.S.A. 2C:5-1 and N.J.S.A. 2C:11-3(a)(1); three counts of second-degree aggravated assault, N.J.S.A. 2C:12-1(b)(1); three counts of fourth-degree aggravated assault, N.J.S.A. 2C:12-1(b)(4); and related

[2] We recognize the State does not seek authorization for law enforcement officers to conduct a hands-on search of the Cooper facility. Rather, the search warrant the State seeks is akin to a communications data warrant, which requires a third-party business entity to turn over particularly described records in its possession.

weapons offenses. Defendant's trial has been significantly delayed because of the COVID-19 pandemic.

In July 2018, the Camden County Prosecutor's Office (Prosecutor's Office) asked Cooper whether any bullet or metal fragments had been removed from defendant's body. On July 30, 2018, Cooper informed a Prosecutor's Office detective that although a bullet was noted in defendant's abdominal x-ray, it had not been removed during the emergency surgery.

On October 7, 2021, the motion judge denied the State's motion to compel discovery. The State "moved to compel discovery from the defense of any physical evidence, reports, records, or other materials relating to an on-the-record statement made by predecessor defense counsel in February 2019 that defendant had incurred three gunshot wounds – one in each hip from a .32 caliber bullet and one in the elbow from a .40 caliber hollow-point bullet." In its application, the State asserted that "there [wa]s no information in the defendant's medical records or in any other discovery materials provided by the State from which an identification can be made of the type of projectile or projectiles that struck defendant." The motion judge explained his reasoning in a letter opinion, citing the reciprocal discovery provisions of Rule 3:13-3 and

relying on State v. Williams, 80 N.J. 472 (1979). The State did not seek leave to appeal the interlocutory order denying its motion to compel discovery.

On June 15, 2022, defendant had elective surgery to remove the bullet that was lodged in his abdomen. Hospital medical staff turned the bullet over to Cooper's Administrative Director of Security, who then contacted CCMPD. He was advised the bullet was related to a case being prosecuted by the Prosecutor's Office.

On June 30, 2022, the Prosecutor's Office applied to the trial court for a search warrant directing Cooper to turn over any projectile or other evidence surgically removed from defendant's body. The prosecutor also sought a Dyal order for medical records relating to the surgical procedure.

The motion judge advised defendant of the prosecutor's application for a search warrant and Dyal subpoena.[3] Following oral argument, the motion judge rendered an oral opinion denying the State's application. The judge found "[t]hat

[3] Although search warrants are typically sought and issued ex parte and executed in secret, see R. 3:5-4, in the unusual circumstances of this case, it was appropriate for the trial court to afford defendant an opportunity to challenge the prosecutor's authority to obtain the bullet by means of a search warrant. Because the bullet and medical records are in Cooper's custody, breaching the secrecy of the search warrant application process posed no risk the sought-after evidence might be destroyed, altered, or otherwise removed from the court's jurisdiction.

the existence of this piece of evidence in a reviewable form or in a testable form is a result of a conscious litigation choice by the defense." The motion judge ruled:

> The defense is entitled[—]it's not a matter of property law or anything like that, it's a matter of . . . the discovery rules and the principle in those rules that the Court relied on earlier in the Williams case . . . that the defense is entitled to conduct an investigation and is entitled to keep the results of that investigation to itself unless and until the defense chooses to use that information at trial, in which case there's a[n] obligation to disclose it in advance to give the State a meaningful opportunity to meet it.
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> So again, there's no formal motion [by the State to compel reciprocal discovery]. I mean, the [c]ourt's action would be to not execute the search warrant and to not execute the Dyal order which is . . . the inaction that I will engage in because I'm ruling that . . . for now whatever results from testing, should the defense even choose to test it, whatever results from that would be subject, really, to the same principles that were in the [c]ourt's order and the letter opinion regarding the defense's obligation to provide notice.
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> . . . So that same principle would apply here. Any evidence that the defense chooses to use as a result of its analysis of this piece of evidence would have to be disclose[d] to the State [thirty] days prior to commencement of jury selection[,] and we'll address any application from the State at that time for it do to its own testing . . . at that time.

