No. _____

IN THE

Supreme Court of the United States

ANDREW STOVEKEN,

Petitioner,

—v.—

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Third Party Doctrine exempt pharmacy prescription records contained in a State-run database from the warrant requirement of the Fourth Amendment, when pharmacies are required by statute to provide the records to the database?

PARTIES TO THE PROCEEDING

Andrew Stoveken – Petitioner

State of New Jersey – Respondent

George Beecher – co-Appellant in consolidated State Court proceeding

RELATED PROCEEDINGS

State v. Stoveken/State v. Beecher, Supreme Court of New Jersey, No. C-220 (084636). Certification denied November 13, 2020;

State v. Stoveken/State v. Beecher, Superior Court of New Jersey Appellate Division, No. A-1753-18T1/A-1985-18T1. Judgment entered June 12, 2020;

State v. Stoveken/State v. Beecher, Superior Court of New Jersey Law Division, Criminal Part, County of Middlesex, Indictment Nos. 16-08-0129-S/16-08-130-S. Order denying Motion to Suppress entered May 22, 2017.

State v. Stoveken, Superior Court of New Jersey Law Division, Criminal Part, County of Middlesex, Indictment No. 16-08-0129-S. Judgment of Conviction entered December 21, 2018.

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The Order of the Supreme Court of New Jersey is published at 240 A.3d 311 (N.J. 2020), and is reprinted at App. 1a. The opinion of the Superior Court of New Jersey Appellate Division is published at 234 A.3d 309 (N.J. Super. Ct. App. Div. 2020) and is reprinted at App. 2a. The opinion of the Superior Court of New Jersey, Law Division – Criminal Part, Middlesex County is unpublished and is reprinted at App. 29a.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of New Jersey was issued on November 13, 2020. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . ."

U.S. Const. Amend. IV.

INTRODUCTION

If states passed laws permitting police to rummage through individuals' medicine cabinets without a search warrant, there would be a public uproar. Constitutionally, state administered Prescription Monitoring Programs ("PMP's") are little different. The investigative techniques implemented in this case should concern privacy advocates anywhere, yet they have become commonplace. Only review by this Court can effectively curb unconstrained intrusion into some of the most private

information catalogued by a public agency: prescription records.

The State of New Jersey issued subpoenas, unreviewed by any neutral magistrate, requiring the administrator of the New Jersey Prescription Monitoring Program ("NJPMP") to disclose records of prescriptions written by a specific medical provider, George Beecher. The NJPMP, which is maintained by one branch of the New Jersey Attorney General's Office, collects that information because a New Jersey statute requires all pharmacies to provide it to them.

A typical transaction looks something like this. A patient goes to a doctor with a private medical concern. The conversation, records, and examination relating to that concern are undoubtedly confidential, pursuant to the rights protected by the physician-patient privilege that exists in every State, and recognized by this Court in *Ferguson v. Charleston*[1]. The doctor writes a prescription to the patient to address those concerns. By law, the prescription can only be filled by a licensed pharmacist, so the patient fills the prescription at their preferred pharmacy. By law, the pharmacist must report the details of that prescription to the PMP. The PMP keeps a record of it in a database.

Do the patient and the physician have a legitimate expectation that that those records will remain confidential? Petitioner submits that the answer is so plain that the question borders on the rhetorical. *Of course* prescription information is expected to be private. Just as importantly, a patient has a *right* to keep it private. Certainly, if law enforcement had free reign to inspect the PMP, they would be able to sift through a treasure trove of

1 532 U.S. 67 (2001).

information that could lead to evidence of criminality. Just as certainly, if law enforcement had free reign to inspect the medicine cabinets of patients, they would eventually find evidence of criminality there as well. Unquestionably, a search warrant is necessary for the latter scenario. There is no reason is should not also be necessary for the NJPMP.

Prior to *Carpenter v. United States*, 138 S.Ct. 2206 (2018), the sharing of the prescription information with a third party (the pharmacy) provided an arguable basis for removing Fourth Amendment protections for the PMP data. *Carpenter*, however, made clear that the Third Party doctrine of *United States v. Miller,* 425 U.S. 435 (1976), and *Smith v. Maryland*, 442 U.S. 735 (1979), is far from absolute, and gives way to circumstances, such as here, when the sharing of information is not voluntary, and the information is acutely sensitive.

This is a question of national importance. In excess of 4 billion [2] prescriptions are filled in the United States annually. As of this writing, PMP's exist in 49 states, plus the District of Columbia, Guam, and the Northern Mariana Islands. Only the State of Missouri does not have a statewide PMP, though individual counties in Missouri do. Of those jurisdictions, only eleven require some form of court approval.[3]

The sheer volume of highly sensitive records that are currently subject to search by law enforcement without court approval is an exception reason for this Court to speak to the issue. For these

[2] https://www.statista.com/statistics/261303/total-number-of-retail-prescriptions-filled-annually-in-the-us/

[3] This is based upon a review of the individual state profiles found at https://www.pdmpassist.org/State

reasons, the writ should be granted.

STATEMENT OF THE CASE

In May, 2015, the State of New Jersey began an investigation into whether Dr. George Beecher, an otolaryngologist, was fraudulently prescribing Oxycodone to his patients. App. 4a. Petitioner Andrew Stoveken shared office space with Dr. Beecher, and had a separate business selling hearing aid equipment. Ibid. Stoveken is accused of being a middleman between Dr. Beecher and the remaining co-defendants, who were accused of receiving fraudulent prescriptions for oxycodone written by Dr. Beecher, and then filling them and selling the product on the street under the direction of co-Defendant John Burnham. Ibid.

After receiving information from a confidential informant that this was allegedly occurring, the State sought records from the Prescription Monitoring Program ("PMP") database in order to investigate further. App. 5a.

The Prescription Monitoring Program ("PMP") is a database of prescription information created by statute in 2007, P.L. 2007, c.244 ¶ 25, and which has been in effect in practice since August 1, 2010. The program requires all pharmacies in the State to enter information into a centralized database regarding every prescription filled. *N.J.S.A.* 45:1-45b. It tracks the name of the patient, the prescriber, the type of drug, the quantity, and other material information about each filled prescription. Id. Pharmacies are required to participate unless they receive a waiver from the Division of Consumer Affairs. *N.J.S.A.* 45:1-45c.

"The division [of Consumer Affairs] shall

maintain procedures to ensure privacy and confidentiality of patients and that patient information collected, recorded, transmitted, and maintained is not disclosed, except as permitted in this section." *N.J.S.A.* 45:1-46a. Access "may" be given to, inter alia, "a State, federal, or municipal law enforcement officer who is acting pursuant to a court order and certifies that the officer is engaged in a bona fide specific investigation of a designated practitioner, pharmacist, or patient," *N.J.S.A.* 45:1-46i(6); "a properly convened grand jury pursuant to a subpoena properly issued for the records." *N.J.S.A.* 45:1-46i(8).

