

SUPREME COURT OF NEW JERSEY  
DOCKET NO. 54, 261  
APP. DIV. DOCKET NO. A-4528-01T2

State of New Jersey,

Plaintiff-Respondent,

-v-

Gary N. Frankel,

Defendant-Petitioner.

CRIMINAL ACTION

On Certification From a Final  
Judgment of the Superior Court  
of New Jersey, Appellate  
Division

Sat Below:

Hon. Edwin H. Stern, P.J.A.D

Hon. Donald S Coburn, J.A.D.

Hon. Donald G. Collester, J.A.D.

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS OF NEW JERSEY IN SUPPORT  
OF DEFENDANT-PETITIONER

---

GIBBONS, DEL DEO, DOLAN,  
GRIFFINGER & VECCHIONE  
A Professional Corporation  
Attorneys for Amicus Curiae the  
Association of Criminal Defense  
Lawyers of New Jersey

On the Brief

Lawrence S. Lustberg, Esq.

Philip G. Gallagher, Esq.

**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF AUTHORITIES.....	ii
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS.....	3
PROCEDURAL HISTORY.....	6
ARGUMENT.....	9
I.    WARRANTLESS SEARCHES ARE PRESUMPTIVELY PROHIBITED BY BOTH THE FEDERAL AND NEW JERSEY CONSTITUTIONS.....	9
II.   THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT JUSTIFIES WARRANTLESS SEARCHES ONLY WHEN THE POLICE HAVE A REASONABLE AND OBJECTIVE BELIEF THAT AN EMERGENCY EXISTS.....	11
III.  THE DECISION OF THE APPELLATE DIVISION SHOULD BE REVERSED BECAUSE THE WARRANTLESS SEARCH OF DEFENDANT’S HOME DOES NOT FALL WITHIN THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT.....	14
A.   An open or dropped 9-1-1 call does not create a reasonable and objective belief that an emergency exists.....	15
B.   The busy signal received by the police dispatcher when calling Defendant’s home telephone did not support a reasonable and objective belief that there was an emergency...	19
C.   Defendant’s assertion of his constitutional rights and Officer Gelber’s subjective perception of his nervousness do not support a reasonable and objective belief that an emergency existed inside Defendant’s home.....	21
CONCLUSION.....	24

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

<u>California v. Ciraolo,</u> 476 <u>U.S.</u> 207 (1986) .....	8
<u>California v. Greenwood,</u> 486 <u>U.S.</u> 35 (1988) .....	8
<u>Flippo v. West Virginia,</u> 528 <u>U.S.</u> 11 (1999) .....	11
<u>Florida v. Bostick,</u> 501 <u>U.S.</u> 429 (1991) .....	23
<u>Horton v. California,</u> 496 <u>U.S.</u> 128 (1990) .....	8, 10
<u>Katz v. United States,</u> 389 <u>U.S.</u> 347 (1967) .....	8
<u>Kyllo v. United States,</u> 533 <u>U.S.</u> 27 (2001) .....	9
<u>Michigan v. Tyler,</u> 436 <u>U.S.</u> 499 (1978) .....	12
<u>New York v. Belton,</u> 453 <u>U.S.</u> 454 (1981) .....	11
<u>New York v. Class,</u> 475 <u>U.S.</u> 106 (1986) .....	8
<u>Silverman v. United States,</u> 365 <u>U.S.</u> 505 (1961) .....	9
<u>South Dakota v. Opperman,</u> 428 <u>U.S.</u> 364 (1976) .....	8
<u>State v. Bolte,</u> 115 <u>N.J.</u> 579 (1989) .....	9
<u>State v. Bruzzese,</u> 94 <u>N.J.</u> 210 (1983) .....	10
<u>State v. Castro,</u> 238 <u>N.J. Super.</u> 482 (App. Div. 1990) .....	13, 14
<u>State v. Cooke,</u> 163 <u>N.J.</u> 657 (2000) .....	10
<u>State v. Deluca,</u> 168 <u>N.J.</u> 626 (2001) .....	11
<u>State v. Flint,</u> 126 <u>N.J. Super.</u> 182 (App. Div. 1973) .....	23