The trial judge offered this further explanation for his ruling:

Now look, I understand, but I agree with [defense counsel]. I mean, one way I'm thinking of this is that[,] setting aside for a moment that [defendant's] release conditions would preclude him from flying to Mexico to have this surgery, he could have gone somewhere else and had this surgery and neither I nor the [p]rosecutor would know anything about it. The reason why I and the [p]rosecutor know anything about it is because it was conducted at Cooper Hospital, Cooper apparently interpreted its policies and statutes as compelling them to reveal the existence of the surgery, the results[—] . . . the removal of the projectile[—]to law enforcement.

I get the State's argument that, okay, we are where we are here[,] and this is potentially evidence in a criminal case. I understand that, but we wouldn't be here[,] where we are[,] had the defense not chosen to take a conscious litigation step and[,] consistent with their right to conduct whatever investigation they think ought to be conducted, the fact that for reasons that they could not control, that someone else interpreted their obligations to generate disclosure of information, I don't think anything is compromising that's been disclosed. The existence of a projectile, that's not compromising anything because there's been representations[,] and everybody's known all along.

So I understand the State's position, but I think consistent with the [c]ourt's ruling about the nature of the information that we have here, it wouldn't exist unless it was a conscious for litigation choice by the defense to go and get this information, to get this potential evidence. And so, consistent with that, it is up to the defense to decide what it chooses to do with this item. How it chooses to test it is up to the defense and, again, subject to their obligation[,] in the event they choose to use any of that evidence to disclose it

> [thirty] days prior to the commencement of jury selection consistent with the [c]ourt's prior ruling about this.

We granted the State's emergent application for a stay of the motion judge's order, and we subsequently granted the prosecutor's motion for leave to appeal.

The State raises the following contention for our consideration:[4]

> POINT I
>
> INTERLOCUTORY REVIEW IS WARRANTED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN APPLYING THE DISCOVERY RULES, AS OPPOSED TO THE FOURTH AMENDMENT, TO THE STATE'S APPLICATION FOR A SEARCH WARRANT AND DYAL ORDER.

II.

We begin our analysis by acknowledging "appellate courts 'generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion, or its determination is based on a mistaken understanding of the applicable law.'" State v. Brown, 236 N.J. 497, 521 (2019) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)). We

[4] The State did not submit a supplemental brief and relies on its brief and appendix filed in support of its motion for leave to appeal. Defendant likewise did not submit a supplemental brief, relying instead on his brief and appendix filed in response to the State's motion for leave to appeal.

likewise review a trial court's ruling on a search and seizure matter "with substantial deference to the trial court's factual findings, which we 'must uphold . . . so long as those findings are supported by sufficient credible evidence in the record.'" State v. Hinton, 216 N.J. 211, 228 (2013) (omission in original) (quoting State v. Handy, 206 N.J. 39, 44 (2011)).

In contrast, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). "A trial court's legal conclusions are reviewed de novo." State v. Hubbard, 222 N.J. 249, 263 (2015).

The motion judge's decision to treat the search warrant application as if it were a motion to compel reciprocal discovery and to invoke the constitutional principles that limit a defendant's reciprocal discovery obligations was a legal determination and interpretation of law to which we owe no deference and view with a fresh set of eyes.

The gravamen of defendant's argument is that allowing the State to obtain the surgically removed bullet by any means, including by means of a search warrant, would violate his Sixth Amendment right to counsel as it would chill

defense attorneys from conducting investigations that include advising a defendant to undergo elective surgery to retrieve potentially exculpatory evidence. Defendant stresses that the bullet would not be available for forensic examination had he not chosen to have it surgically removed as part of his defense investigation strategy, and that he would not have pursued such investigative course if he knew the bullet would fall into the hands of the prosecution.

Defendant's argument purports to rest on foundational principles established by our Supreme Court in Williams. The Court in that case imposed limitations on when the State can compel a defendant to disclose the fruits of the defense investigation pursuant to the court rule governing reciprocal discovery, Rule 3:13-3. 80 N.J. at 482. We have no quarrel with the notion that the bullet in its present state—capable of being forensically examined—is a fruit of the defense investigation strategy to undergo elective surgery.[5] The novel issue before us is whether Sixth Amendment concerns recognized in Williams apply when, as in this case, the State is not seeking to compel the defense to turn over evidence or information, but rather is seeking a search warrant to secure

[5] We note the State argues the bullet is actually a fruit of a police-involved shooting incident.