This investigation used the PMP to connect individuals who were seen meeting with John Burnham, to Dr. Beecher, who had allegedly written narcotics prescriptions for those same individuals. The State's investigation was initiated through the use of state grand jury subpoenas served upon the PMP, beginning on May 18, 2015. App. 19a. The PMP data led to surveillance operations, witness statements, and search warrants. App. 19a. Ultimately, the evidence led to indictments against seven Defendants, including Mr. Stoveken. Ibid.

In the trial court, Petitioner argued that the PMP records were improperly obtained through invalid grand jury subpoenas, because individuals had a reasonable expectation of privacy in prescription information, which required judicial review. Ibid.

The trial court denied the Motion to Suppress. App. 16a. Petitioner pled guilty to distributing oxycodone, and was sentenced to seven years in State Prison. App. 8a. He appealed the denial of the Motion to the New Jersey Superior Court, Appellate Division. App. 3a. The Appellate Division recognized that the constitutionality of the PMP was an issue of first impression in the New Jersey courts, but affirmed the

trial court. App. 3a.

The Appellate Division held that under federal law, the Fourth Amendment "generally does not protect information that has been turned over to third parties." App. 13a (*citing Miller,* 425 U.S. at 442). Without further discussion of federal law, the court then looked to New Jersey state court decisions applying the Third Party doctrine, and determined that simple "relevancy" can be a sufficient basis for obtaining the records at issue. App. 14a. The court found that the reasonable expectations of privacy were "limited" in this case, because the investigation did not target the individuals with the privacy interests. App. 14a. However, the court never addressed the fact that this investigation targeted both patients and prescribers, nor did the court address the standard to access the PMP when privacy interests are less "limited."

The New Jersey Supreme Court declined to grant certification. App. 1a. This Honorable Court should grant the writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *CARPENTER V. UNITED STATES* LEFT LITTLE DOUBT THAT THE THIRD PARTY DOCTRINE SHOULD NOT EXEMPT PMP'S FROM THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

Unchecked intrusion into the private affairs of citizens is the primary evil against which the Fourth Amendment is aimed. *See United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528, (1967).

As a check on this power, this Court has held that when an individual seeks to preserve something as private, and that expectation of privacy is "one that society is prepared to recognize as reasonable," an intrusion into that expectation is a search which requires a warrant supported by probable cause. *Katz v. United States*, 389 U.S. 347, 361 (1967)(Harlan, J., concurring).

A pair of decisions of this Court in the 1970's solidified the "Third Party Doctrine": the principle that if one voluntarily shares private information with third parties, any expectation of privacy of that information loses its reasonableness. *United States v. Miller*, 425 U.S. 435 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979).

In *Miller*, this Court held that voluntarily providing financial documents to a bank for the purpose of executing financial transactions does not prohibit the government from seeking that same information from the bank. 425 U.S. at 442. In so holding, this Court looked to the contents of the documents, and determined that checks at deposit slips are "not confidential communications but negotiable instruments." Id.

Similarly, in *Smith*, this Court held that dialing phone numbers voluntarily conveys that information to the phone company. 442 U.S. at 743.

Miller and *Smith* have withstood academic scrutiny, as this Court did not substantially carve out any exceptions to the Third Party doctrine until *Carpenter v. United States*, 138 S.Ct. 2206 (2018). In *Carpenter*, this Court meaningfully examined an oft-overlooked proviso of *Smith* and *Miller*:

> *Smith* and *Miller*, after all, did not rely solely on the act of sharing.

> Instead, they considered "the nature of the particular documents sought" to determine whether "there is a legitimate 'expectation of privacy' concerning their contents."
>
> *Carpenter*, 138 S.Ct. at 2219.

Applying that limiting principle to the information sought in *Carpenter* – cell site location information ("CSLI") from cell phones – this Court held that such information was "a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*." Id.

Similarly, examining the privacy concerns inherent in prescription data inevitably leads to the conclusion that they are likewise far more sensitive than any information disclosed in *Smith* or *Miller*. Moreover, patients – and prescribers – have positive statutory and constitutional rights to the privacy of that data that should require a warrant to overcome.

A. *Carpenter* suggests the Third Party Doctrine should not apply to prescription data.

This Court's decision in *Carpenter* is framed by the Court's observation, "[T] his Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." Whether an individual has such a reasonable expectation in records held by third parties is dependent on the reason the third party has them (i.e., through voluntary or involuntary means), and the nature of the records themselves.

By rejecting the "act of sharing" as a categorical

basis for invocation of the Third Party doctrine, this court opened the door to the very argument in this Petition. Applying *Smith* and *Miller* to CSLI, this Court observed,

> Cell phone location information is not truly "shared" as one normally understands the term. In the first place, cell phones and the services they provide are "such a pervasive and insistent part of daily life" that carrying one is indispensable to participation in modern society. Second, a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.
>
> Virtually any activity on the phone generates CSLI, including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data.
>
> [*Carpenter*, 138 S.Ct. at 2220 (*quoting Riley v. California*, 573 U.S. 373 (2013)]

This observation is equally applicable to prescription information, which is also not truly "shared". A patient has no choice in obtaining the drug the doctor prescribes. The patient is required by law to get the drug from a licensed pharmacist, who is required by law to report the contents to the PMP. The alternative – not filling the prescription at

all – is far less realistic that the alternative posited by the Court regarding CSLI data: disconnecting from the network. While that CSLI choice might result in missing treasured social media updates, not filling a prescription is essentially refusing a doctor's orders, and inviting accompanying deleterious health effects. The unreasonableness of such an alternative needs little explanation.

Separately, this Court considered the nature of the contents of CSLI data. As the Court noted, "A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, *doctor's offices*, political headquarters, and other potentially revealing locales." *Carpenter*, 138 S.Ct. at 2218. If knowledge of a person's doctor visits is unreasonably revealing, surely knowledge about what the doctor *prescribed* at those visits is moreso. Accordingly, prescription information should be on the same Constitutional footing as CSLI.

That being so, this Court held that because the information was sought in an ordinary search for evidence of criminal wrongdoing, a warrant was necessary. Id. at 2221 (*citing Vernonia v. Acton*, 515 U.S. 646, 652–653 (1995)).

Thus, the New Jersey court's decision contravened the Fourth Amendment for two reasons. First, because it failed to consider the limits of the Third Party doctrine by taking for granted *Miller* exempted the data from Fourth Amendment protection. Second, by holding that even if some expectations of privacy existed, a subpoena based on a relevance standard would protect it.