<u>State v. Frankel,</u> 341 <u>N.J. Super.</u> 594 (App. Div. 2001) .....	passim
<u>State v. Garbin,</u> 325 <u>N.J. Super.</u> 521 (App. Div. 1999) .....	14
<u>State v. Garland,</u> 270 <u>N.J. Super.</u> 31 (App. Div. 1994) .....	6, 13
<u>State v. Hemptele,</u> 120 <u>N.J.</u> 182 (1990) .....	9, 11
<u>State v. Hill,</u> 115 <u>N.J.</u> 169 (1989) .....	10
<u>State v. Johnson,</u> 168 <u>N.J.</u> 608 (2001) .....	10
<u>State v. Leandry,</u> 151 <u>N.J. Super.</u> 92 (App. Div. 1977) .....	12, 13
<u>State v. Maryland,</u> 167 <u>N.J.</u> 471 (2001) .....	23
<u>State v. Patino,</u> 83 <u>N.J.</u> 1 (1980) .....	8, 11
<u>State v. Rice,</u> 251 <u>N.J. Super.</u> 136 (App. Div. 1991) .....	22, 24
<u>State v. Richards,</u> 351 <u>N.J. Super.</u> 289 (App. Div. 2002) .....	24
<u>State v. Rivera,</u> 276 <u>N.J. Super.</u> 346 (App. Div. 1994) .....	10
<u>State v. Scott,</u> 231 <u>N.J. Super.</u> 258 (App. Div. 1989) .....	6, 13
<u>State v. Stott,</u> 171 <u>N.J.</u> 343 (2002) .....	12, 14
<u>State v. Tucker,</u> 136 <u>N.J.</u> 158 (1994) .....	24
<u>Thacker v. City of Columbus,</u> 328 <u>F.3d</u> 244 (6 <sup>th</sup> Cir. 2003) .....	17
<u>United States v. Meixner,</u> 2000 WL 1597736 (E.D. Mich. Oct. 26, 2000) .....	10, 16
<u>United States v. Pihlbad,</u> 142 <u>F.3d</u> 437, 1998 WL 165150 (6 <sup>th</sup> Cir. Apr. 3, 1998) .....	18
<u>United States v. Richardson,</u> 208 <u>F.3d</u> 626 (7 <sup>th</sup> Cir. 2000) .....	18
<u>United States v. United States District Court,</u> 407 <u>U.S.</u> 297 (1972) .....	7

<u>Wayne v. United States,</u> 318 <u>F.2d</u> 205 D.C. Cir. 1963) .....	12
<u>Welsh v. Wisconsin,</u> 466 <u>U.S.</u> 740 (1984) .....	7, 9, 11
<b><u>STATUTES</u></b>	
N.J.S.A. 2C:35-10a(3).....	4
N.J.S.A. 2C:35-4.....	4
<b><u>OTHER AUTHORITIES</u></b>	
<u>211 System will Connect People with Services,</u> Courier-Journal (July 11, 2003) .....	19
MacQuarrie Brian, <u>Vineyard Institutes 311,</u> Boston Globe (June 27, 2003) .....	19
Office of Community Oriented Policing Servs., U.S. Dep't of Justice, <u>311 For Non-Emergencies</u> (Aug. 25, 2003) .....	18
Sampson Rana, Office of Community Oriented Policing Servs., U.S. Dep't of Justice, <u>Misuse and Abuse of 911</u> (2002) .....	19
Walsh Trudy, <u>New Yorkers Dial 311 for Routine Info,</u> Gov't Computer News (June 2, 2003) .....	19
<u>Winnipeg,</u> Broadcast News, Feb. 26, 2002.....	19

## PRELIMINARY STATEMENT

The Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) submits this brief amicus curiae in support of Defendant-Petitioner and urges reversal of the decision of the Appellate Division in this matter. Because the Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution of 1947 protect sacrosanctity of the home, courts have strictly limited and narrowly interpreted the judicially created exceptions to the general rule that police must obtain a warrant before entering a home without consent. And, when the police seek to rely on one of these exceptions to justify the warrantless intrusion into a home, they are held to a heavy burden to demonstrate the necessity of their actions.

Thus, when the police can show that they had a reasonable and objective belief that an emergency existed and that immediate action was necessary, the so-called emergency aid exception to the warrant requirement permits warrantless entries. Here, however, though the police purported to rely on this exception, they lacked any reasonable and objective belief that there was an emergency inside Defendant's home. To the contrary, the information available to the police when they searched Defendant's home was insufficient to create a reasonable and objective belief that there was an emergency within. Specifically, the police searched Defendant's home on the basis of: 1) a 9-1-1 call which was traced to Defendant's home but which provided no information regarding the presence of

an emergency; 2) a busy signal encountered by a police dispatcher when she attempted to call the number to which she traced the 9-1-1 call; and 3) the subjective impressions of a responding police officer, who believed that Defendant appeared nervous when subjected to an early morning police visit and pat-down search and who was particularly alarmed by Defendant's refusal to permit a search of his home and musing over whether to contact an attorney. These bases are either constitutionally insufficient or legally impermissible.