tangible evidence in the possession of a third party. We conclude that Williams does not foreclose the issuance of a search warrant when the sought-after tangible evidence (1) is not in the custody of the defendant or his or her counsel and (2) was revealed to the prosecution outside the reciprocal discovery process.[6]

In Williams, the trial court granted the prosecutor's request for reciprocal discovery pertaining to information learned in an interview with the victim that was conducted by defense counsel and his investigator. Id. at 476. During that interview, the victim identified a photograph of the defendant as the culprit. Id. at 475. Our Supreme Court held that by extending the criminal reciprocal discovery rule to inculpatory material that defense counsel had in his file, the trial court "trespassed on defendant's right to effective assistance of counsel." Id. at 477. The Court determined that "[t]he material was obtained during defense counsel's preparation for trial and, since it was inculpatory, counsel obviously did not intend to use it at trial." Ibid.

[6] We address only whether the State may obtain a warrant to secure physical evidence presently in the possession of Cooper. We do not address whether and in what circumstances the State might obtain a search warrant to authorize law enforcement officers to conduct a hands-on search of a defense attorney's office to find and seize physical evidence or to obtain a search warrant to compel a defense attorney to turn over evidence in the attorney's custody.

The Supreme Court concluded that the reciprocal discovery rule

> does not give the State access to statements or summaries of statements made by its witnesses to defense counsel during defense preparation for trial if defense counsel does not intend to use them at trial. To hold otherwise would infringe on a defendant's constitutional right to the effective assistance of counsel because of the chilling effect it would have on defense investigation. Defense counsel would be hesitant to make an in-depth investigation of the case for fear that inculpatory material would be disclosed which might have to be turned over to the State.
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> [Id. at 478–79.]

The Court added,

> [t]he investigative course selected by an attorney in order to prepare a proper defense for his client frequently entails a high order of discretion. This often calls for more than simple fact gathering. Evidential materials obtained in the exercise of this professional responsibility are so interwoven with the professional judgments relating to a client's case, strategy[,] and tactics that they may be said to share the characteristics of an attorney's "work product." Blanket discovery of the fruits of this kind of legal creativity and preparation may impact directly upon the freedom and initiative which a lawyer must have in order to fully represent his client. Curtailment or inhibition of this attorney function by discovery, not otherwise justified to avoid trial surprise, would permit the State to undermine the effectiveness of an attorney in serving his client.
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> It is abhorrent to our concept of criminal justice to compel a defendant, under the guise of reciprocal discovery, to disclose to the State inculpatory evidence

> uncovered by defense counsel during his preparation for trial and then allow the State to use that evidence as part of its case in chief.
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> [Id. at 479 (citation omitted).]

Williams makes clear that a defendant's Sixth Amendment[7] rights would be undermined were the defense to be inhibited from conducting its own thorough investigation by the prospect of being compelled to disclose

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[7] We add that aside from treading on Sixth Amendment rights, an order to compel a defendant to turn over inculpatory evidence raises Fifth Amendment self-incrimination concerns. In State v. Kelsey, we held,

> [t]he State's line of reasoning fails to appreciate that none of the cases cited have compelled defendants to divulge the location of incriminating physical evidence, or otherwise incriminate themselves by the mere act of responding to the question itself. As Chief Justice Weintraub aptly noted forty-five years ago, the right against self-incrimination protects a defendant from being "subpoenaed to produce the gun or the loot, no matter how probable the cause, for the Fifth [Amendment] protects the individual from coercion upon him to come forward with anything that can incriminate him." In re Addonizio, 53 N.J. 107, 129 (1968).
>
> Here, we are satisfied that, under Addonizio, the State does not have the right to compel defendant to incriminate himself by producing the [physical evidence] at issue.
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> [429 N.J. Super. 449, 455 (App. Div. 2013).]

incriminating investigative results to the prosecutor. However, the Court did not address the State's ability to obtain physical evidence by a means that does not involve compelled disclosure by the defense. Nor did the Court address the State's ability to obtain tangible evidence in the possession of a third party that elects on its own to reach out to law enforcement.