B. Patients and prescribers have positive rights in the privacy of their prescription data.

The data should also be protected from warrantless searches based upon the "positive law" approach discussed by Justice Gorsuch in his *Carpenter* dissent. 138 S.Ct. at 2261 (Gorsuch, J., dissenting). As Justice Gorsuch noted, "[J]ust because you *have* to entrust a third party with your data doesn't mean you lose all Fourth Amendment protections in it." Id. at 2270. With that in mind, Justice Gorsuch observed, "[P]ositive law may help provide detailed guidance on evolving technologies without resort to judicial intuition. State (or sometimes federal) law often creates rights in both tangible and intangible things." Id.

Here, by the very terms of the enacting legislation of the NJPMP, "The division [of Consumer Affairs] shall maintain procedures to ensure privacy and confidentiality of patients and that patient information collected, recorded, transmitted, and maintained is not disclosed, except as permitted in this section." *N.J.S.A.* 45:1-46a. Moreover, "the prescription monitoring information submitted to the division shall be confidential and not be subject to public disclosure under [the Open Public Record Act]." *N.J.S.A.* 45:1-46b. Thus, expectations of privacy are legislatively codified into the NJPMP.

Moreover, this Court's decisions in *Whalen v. Roe*, 429 U.S. 529 (1977), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), support the proposition that patients have not only an expectation, but Fourteenth and Fourth Amendment *rights* to privacy in their health-related information. In *Whalen*, this Court recognized that patients and prescribers have privacy rights in prescription

records. 429 U.S. at 605-06. In *Ferguson*, this Court held that a hospital could not share diagnostic health data with law enforcement absent a warrant or consent, because it "may have adverse consequences because it may deter patients from receiving needed medical care." *Ferguson*, 532 U.S. at 78. The same can easily be said for prescription data.

Thus, one does not need to look far for positive law creating rights to privacy of prescription data. Such "positive law" is an independent basis for applying the warrant requirement to PMP data.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

An outgrowth of the popularity of PMP's at the state level has been continuous litigation in State and Federal courts addressing the warrant requirement, or lack thereof, in most PMP enacting legislation. The majority occurred prior to this Court's decision in *Carpenter*.[4] Post-*Carpenter*, the litigation has resulted in divided opinion in the lower courts.[5]

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[4] In pre-*Carpenter* rulings, state courts have ranged from requiring a warrant for PMP searches, *State v. Skinner*, 10 So.3d 1212 (La. 2009), to rejecting a legitimate expectation of privacy in prescription records, *Carter v. Commonwealth of Kentucky*, 358 S.W.3d 4 (Ct. App. Ky. 2012); to recognizing the legitimacy of the expectation but applying an exception for a "pervasively regulated industry." *State v. Russo*, 790 A.2d 1132 (Conn. 2002); *Stone v. Stow*, 593 N.E.2d 294 (Ohio 1992); *State v. Welch*, 624 A.2d 1105 (Vt. 1992). Incidentally, the State of New Jersey never made the "pervasively regulated industry" argument in this matter.

[5] At the Court of Appeals level, the Eleventh Circuit has

> The volume of litigation is unsurprising, considering the breadth of those potentially affected by dissemination of PMP data. In excess of 4 billion[6] prescriptions are filled in the United States annually.

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rejected the warrant requirement as applied to Florida's PMP after a *Carpenter* challenge. *United States v. Gayden,* 977 F.3d 1146 (11th Cir. 2020). The district courts to consider the issue are divided. *Compare Oregon Prescription Drug Monitoring Program v. United States Drug Enforcement Administration,998 F.Supp.2d 957 (D. Or. 2014)* (holding doctors and patients have reasonable expectation of privacy in Oregon's PDMP and DEA's warrantless search of database violated Fourth Amendment), *with United States Department of Justice v. Jonas,* No. 18-mc-56-LM, 2018 WL 6718579, at *5–7 (D.N.H. Nov. 1, 2018) (approving of DEA using administrative subpoena to access PDMP and holding patients had no reasonable expectation of privacy in PDMP records), *rep. & rec. adopted*, 2019 WL 251246, *and appeal pending*, 19-1243; *United States Department of Justice v. Utah Department of Commerce*, No. 2:16-cv-611- DN-DBP, 2017 WL 31896868, at *7–8 (D. Utah July 27, 2017) (determining doctors and patients lacked reasonable expectation of privacy in Utah's controlled substance database, but explaining Fourth Amendment required DEA's subpoena satisfy "reasonable relevance" test), *and United States v. Motley*, No. 3:19-cr-00026-LRH-WGC, 2020 WL 1076116, *4–7 (D. Nev. March 6, 2020) (holding patient lacked reasonable expectation of privacy in his prescription information stored in Nevada's database); *United States v. Bereznak*, No. 3:18-CR-39, 2018 WL 1993904, at *5 (M.D. Pa. Apr. 27, 2018) (holding prescriber could not show Fourth Amendment violation in PDMP search done pursuant to court order), *appeal pending*, 20-1921.

[6] https://www.statista.com/statistics/261303/total-number-of-retail-prescriptions-filled-annually-in-the-us/

As of this writing, PMP's exist in 49 states, plus the District of Columbia, Guam, and the Northern Mariana Islands. Only the State of Missouri does not have a statewide PMP, though individual counties in Missouri do. Of those jurisdictions, only eleven require some form of court approval.[7]

Thus, there is a distinct split in the application of the Fourth Amendment to PMP databases. Some states require warrants, others require subpoenas, other require a written request, while others simply give law enforcement access to the database and ask them to certify that any searches are pertinent to an active investigation, with nearly no oversight at all.[8]

Such diversity of application of the Fourth Amendment should be unacceptable. Medical visits and prescriptions medications are a universal experience. Many are taking multiple prescriptions at any given time, and do not know whether they fall under the category of "Controlled Dangerous Substance" that is subject to collection in a PMP. There is one thing, however, that every single prescription has in common: it is none of the government's business. Without a search warrant, it should stay that way.

As a result, the time is right for this Honorable Court to grant a writ of certiorari to resolve this important issue.

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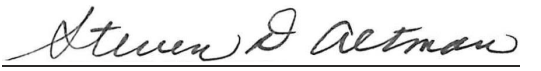
[7] This is based upon a review of the individual state profiles found at https://www.pdmpassist.org/State

[8] Id.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Date: April 12, 2021

APPENDIX

APPENDIX A

FILED, Clerk of the Supreme Court, 13 Nov 2020, 084636

SUPREME COURT OF NEW JERSEY C-220
September Term 2020

084636
State of New Jersey,
Plaintiff-Respondent
v.
Andrew Stoveken,
Defendant-Petitioner

State of New Jersey,
Plaintiff
v.
George Beecher,
Defendant

A petition for certification of the judgment in A-1753/1985-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied

WITNESS , the Honorable Stuart Rabner, Chief Justice, at Trenton, this 9th day of November, 2020.