Because the police thus entered Defendant's home lacking an appropriately reasonable and objective belief that an emergency existed, this Court should reverse the decision of the Appellate Division and find the warrantless search of Defendant's home unconstitutional.

## STATEMENT OF FACTS

At 7:27 a.m. on June 21, 1999, a Freehold Township police dispatcher received a 9-1-1 call on which the dispatcher heard no voice but only static (known as an "open call").<sup>1</sup> The 7:27 a.m. call was the fourth open 9-1-1 call received by the dispatcher since 12:20 a.m. that morning. Nonetheless, after tracing the open call to Defendant's home, the dispatcher sent Officer Gelber to the home, although she did not tell him of the three previous open calls received that day. State v. Frankel, 341 N.J. Super. 594, 597 (App. Div. 2001).

Officer Gelber arrived at Defendant's home within ten minutes and knocked on the door. Defendant answered the door and explained that he had made no 9-1-1 call and that he lived alone. Id. Because Defendant appeared nervous, Officer Gelber asked him to step outside his home. Defendant complied, and Officer Gelber patted him down for weapons but found nothing. Id. at 598.

At this point, Officer Gelber sought permission to enter and search Defendant's home, but Defendant refused. Id. Officer Gelber's request surprised Defendant, who wondered aloud whether he needed a lawyer and stated that Officer Gelber could not enter his home without a search warrant. Id. Defendant appeared nervous to Officer Gelber and that, along with his refusal to permit a search of his home, aroused Officer Gelber's

---

<sup>1</sup> In contrast, the phrase "dropped call" refers to a call in which the operator is able to determine that a person placed that call, but that person terminates the call before speaking.

fears that someone might be in danger inside the home. Accordingly, Officer Gelber called for backup. Id.

While waiting for another officer to respond, Defendant stated he had used his computer earlier that morning and suggested that his computer may somehow have caused an open 9-1-1 call from his residence. To verify this, Officer Gelber asked the dispatcher to call the number from which the open 9-1-1 call had been received. The dispatcher did this and informed Officer Gelber that the phone line was busy. This information heightened Officer Gelber's suspicions that someone inside Defendant's home required assistance. Id.

In order to show Officer Gelber that his phone was in working order, Defendant invited him inside the foyer of his home. Leaving Officer Gelber there, Defendant retrieved two cordless telephones -- one for each of the two telephone lines in his home. In front of Officer Gelber, Defendant used the second telephone to call the number to which the 9-1-1 call had been traced, and the other telephone rang. Id. at 598-99.

After this demonstration, a second policeman, Officer Smith, arrived at Defendant's home. After telling Defendant that they were not satisfied with his explanation of the origin of the 9-1-1 call, the two undertook a warrantless search of Defendant's home by walking into rooms and looking into closets. During the course of this search, the officers observed a tray of marijuana and several live plants. Id. at 599. Only after seeing the plants did the police undertake steps to obtain a

search warrant, after arresting Defendant. Id. As a result of the evidence discovered during the warrantless search of his home, Defendant was charged with possession of marijuana in the fourth degree, N.J.S.A. 2C:35-10a(3), as well as the first degree crime of operating a marijuana production facility, N.J.S.A. 2C:35-4. Id. at 597.

## PROCEDURAL HISTORY

Defendant moved to suppress the evidence discovered during the warrantless search of his home. After an evidentiary hearing, the trial court suppressed the evidence.

In its opinion, the trial court rejected the State's argument that the warrantless search was permissible under the "exigent circumstances" exception to the warrant requirement. (Pa 5.)<sup>2</sup> The court explained that exigent circumstances only justifies a warrantless search when there is probable cause to believe that a crime has been or is being committed (Pa 5), but found that the State had failed "to present a sufficient showing of a well-grounded suspicion that a crime had or would occur." (Pa 5.) While the court did not question Officer Gelber's subjective belief that there was a problem within Defendant's home, it held that the open 9-1-1 call, the busy signal, and Defendant's nervousness did not rise to the level of probable cause and that the State's attempted reliance on the exigent circumstances exception therefore failed. (Pa 6.)