Here, the defense was not "compel[led] . . . under the guise of reciprocal discovery," id. at 479, to disclose any information to the State with respect to the surgically removed bullet. Nor was defendant compelled to turn over the bullet itself. See supra note 7 (discussing the self-incrimination implications of compelling the production of incriminating evidence). In the absence of such compulsion, we do not read the ruling or rationale of Williams so broadly as to categorically preclude the State from using a search warrant to seize physical evidence in the possession of a third party that was revealed to the prosecution outside the reciprocal discovery process.

We accept defendant's assertion that he would not have made the litigation decision to undergo surgery to remove the bullet if he knew there was a risk the prosecution would gain access to the bullet. However, when a defendant undertakes an investigation and reaches out to others, the defense necessarily

assumes the risk that a third party will choose to disclose information or evidence that comes into his or her possession.

The assumption-of-risk principle is well established in Fourth Amendment cases that discuss whether suspects have a reasonable expectation of privacy when they confide in someone who subsequently cooperates with law enforcement. See, e.g., United States v. Jacobsen, 466 U.S. 109, 117 (1984) ("[W]hen an individual reveals private information to another," he [or she] assumes the risk that his [or her] confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."). Relatedly, the law is clear that "[u]nder the third-party intervention doctrine, a person's reasonable expectation of privacy is not violated by the actions or search of a private, rather than government, actor." State v. Shaw, 237 N.J. 588, 608 (2019) (citing State v. Wright, 221 N.J. 456, 476–77 (2015)). In Wright, the Court held that a landlord, like any other guest, may tell the police about contraband he or she has observed in a private home, and the police, in turn, can use that information to apply for a search warrant. 221 N.J. at 476–77. See also In Interest of J.A., 233 N.J. 432 (2018) ("[W]here a private person steals or unlawfully takes possession of property from the premises of the owner and turns it over to the government,

which did not participate in the taking, [the property] may be used as incriminating evidence against the owner in a subsequent criminal prosecution." (quoting State v. Scrotsky, 39 N.J. 410, 416 (1963))).

The assumption-of-risk principle logically applies with respect to a defendant's Sixth Amendment right to conduct a thorough and unfettered investigation as recognized in Williams. As a matter of practical reality, there always exists a possibility that when the defense interacts with a private person or entity in the course of its investigation, that person or entity might cooperate with law enforcement authorities, revealing information the defense hoped to keep to itself.

Consider, for example, a situation where the defense investigation reveals an eyewitness not previously known to the prosecution. Under our reciprocal discovery rule as interpreted in Williams, a defendant could not be compelled to disclose the statement the person gave to the defense, or the person's identity, or even existence, unless the defendant elects to introduce the statement at trial or call the person as a witness. But, if that eyewitness, now alerted to the pending criminal prosecution, chooses on his or her own to reach out to police, the prosecutor is not precluded on Sixth Amendment grounds from subpoenaing that person to testify for the State merely because he or she would not have come to

the State's attention but for the defense investigation. The State, in other words, is not categorically precluded from interviewing and subpoenaing an eyewitness on the grounds that the prosecutor's discovery of the witness would not have occurred but for the defense investigation. That is true notwithstanding that the prospect of any such use of the eyewitness by the prosecution might conceivably inhibit defense attorneys from looking for witnesses of whom the State is not already aware.

Defendant assumed the risk that Cooper or any other hospital performing surgery to remove the bullet would reach out to law enforcement to advise that it was in possession of evidence of a shooting.[8] We acknowledge the motion judge's observation that had the surgery been conducted elsewhere, the

[8] Defendant argues Cooper violated an agreement, or at least an "understanding," as to the disposition of the removed bullet. As Cooper is not a party in this action, the trial judge declined to make any rulings regarding whether they acted consistently with the law. In any event, we deem any agreement between defendant and Cooper to be irrelevant as to whether the bullet is presently within the reach of a search warrant. Even accepting for the sake of argument that defendant owns the bullet and has the right to exercise exclusive control of it, it can hardly be disputed that a search warrant may authorize the seizure of personal property that is owned by the suspect. See also J.A., 233 N.J. at 432 (where a private person steals or unlawfully takes possession of property and turns it over to the government, which did not participate in the taking, it may be used as incriminating evidence against the owner). We do not address and offer no opinion on any dispute between defendant and Cooper regarding the handling of the bullet once it had been surgically removed.

prosecutor might not have learned that the bullet was removed and is now available for forensic examination, and thus would not have applied for a search warrant.[9] But that observation does not change the facts before us. Defendant's elective surgery was performed in the same county where the prosecution was pending, and the hospital, on its own initiative, notified local authorities it had evidence in its custody pertaining to a shooting.