CLERK OF THE SUPREME COURT

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1753-18T1, A-1985-18T1

APPROVED FOR PUBLICATION JUNE 12, 2020
APPELLATE DIVISION

State of New Jersey,
Plaintiff-Respondent
v.
Andrew Stoveken,
Defendant-Appellant

State of New Jersey,
Plaintiff-Respondent
v.
George Beecher,
Defendant-Appellant

Argued telephonically April 21, 2020 –

Decided June 12, 2020

Before Judges Fisher, Accurso and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Indictment Nos. 16-08-0130 and 16-08-0129.

The opinion of the court was delivered by

GILSON, J.A.D.

In these appeals, we address a question of first impression: is a grand jury subpoena sufficient to access prescription drug information maintained in New Jersey's Prescription Monitoring Program (PMP). We hold that a properly issued grand jury

subpoena is sufficient to obtain information concerning an investigation into a prescriber. We also hold that the grand jury subpoenas issued in these matters were valid.

Defendants George Beecher and Andrew Stoveken were involved, along with others, in a conspiracy to distribute oxycodone, an opioid pain medication that is classified as a controlled dangerous substance (CDS). During an investigation of the conspiracy, the State issued subpoenas to the administrator of the PMP. Defendants moved to suppress the evidence obtained as a result of those subpoenas, but the trial court denied that motion. Thereafter, both defendants pled guilty to second-degree conspiracy to distribute oxycodone, N.J.S.A. 2C:5-2, N.J.S.A. 2C:35-5(a)(1), and N.J.S.A. 2C:35-5(b)(4); and second-degree distribution of oxycodone, N.J.S.A. 2C:35-5(a)(1), N.J.S.A. 2C:35-5(b)(4), and N.J.S.A. 2C:2-6. Beecher was sentenced to ten years in prison and Stoveken was sentenced to seven years in prison.

In separate appeals, defendants challenge the validity of the subpoenas. They argue that the subpoenas were not actually issued by a grand jury; rather, they were issued by prosecutors and detectives in the Attorney General's Office. They also argue that even if the subpoenas were issued by a grand jury, New Jersey's Constitution requires that a court must find probable cause before information maintained in the PMP can be accessed. We consolidate the appeals for purposes of this opinion, reject both these arguments, and affirm.

Defendant Stoveken also argues that his application to the special probation Drug Court program was improperly denied. We reject that argument and affirm Stoveken's sentence.

I.

We derive the facts from the record on the motion

to suppress and admissions defendants made when they pled guilty. In May 2015, a confidential source informed the State about a pharmaceutical narcotics distribution network operating in the South Plainfield area. The source told the State that Beecher, who was a medical doctor, was providing John Burnham with prescriptions for oxycodone. The Division of Criminal Justice launched an investigation into the network. Ultimately, the State came to believe that Beecher, Stoveken, and Burnham were part of a network that included approximately twenty-five individuals.

Beecher was a medical doctor specializing in otolaryngology. Stoveken was an audiologist who shared offices with Beecher. Beecher would write prescriptions for oxycodone for individuals whom he never met based on driver's license information given to him by Stoveken. Beecher would then give the prescriptions to Stoveken, who in turn would give them to Burnham. Burnham oversaw a network of individuals who filled the prescriptions and sold the oxycodone.

Beecher was paid for each prescription he wrote. When he pled guilty, Beecher admitted that he fraudulently prescribed approximately 38,000 doses of oxycodone during the conspiracy. In connection with his plea to a second-degree crime, Beecher also admitted that the aggregate amount of oxycodone he prescribed exceeded one ounce.

When Stoveken pled guilty, he acknowledged that he acted as the middleman between Burnham and Beecher with the understanding that Burnham would oversee the fulfillment of the oxycodone prescriptions and the sale of the drugs. Stoveken was paid between $250 and $500 per month for his role and he also relayed money from Burnham to Beecher.

As part of its investigation, the State sought records from the PMP. The PMP was established by

statute in 2007 as an electronic database "for monitoring controlled dangerous substances that are dispensed in or into [New Jersey] by a pharmacist in an outpatient setting." N.J.S.A. 45:1-45(a). Pharmacies are required to submit, "by electronic means," information about each prescription for CDS, which includes, among other things: the name and address of the patient receiving the medication; the prescriber; the date the prescription was issued; the name, strength, and quantity of the CDS dispensed; and the source of payment for the CDS. N.J.S.A. 45:1-45(b). The PMP is maintained by the Division of Consumer Affairs (DCA), which is part of the Department of Law and Public Safety. N.J.S.A. 45:1-45(a).

Between May 2015 and March 2016, the State issued sixteen subpoenas to the administrator of the PMP. The initial subpoenas sought information about prescriptions written by Beecher. The additional subpoenas sought information concerning prescriptions written by Beecher, as well as prescriptions for various individual patients. Each subpoena stated that the information was to be provided to a State grand jury on an identified date. Each subpoena was also accompanied by a certification from a detective of the Division of Criminal Justice and a cover letter. The certifications stated that the information was sought "pursuant to a subpoena properly issued under the authority of a properly convened grand jury." The cover letters stated that the information should be emailed to the detectives.

The State acknowledges that a grand jury was not necessarily sitting on the dates the subpoenas were issued. It is undisputed, however, that when the information from the PMP was due to be returned, a grand jury was in session.

In response to the subpoenas, the acting

administrator of the PMP delivered to the detectives the requested records, together with a certification from the custodian of the records. The State then used the PMP records to develop its investigation. In that regard, the State used information from the PMP records to obtain communication data warrants and search warrants. The State also interviewed witnesses using the PMP information.

In August 2016, the information the State obtained during its investigation was presented to a grand jury. The grand jury then returned two indictments: one against Beecher, and another against Stoveken, Burnham, and five other alleged co-conspirators. Ultimately, Burnham and the five other co-defendants pled guilty. As part of his plea agreement, Burnham agreed to cooperate with the State and testify against Beecher and Stoveken.

Beecher was charged with four crimes: second-degree conspiracy to distribute oxycodone; second-degree distribution of oxycodone; third-degree distribution of alprazolam (Xanax), N.J.S.A. 2C:35-5(a)(1) and N.J.S.A. 2C:35-5(b)(13); and first-degree strict liability for the drug-induced death of Jason Stoveken, N.J.S.A. 2C:35-9(a). Jason was the son of defendant Stoveken, who was charged with two crimes: second-degree conspiracy to distribute oxycodone, and second-degree distribution of oxycodone.

Stoveken, joined by Beecher, moved to suppress the evidence obtained from the PMP, as well as evidence the State obtained by using the PMP information. The trial court heard oral arguments on May 12, 2017, and on May 22, 2017, it issued a written opinion and order denying the motion.

The trial court focused its decision on two arguments made by defendants: (1) whether the PMP records should be accessible only on a showing of probable cause; and (2) whether the subpoenas issued

by the State were proper grand jury subpoenas. In addressing the first issue, the trial court reasoned that the PMP statute allowed law enforcement personnel to access PMP records pursuant to a grand jury subpoena. N.J.S.A. 45:1-46(i)(8). The trial court also held that such grand jury subpoenas need not be based on a showing of probable cause and instead could be based on a showing of relevancy. In connection with those rulings, the trial court also found that defendants had presented no evidence that the State had abused its access to the PMP records.

Concerning the subpoenas themselves, the trial court held that the subpoenas were validly issued. Relying on our decision in State v. Hilltop Private Nursing Home, Inc., the trial court found that the subpoenas were valid because they were made returnable to the grand jury on specific days when the grand jury was sitting. 177 N.J. Super. 377 (App. Div. 1981). The trial court also found that the administrator of the PMP had the opportunity to appear before the grand jury. Further, the trial court reasoned that the prosecutor or detectives could accept the subpoenaed records for the grand jury. Finally, relying on State v. McAllister, the trial court held that the State was not required to provide notice to defendants when it served the grand jury subpoenas on the PMP administrator. 184 N.J. 17 (2005).

Following the denial of their motion to suppress, Beecher and Stoveken pled guilty. As noted earlier, both defendants pled guilty to second-degree conspiracy to distribute oxycodone and second-degree distribution of oxycodone. In the plea agreement with Beecher, the State agreed to dismiss all other charges and recommend that Beecher be sentenced to ten years in prison. The charges dismissed against Beecher included the charge of strict liability for the drug-induced death of Jason Stoveken. In pleading guilty, Beecher acknowledged that he had

fraudulently prescribed oxycodone and alprazolam to Jason Stoveken and that Jason had died of an overdose caused by "acute combined toxicity due to oxycodone and alprazolam."

In the plea agreement with Stoveken, the State recommended that he be sentenced to seven years in prison. Stoveken applied for admission into Drug Court, contending that he was an alcoholic. Although Stoveken was found to be eligible due to his severe alcoholism, the trial judge determined that Stoveken did not commit the offenses while under the influence of alcohol and that he was therefore not eligible for admission to the Drug Court program.

In accordance with their plea agreements, Stoveken was sentenced to seven years in prison and Beecher was sentenced to ten years in prison. The trial court granted both defendants' applications to stay their sentences pending their appeals and granted defendants bail pending appeal.

II.

On appeal, defendants present two arguments concerning the subpoenas and the denial of the motion to suppress. First, they argue that the subpoenas were improper "office subpoenas" because the grand jury was not convened when the subpoenas were issued, and the materials were produced to detectives rather than the grand jury. Second, they argue that New Jersey's Constitution requires a court order based on a showing of probable cause to access PMP information.

Beecher articulates his arguments as follows:

> THE TRIAL COURT ERRED IN DENYING [BEECHER'S] MOTION TO SUPPRESS BECAUSE THE STATE UNLAWFULLY UTILIZED "OFFICE SUBPOENAS" TO OBTAIN PMP RECORDS CONTRARY TO

RELEVANT CASE LAW, THE REQUIREMENTS OF N.J.S.A. 45:1-45 ET SEQ., AND THE NEW JERSEY CONSTITUTION.

Stoveken articulates his arguments as follows:

I. The trial court erred in denying [Stoveken's] Motion to Suppress the subpoenas served upon the Prescription Monitoring Program ("PMP")

A. A court order, as contemplated by the PMP statute, is constitutionally necessary to protect reasonable expectations of privacy.

B. Even if a grand jury subpoena is constitutionally sufficient, the PMP statute requires a [c]ourt [o]rder under the present circumstances, because the PMP records were provided to a law enforcement officer, not a grand jury.

In addition, Stoveken contends that the trial court erred in denying his application to enter the Drug Court program and he makes the following arguments:

II. The trial court erred in denying Defendant's entry into the Drug Court program.

A. Defendant's voluntary Drug Court application was wrongly rejected.

B. The sentencing court erred by not reconsidering Defendant's Drug Court eligibility under the mandatory track.

We hold that the subpoenas were valid grand jury subpoenas. We also hold that law enforcement personnel can obtain information from the PMP with a valid grand jury subpoena issued on a showing of relevancy. Finally, we affirm the denial of Stoveken's

application to the special probation Drug Court program.

A. The Subpoenas to the PMP

The PMP statute states: "[P]rescription monitoring information submitted to the [DCA] shall be confidential and not be subject to public disclosure." N.J.S.A. 45:1-46(b). Accordingly, access to information in the PMP is limited. The DCA itself must review the information to (1) protect against "misuse, abuse, or diversion of a [CDS]" and (2) identify any violation of law or regulations. N.J.S.A. 45:1-46(c)(1) to (2). The PMP statute also permits access to prescribers, pharmacies, and appropriate medical and dental personnel generally related to treatment of patients. N.J.S.A. 45:1-46(h). In addition, the statute authorizes access to certain persons, including both "a State, federal, or municipal law enforcement officer who is acting pursuant to a court order and certifies that the officer is engaged in a bona fide specific investigation of a designated practitioner, pharmacist, or patient" and "a properly convened grand jury pursuant to a subpoena properly issued for the records." N.J.S.A. 45:1-46(i)(6), (8). As a condition for obtaining prescription monitoring information, such persons must "certify the reasons for seeking to obtain that information." N.J.S.A. 45:1-46(j).

The State acknowledges that it relied on the grand jury subpoena provision of the PMP statute to access the information concerning Beecher and relatedly Stoveken. N.J.S.A. 45:1-46(i)(8). In other words, the State did not obtain a court order and is not relying on that provision of the statute. N.J.S.A. 45:1-46(i)(6).

The first question, therefore, is whether the subpoenas issued were valid grand jury subpoenas. The trial court did not conduct an evidentiary hearing. Instead, the facts relevant to the issuance of the subpoenas were presented as undisputed. We

review a trial court's conclusions of law in a non-evidentiary hearing de novo. *State v. Hinton*, 216 N.J. 211, 228 (2013); *State v. Jackson*, 460 N.J. Super. 258, 271 (App. Div. 2019). Moreover, when applying law to undisputed facts, our review is plenary. *Spangenberg v. Kolakowski*, 442 N.J. Super. 529, 535 (App. Div. 2015) (quoting *Reese v. Weis*, 430 N.J. Super. 552, 568 (App. Div. 2013)).