III.

We deem it imperative to draw an analytical distinction between two very different methods by which the State might take possession of a surgically removed bullet: reciprocal discovery and a search warrant. The issue before us, we emphasize, is not whether defendant or his attorney can be compelled to turn over tangible evidence pursuant to the reciprocal discovery rule, since the State

[9] We offer no comment on the argument that future defendants will be motivated by our ruling to have elective surgery performed in other jurisdictions except that to say it is a decision to be made by defense lawyers and their clients, subject to any applicable ethical responsibilities and legal constraints. See, e.g., N.J.S.A. 2C:28-6 (prohibiting alteration, destruction, concealment, or removal of physical evidence with the purpose to impair its availability in a legal proceeding or investigation); Rule of Professional Conduct 3.4 ("A lawyer shall not . . . unlawfully alter, destroy or conceal a document or other material having potential evidentiary value[,] . . . or assist another person to do any such act.").

made no such application.[10] Rather, the critical issue is whether the State is precluded from obtaining a search warrant to secure the bullet now in the custody of a third party.

Article I, paragraph 7, of the New Jersey Constitution and the Fourth Amendment to the United States Constitution "protect individuals' rights 'to be secure in their persons, houses, papers, and effects' by requiring that search warrants be 'supported by oath or affirmation' and describe with particularity the places subject to search and people or things subject to seizure." State v. Andrews, 243 N.J. 447, 464 (2020). A search warrant application must "satisfy the issuing authority 'that there is probable cause to believe that . . . evidence of a crime is at the place sought to be searched.'" State v. Boone, 232 N.J. 417, 426 (2017) (quoting State v. Jones, 179 N.J. 377, 388 (2004)). New Jersey courts have expressed "a preference for law enforcement to secure warrants from detached judges prior to a search, and searches without a warrant are presumed

[10] As we have noted, the State had previously sought reciprocal discovery with respect to projectiles, but that application was denied, and the State did not appeal. It is noteworthy the State, upon learning from Cooper that the bullet had been surgically removed, did not renew its previous reciprocal discovery request to compel disclosure, but rather sought a search warrant and a Dyal subpoena. The sought-after search warrant and Dyal subpoena are directed at the third-party hospital, not defendant or his attorney.

unreasonable unless they fall within an exception to the warrant requirement." Ibid.

Importantly, as our Supreme Court recently reaffirmed in Andrews, the State has broad authority to effectuate searches permitted by valid warrants. 243 N.J. at 464–65. As we have already noted, even were we to accept for purposes of argument that defendant "owns" the bullet after its surgical removal, a search warrant can, of course, reach physical evidence in which a defendant maintains a property and privacy interest. Ibid.

Defendant additionally contends the State essentially forfeited its authority to apply for a warrant to obtain the bullet now in the custody of Cooper by choosing not to apply for a warrant to require defendant to submit to involuntary surgery. We reject that argument. We are aware of no precedent suggesting the prosecutor was required to exhaust legal efforts to obtain the bullet while it was still in defendant's body.

In this instance, moreover, it is doubtful the State would have been able to obtain a warrant to compel involuntary surgery under the strict standards spelled out by the United States Supreme Court in Winston v. Lee, 470 U.S. 753, 758–61 (1985). In Winston, the Court stressed that a compelled surgical intrusion into a suspect's body for evidence implicates the "most personal and

deep-rooted expectations of privacy." 470 U.S. at 760. The Court explained that probable cause—the threshold standard for issuing regular search warrants—is not sufficient to justify court-ordered involuntary surgery. Id. at 761. The Court stressed that "[a] compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." Id. at 759.

The Court drew upon factors from Schmerber v. California, 384 U.S. 757 (1966),[11] to balance the "the individual's interests in privacy and security . . . against society's interests in conducting the [medical] procedure." Winston, 470 U.S. at 760. These factors include the extent to which the procedure may threaten the individual's safety or health; the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, including whether the surgery requires general anesthesia; and the community's interest in fairly and accurately determining guilt or innocence. Id. at 761–62.