1. The Validity of the Subpoenas

"New Jersey courts have consistently affirmed the expansive investigative powers of grand juries." *McAllister*, 184 N.J. at 34. A grand jury subpoena is valid if the State establishes "(1) the existence of a grand jury investigation and (2) the nature and subject matter of the investigation." Ibid. (quoting, as the "prevailing standard," *In re Grand Jury Subpoena Duces Tecum*, 167 N.J. Super. 471, 472 (App. Div. 1979)). A grand jury does not have to initiate the subpoena process or authorize the issuance of the subpoena. Id. at 34-35 (citing *Hilltop*, 177 N.J. Super. at 389). Accordingly, a prosecutor can issue subpoenas in the name of the grand jury, which does not have to be sitting on the day the subpoenas are issued. *Jackson*, 460 N.J. Super. at 270.

In summary, there are three criteria required for a valid grand jury subpoena: (1) the existence of a grand jury investigation; (2) the identification of the nature and subject matter of the investigation; and (3) the subpoenaed materials must be returnable on a day when a grand jury is sitting and the subpoenaed individual must have an opportunity to appear before the grand jury. Ibid.; *McAllister*, 184 N.J. at 34-35.

It is also well-established that a grand jury subpoena can be issued on a showing of relevancy for the information, and probable cause need not be established. *McAllister*, 184 N.J. at 34-35. Moreover, the State can establish relevancy on a prosecutor's representations and such representations do not have

to be set forth in a certification or affidavit. Id. at 34 (citing *In re Grand Jury Subpoena Duces Tecum*, 167 N.J. Super. at 472).

When the Legislature enacted the PMP statute in 2007, the law concerning the validity of grand jury subpoenas was well-established. We presume that the Legislature was aware of that jurisprudence and, therefore, we construe N.J.S.A. 45:1-46(i)(8) accordingly. See *Atl. Ambulance Corp. v. Cullum*, 451 N.J. Super. 247, 255 (App. Div. 2017) (quoting *Macedo v. Dello Russo*, 178 N.J. 340, 345-46 (2004)) (holding that the Legislature is "presumed to be aware" of judicial case law and the judiciary's interpretations of its enactments).

All sixteen of the subpoenas issued by the State met these criteria and were valid grand jury subpoenas. Each subpoena was issued in the name of a grand jury, and the subpoenas, together with the accompanying certifications, established the existence of a grand jury investigation. Each subpoena also established the nature and subject matter of the investigation by identifying Beecher and individuals to whom he was prescribing medication. Finally, each subpoena identified a specific date, time, and location "to give evidence before the State grand jury" and the PMP administrator had the opportunity to appear before the State grand jury. That the evidence was turned over to detectives, as opposed to the grand jury itself, does not invalidate the subpoenas. It is also undisputed that the materials collected from the PMP were ultimately presented to a grand jury.

2. The Constitutionality of the Grand Jury Subpoenas

Defendants argue that even if the grand jury subpoenas were valid, New Jersey's Constitution requires that the PMP information can be accessed only on a showing of probable cause. Defendants also contend that probable cause must be found by a court.

We disagree.

The Fourth Amendment of the United States Constitution and Article I, Paragraph 7 of the New Jersey Constitution are almost identical and guarantee the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures by the government. U.S. Const. Amend. IV; N.J. Const. art. I, ¶ 7. The Fourth Amendment of the federal Constitution generally does not protect information that has been turned over to a third party. See *United States v. Miller*, 425 U.S. 435, 442 (1976). In contrast, New Jersey gives greater protection to its residents under its Constitution. Individuals in New Jersey do not lose their right to privacy simply because they have given information to a third party. See *State v. Earls*, 214 N.J. 564, 568 (2013); *McAllister*, 184 N.J. at 25-27; see also *State v. Shaw*, 237 N.J. 588, 616 (2019) (citing *State v. Alston*, 88 N.J. 211, 226 (1981)) ("The New Jersey Constitution provides greater protections from warrantless searches and seizures than the Fourth Amendment of the Constitution of the United States.").

Nevertheless, even when New Jersey recognizes that its citizens have a reasonable expectation of privacy in information, the standard for accessing that information varies in light of the intrusion on the privacy interests. See *Earls*, 214 N.J. at 569; *McAllister*, 184 N.J. at 33; see also *State v. Lunsford*, 226 N.J. 129, 131-32 (2016). In other words, although a citizen may have a reasonable expectation of privacy, under certain circumstances the State can intrude on that privacy in order, among other things, to investigate criminal activity.

Accordingly, the question becomes whether the intrusion should require a showing of probable cause or relevancy. *McAllister*, 184 N.J. at 33; see also *Lunsford*, 226 N.J. at 131. For example, in *Lunsford*,

the Court decided that an individual's privacy interest in telephone billing records was protected by a relevancy standard. *Lunsford*, 226 N.J. at 154; see also *State v. Reid*, 194 N.J. 386, 389 (2008) (holding that a privacy interest in information provided to internet service providers was adequately protected by grand jury procedures); *McAllister*, 184 N.J. at 19 (same as to bank records). By contrast, in *Earls*, the Court determined that to access cell-phone location information, a warrant based on probable cause was required. 214 N.J. at 569.

In applying these constitutional standards to the PMP statute, we hold that the relevancy standard applies when the government is seeking information about a prescriber. Beecher was a prescribing doctor. Stoveken was neither the prescriber nor the patient receiving the medicine. Consequently, neither defendant had a strong privacy interest in the patient information and their reasonable expectations of privacy concerning the information in the PMP was limited. See *Lunsford*, 226 N.J. at 131; *McAllister*, 184 N.J. at 33; see also *State v. Evers*, 175 N.J. 355, 368-69 (2003) (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)) (recognizing that "[t]o invoke the protections of the Fourth Amendment and its New Jersey counterpart, Article I, Paragraph 7, [a] defendant must show that a reasonable or legitimate expectation of privacy was trammeled by government authorities.").

We do not reach the issue of what the appropriate standard is if the State seeks information in an investigation of a patient. We also do not determine whether a court order under N.J.S.A. 45:1-46(i)(6) could be issued on a showing of relevancy versus probable cause. As noted earlier, the State is not relying on that provision and, therefore, those issues are not before us. To the extent that the trial court reached those issues, we construe the court's reasoning to be dicta and we take no position on

whether it was correct.

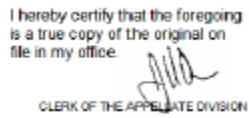
In summary, the subpoenas the State issued to the administrator of the PMP were valid grand jury subpoenas and those subpoenas did not violate either Beecher's or Stoveken's reasonable expectation of privacy under our State or federal Constitutions.

B. Stoveken's Application to Drug Court

[this section of opinion omitted from Appendix as irrelevant to Petition for Certiorari]

…

Affirmed.



APPENDIX C

BY ORDER OF THE COURT
SUPERIOR COURT OF NEW JERSEY
COUNTY OF MIDDLESEX
LAW DIVISION

State of New Jersey,

Plaintiff

v.

Andrew Stoveken, et al.

Ind. 16-08-129-S

George Beecher,

Ind. 16-08-130-S,

Defendants

FILED MAY 22, 2017

ORDER

THIS MATTER having been brought before the Court by Steven D. Altman, Esq., appearing on behalf of Defendant, Andrew Stoveken, Indictment No. 16-08-129-S; and joined by Steven C. Lember, Esq., appearing on behalf of Co-Defendant John Burnham; and joined by Jarred S. Freeman, Esq., appearing on behalf of Co-Defendant Jamar Mayers; and joined by Luis A. Negron, Esq., appearing on behalf of Co-Defendant Donn Rush; and joined by Charlene Cathcart, Esq., appearing on behalf of Co-Defendant George Sara; and Defendant George Beecher, Indictment No. 16-08-130-S having joined by filing a supplemental brief by and through his attorney

Robert L. Galantucci, Esq.; and Deputy Attorney General Michael W. King, Esq., appearing on behalf of the State of New Jersey; and the Court having reviewed all papers submitted and having heard oral argument on May 12, 2017; and for good cause shown;

IT IS ON THIS 22ND DAY OF MAY, 2017,

ORDERED that the Defendant's Motion to Suppress Evidence is hereby **DENIED** for the reasons set forth in the attached Opinion.

Hon. Ben Bucca, Jr. J.S.C.

APPENDIX D

BY ORDER OF THE COURT
SUPERIOR COURT OF NEW JERSEY
COUNTY OF MIDDLESEX
LAW DIVISION

State of New Jersey,

Plaintiff

v.

Andrew Stoveken, et al.

Ind. 16-08-129-S/

George Beecher,

Ind. 16-08-130-S,

Defendants

This memorandum addresses Defendant Andrew Stoveken' s Motion to Suppress, which Co-Defendants John Burnham, Jamar Mayers, Donn Rush, and George Sara joined, and which Defendant George Beecher, Indictment No. 16-08-130-S, joined by filing a supplemental brief.

Statement of Facts

In May 2015, the State initiated an investigation into whether Defendant Dr. George Beecher was a supplier of oxycodone pills to a narcotics distribution organization. The State alleges that the network of individuals associated

with Beecher numbered approximately twenty-five people and was overseen by Defendant John Burnham. The State alleges that Defendant Andrew Stoveken acted as a middleman between Beecher and Burnham.

To investigate the alleged organization, the State subpoenaed prescription monitoring information held by the Division of Consumer Affairs in the Department of Law and Public Safety pursuant to N.J.S.A. 45:1-45, et al. Between May 18, 2015 and March 14, 2016, detectives from the NJ Division of Criminal Justice served sixteen subpoenas duces tecum on the NJPMP Administrator in the Division of Consumer Affairs. They served four subpoenas by physical mail and the other twelve by e-mail. Each subpoena was accompanied by a cover letter captioned " Request for NJPMP records" and a " Certification of Investigator" signed by the detective who delivered the subpoena. In response to each request, the acting PMP Administrator delivered responsive records to the requesting detective along with a "Certification of the Custodian of Records." The State used the PMP records to develop the investigation, take witness statements, and secure Communication Data Warrants and search warrants.

On August 16, 2016, a State Grand Jury issued an indictment charging John Burnham, Andrew Stoveken, Jared Burnham, George Sara, Jamar Mayers, Donn Rush, and Marina Burnham with **second-degree** Conspiracy, in violation of N.J.S.A. 2C:5-2, and **second-degree** Distribution of Controlled Dangerous Substances, in violation of N.J.S.A. 2C:35-5. The State Grand

Jury also issued an indictment charging George Beecher with **second-degree** Conspiracy, in violation of N.J.S.A. 2C:5-2, **second-degree** Distribution of CDS, in violation of N.J.S.A. 2C:35-5, **third-degree** Distribution of CDS, in violation of N.J.S.A. 2C:35-5, and **first-degree** Strict Liability for Drug Induced Death, in violation of N.J.S.A. 2C:35-9.

On February 28, 2017, Defendant Stoveken filed a Motion to Suppress. Stoveken's Co-Defendants noticed their intent to join. On March 15, 2017, Beecher joined the motion and filed a supplemental brief. On May 12, 2017, the Honorable Benjamin S. Bucca, Jr. entertained oral argument.

Analysis

I. The PMP Statute

The Defendants argue that the State must obtain a search warrant issued pursuant to a probable cause finding in order to access prescription monitoring information ("PMP records"). They assert that a lower threshold showing does not protect an individual's privacy interest in PMP records. They conclude that the PMP statute is internally inconsistent because it allows access by either a court order issued upon a probable cause showing or a grand jury subpoena issued upon a relevancy showing.

The State responds that the statute is consistent even though it grants access to PMP records by either court order or grand jury subpoena. The State reasons that the Legislature used "court order" as a distinct term and not as an equivalent of "search warrant," the latter of which

would require a probable cause showing. The State concludes that the provisions permitting access by court order or by grand jury subpoena are consistent with each other because they both require a relevancy showing to access PMP records.

The PMP statute permits both "a [...] law enforcement officer acting pursuant to a court order" and "a properly convened jury pursuant to a subpoena properly is sued" to access PMP records. However , the statute does not set out the standard that either must satisfy to access those records . This treatment differs from the Legislature's treatment of the Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1, et The Act explicitly provides that telephone billing records may be released "only if the law enforcement agency offers specific and articulable facts showing information [...] is relevant and material to an ongoing criminal investigation." N.J.S.A. 2A:156A-29e.

The Defendants are incorrect that investigative entities may access PMP records only upon a showing of probable cause. To read "court order" as the equivalent of "search warrant" would render the statute inconsistent. This is not called for because the Legislature previously distinguished the term "court order" from "search warrant" and explicitly paired it with a relevancy standard. In the Wiretapping Act, the Legislature set out a relevancy standard for issuance of a court order. Ibid. As a search warrant issues only on a finding of probable cause, the Legislature clearly did not intend to use "court order" as an equivalent term. Against this legislative history,

the Defendants provide no convincing argument to why the court should read the PMP statute to require a relevancy showing from a grand jury on one hand but a probable cause showing from a law enforcement officer on the other hand.

New Jersey case law supports finding the PMP statute requires a relevancy showing from all parties. New Jersey law recognizes that individuals retain a privacy interest in some types of information disclosed to third parties. A grand jury acting pursuant to a subpoena may obtain bank records and ISP subscriber information. The information sought must be " relevant to the subject matter of the investigation." State v. McAllister, 184 N.J. 17, 36 (2005); State v. Reid, 194 N.J. 386, 403 (2008). Further, the Court has affirmed the Legislature's choice of a relevancy standard to protect an individual' s privacy right in telephone billing records. State v. Lunsford, 226 N.J. 129, 152 (2016).