The Winston Court concluded that the government had not established a "compelling need," a requirement not found in ordinary search warrant

[11] Schmerber addressed the constitutional limitations on the government's authority to involuntarily draw a suspect's blood for alcohol testing.

applications. Id. at 765. In reaching that conclusion, the Court rejected the prosecution's argument it needed the bullet to show that it was fired from the victim's weapon, which would confirm the defendant's identity as the robber. Ibid. The Court remarked the prosecution had "available substantial additional evidence that respondent was the individual who accosted [the victim] on the night of the robbery." Ibid.

In the matter before us, defendant asserted at oral argument the State does not need the bullet to make its case. We agree there is no compelling need for the bullet within the meaning of Winston. Indeed, the record shows the State declared that it was ready to go to trial before it learned from Cooper that the bullet had been removed and could now be examined. In those circumstances, the State would have been hard-pressed to demonstrate a compelling need to retrieve the bullet by means of court-ordered surgery.[12]

In sum, considering the totality of the circumstances militating against the issuance of a Winston warrant to compel surgery, the State cannot be faulted for its decision not to apply for one. This is not a situation where the State sat on

[12] We reiterate the State in its present search warrant application is not required to establish a compelling need since execution of the warrant to retrieve tangible evidence in Cooper's possession would not entail the extraordinary Fourth Amendment intrusion of court-ordered involuntary surgery. Probable cause is sufficient to justify issuance of the warrant for which the State has applied.

probable cause or otherwise failed to preserve its rights, and defendant cannot now complain that if the State really wanted to subject the bullet to ballistics examination, it would have taken steps before now to secure it.

We also reject defendant's contention that the four-year delay between the shooting incident and the State's application for a search warrant somehow disentitles the State to obtain the bullet now that it is in Cooper's custody. Defendant cites no authority for the proposition the warrant application made to the motion judge is time-barred. This is not a situation where probable cause became stale. Cf. State v. Blaurock, 143 N.J. Super. 476, 479–80 (App. Div. 1976) (discussing when information supporting a search warrant application is deemed to be stale so that probable cause no longer exists). The evidentiary value of the bullet did not degrade over time. The record shows, moreover, the State promptly applied for a search warrant when it learned the bullet had been surgically removed and was in Cooper's custody and control.

Finally, we reject defendant's argument the State is not authorized to obtain a search warrant because the opportunity to seize the bullet arose fortuitously as a result of defendant's election to have it removed and Cooper's decision to call police. We do not dispute that, from the prosecutor's perspective, the opportunity to seize and examine the bullet arose by

happenstance rather than as a result of the prosecutor's own investigative efforts to secure the bullet. As we have noted, the State did not apply for a Winston warrant. But many criminal investigations are advanced by the fortuitous cooperation of private citizens. Police and prosecutors maintain "tiplines," for example, precisely to encourage concerned citizens to report crimes and provide actionable information and "leads." At bottom, the fact the State would not have been presented an opportunity to seize the bullet but for defendant's decision to have surgery, followed by Cooper's decision to alert police, does not render tangible evidence at a known location beyond the reach of a search warrant.

We reiterate and stress the State did nothing to interfere with the defense investigative decision to undergo elective surgery to remove the bullet. The prosecutor merely reacted to information provided to it by a third party. Of course, the defense is entitled to reasonable access to the bullet pursuant to Rule 3:13-3 so that it may perform its own forensic examination to support whatever theory defendant seeks to present at trial.

We reverse and remand for the motion judge to determine whether probable cause exists for issuance of a search warrant and a Dyal subpoena. We reject the State's request that we exercise original jurisdiction and issue the warrant ourselves. Nor do we deem it necessary to remand to another judge.

The motion judge's prior rulings do not suggest he is unable to properly apply the governing Fourth Amendment principles in determining whether to issue a search warrant and Dyal subpoena. See R. 1:12-1(d) (authorizing the court to disqualify a judge from a particular matter if the judge "has given an opinion upon a matter in question in the action"). As defense counsel was involved with arranging the surgery, and communicated to Cooper on defendant's behalf, the motion judge should conduct an in camera review of the medical records related to the surgery to ensure no privileged communication is disclosed to the State. We do not retain jurisdiction.

Reversed and remanded.