While this court recognizes that PMP records disclose personal medical information, it considers the amount of information disclosed to be limited. The court agrees with the State's argument:

> The fact that a person received a prescription for Oxycodone informs only a single conclusion: that the person either suffers, or at one time suffered from pain. The fact that a person received a prescription for Xanax (Alprazolam) similarly

> reveals little: the person suffers or at one time may have suffered from anxiety disorders or panic disorders. The root cause - the underlying medical condition - is absent from the PMP data. PMP records are limited to the person's access to controlled dangerous substances.
>
> [State's Brief, 17.]

The amount of personal information revealed by the disclosure of PMP records is no greater than the amount of personal information revealed by the disclosure of bank records , ISP subscriber information, or telephone billing records. The same degree of protection should be afforded to privacy interest in prescription monitoring information held in the PMP database. Therefore, a grand jury subpoena issued pursuant to a relevancy standard is sufficient to protect those privacy interests.

Lastly, the defendants have provided no facts to suggest the possibility that law enforcement has abused access to PMP records. In Lunsford, the Court acknowledged the long recognized possibility of abuse in the particular context of telephone records. 226 N.J. at 154. The Court established a relevancy standard for release of such records but also required that requests for access be made by court order. There is no basis for this court to find the context of PMP records comparable. A grand jury subpoena

provides sufficient protection of privacy interests in PMP records.

II. *The Subpoenas Duces Tecum*

The Defendants argue that a grand jury subpoena issued for PMP records is valid only if agrand jury is actively investigation the matter for which the subpoena is issued. The Defendants assert that the phrase "a properly convened grand jury" in the PMP statute requires not only that the grand jury be seated but that it is actually investigating the matter for which subpoenas are issued. Further, the Defendants argue that the grand jury subpoenas issued in the underlying casewere invalid because their delivery to the PMP Administrator without notice to the Defendants did not provide an opportunity to contest the request and, therefore, ensure sufficient oversight of the State's requests. On the other hand, the State represented to the court that the State was investigating Dr. Beecher for potentially oversubscribing opioids and was doing so based on information provided to the State by a confidential informant. In additi on, the State represented that a grand jury was convened each day the subpoenas were returnable.

The PMP statute provides that PMP records may be provided to a "properly convened grand jury pursuant to a subpoena properly issued for the records." N.J.S.A. 45:l-46i(8). This provision should be read in conjunction with State v. Hilltop Private Nursing Home, Inc., 177 N.J. Super. 377 (App. Div. 1981). In that case, the court found a grand jury does not need to be actively

investigating a case when a subpoena is issued. Id. at 396. Further, where multiple subpoenas are issued, the grand jury sitting on each return date does not need to be one impaneled specifically for the ongoing investigation. Id. at 385-386. Lastly, a prosecutor may accept subpoenaed material on their return in place of a grand jury. Id. at 393. The court concluded that a subpoena ducestecum is valid provided it is marked returnable to a grand jury room and the subpoenaed witnesses is given the opportunity to go before a grand jury on the return date. Id. at 396-397.

In Hilltop, the State issued four grand jury subpoenas between November 28, 1978 andJune 20, 1979. During this time, the State made no actual grand jury presentation. The actual presentation to the grand jury did not begin until July 31, 1979. Id. at 386. The trial court suppressed the subpoenaed evidence as no grand jury had authorized issuance of the subpoenas. The appellate court reversed the trial court's decision, finding that a grand jury subpoena is valid even if a grand jury does not authorize it. The court concluded that the validity of a subpoena turns on the opportunity to appear rather than when the grand jury came into existence. Id. at 396. "The thin line between a valid grand jury subpoena and an invalid office subpoena is crossed when theprosecutor does not provide the subpoenaed witness with *an opportunity* to go before the grand jury on the return date." Id. at 395. (original emphasis).

The provision in the PMP statute that provides access to PMP records by subpoena adds no requirements to those set out in Hilltop. First,

the provision states that the subpoena must be " properly issued." N.J.S.A. 45:1-46i(8). As set forth in Hilltop, a subpoena is "properly issued" so long as it is marked returnable to a grand jury room and the subpoenaed witnesses is given the opportunity to go before a grand jury on the return date. Hilltop, supra, 177 N.J. Super. at 396-397. The Statute's phrase "properly issued" does not require anything more.

Second, the provision requires that the Division provide the subpoenaed records to a "properly convened grand jury." Id. As set forth in Hilltop, the prosecutor may accept subpoenaed material in place of a grand jury. If the Legislature intended to limit the State from accepting subpoenaed material in place of a grand jury scheduled to sit on the return date, it would have said so. The Statute's language provides no signal that the Legislature intended to depart from a thirty- six-year-old case precedent that permits a prosecutor to accept subpoenaed material returned to a grand jury.

Each of the sixteen Grand Jury subpoenas issued in this case satisfy the two requirements set out by the court in Hilltop. First, the subpoenas were marked returnable to a grand jury room. Each subpoena commanded the PMP Administrator to appear at the State Grand Jury on the 4th Floor, West Wing of the Richard J. Hughes Justice Complex on a specified date and at a specified tim e. Second, each subpoena gave the PMP Administrator the opportunity to go before a grand jury. In State v. Stelzner, the court found that this requirement is satisfied where "the face of each subpoena offered the

opportunity to appear before the grand jury." 257 N.J. Super. 219, 236 (App. Div. 1992). As each subpoena ordered the Administrator to appear with the requested records, each subpoena on its face established the opportunity to appear.

Lastly, the court is satisfied that the Division of Criminal Justice was not required to provide notice to the Defendants when it served the grand jury subpoenas on the PMP Administrator. In State v. McAllister, the Court found that the prosecutor is not required to provide notice to an individual under investigation when it issues a grand jury subpoena to a banking institution for that individual's banking records. 184 N.J. 17, 42. The Court acknowledged that banks may not have the same incentives or substantive arguments to challenge the subpoenas. However, the Court recognized that banks do have the opportunity to oppose. Further, New Jersey law does not require notice be given to the target of the investigation.

The scenario before this court is comparable. The court is satisfied that the Division of Consumer Affairs had the ability to object to the subpoenas served by detectives for PMP records. The Division of Criminal Justice did not need to provide notice to the Defendants when it served any of the subpoena s. Each subpoena was valid. The procedure by which they were served was valid. Therefore, the court does not suppress the evidence obtained pursuant to their issuance.

Conclusion

For the reasons set forth above, this

court is satisfied that the PMP statute provides sufficient constitutional protection of individual's privacy rights in prescription monitoring information held by the Division of Consumer Affairs pursuant to N.J.S.A. 45:1-45, et Further, the court is satisfied that each subpoena issued to the PMP Administrator was valid.Therefore, having reviewed the papers and having heard oral argument, this court denies Defendant's Motion to Suppress.