The State took an interlocutory appeal to the Appellate Division, which reversed the decision of the trial court. Frankel, 341 N.J. Super. at 597. On appeal, the State abandoned its reliance on the exigent circumstances exception to the

---

<sup>2</sup> The "Pa" references used in this brief refer to the Petitioner's Appendix filed by the State on its interlocutory appeal to the Appellate Division.

warrant requirement and instead argued that the "emergency aid" exception justified its warrantless search. Id. at 600-01.<sup>3</sup>

In order to rely upon the emergency aid exception to justify a warrantless search, the Appellate Division held that the State must make the following three showings:

- 1) there must be a reasonable and objective basis to believe that an emergency exists;
- 2) the resulting search must not be motivated by a desire to find evidence of a crime; and
- 3) there must be a nexus between the search and the emergency.

[Id. at 601 (citing State v. Garland, 270 N.J. Super. 31, 44 (App. Div. 1994), and State v. Scott, 231 N.J. Super. 258, 275 (App. Div. 1989)).]

The court's analysis focused on the first requirement -- whether there was a reasonable and objective basis to believe an emergency existed inside Defendant's home at the time Officers Gelber and Smith commenced their warrantless search. Id. at 602-03.

The court held that the State had satisfied this element in part because Officer Gelber had made some attempt to investigate the origin of the open 9-1-1 call before entering Defendant's home. Id. at 603. The court also concluded that the busy signal encountered by the dispatcher when she called Defendant's telephone reasonably heightened Officer Gelber's suspicions. Id.

---

<sup>3</sup> The Appellate Division also refers to this exception as the "community care-taking" exception. Id. at 600.

On remand, Defendant pleaded guilty to possession of marijuana, and the Appellate Division summarily affirmed his conviction on January 29, 2003. Defendant filed a Notice of Petition for Certification on February 21, 2003, and this Court granted the petition on May 22, 2003. State v. Frankel, 176 N.J. 430 (2003). On September 16, 2003, this Court granted ACDL-NJ leave to file this brief and to participate as amicus curiae.

## ARGUMENT

### I. **WARRANTLESS SEARCHES ARE PRESUMPTIVELY PROHIBITED BY BOTH THE FEDERAL AND NEW JERSEY CONSTITUTIONS.**

"It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" Welsh v. Wisconsin, 466 U.S. 740, 748 (1984) (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)). See also State v. Lewis, 116 N.J. 477, 483 (1989). In order to protect people from such government intrusions, both the Fourth Amendment to the United States Constitution and Article 1, paragraph 7 of the New Jersey Constitution of 1947 require "the approval of an impartial judicial officer based on probable cause before most searches may be undertaken." State v. Patino, 83 N.J. 1, 7 (1980). Thus, even if police officers have probable cause to know the location of contraband or evidence of a crime, they generally may not search private property without first obtaining judicial approval. Horton v. California, 496 U.S. 128, 137 n.7 (1990); Katz v. United States, 389 U.S. 347, 356-57 (1967).

The privacy protections of the federal and state constitutions vary depending on the nature of the location to be searched. For example, automobiles are afforded a relatively low level of protection against police searches. See, e.g., New York v. Class, 475 U.S. 106 (1986); South Dakota v. Opperman, 428 U.S. 364 (1976). Likewise, the yard surrounding a house, California v. Ciraolo, 476 U.S. 207 (1986), and trash left on the street, California v. Greenwood, 486 U.S. 35 (1988); but see

State v. Hemepele, 120 N.J. 182 (1990), are afforded little constitutional protection.

In contrast, constitutional protections against warrantless searches are at their strongest in the "sanctity of the home." Welsh, 466 U.S. at 750. As the United States Supreme Court has recently written: "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." Kyllo v. United States, 533 U.S. 27, 31 (2001) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)). This Court has similarly recognized the special constitutional protection of the home: "'Historically, the [United States Supreme] Court has applied a more stringent standard of the Fourth Amendment to searches of a residential dwelling. Indeed, one of this country's most protected rights throughout history has been the sanctity and privacy of a person's home.'" State v. Bolte, 115 N.J. 579, 585 (1989) (quoting State v. Bruzzese, 94 N.J. 210, 217 (1983)).

Accordingly, the courts of New Jersey, like their federal counter-parts, have protected "the legitimate expectations of privacy that every person possesses, especially when enveloped by the special protections that devolve in a home." State v. Rivera, 276 N.J. Super. 346, 354 (App. Div. 1994). See also State v. Johnson, 168 N.J. 608, 625 (2001) ("An individual's

privacy interests are nowhere more clearly defined or rigorously protected by the courts than in the home, the core of Fourth Amendment rights.”).

Against this jurisprudential backdrop, the presumptive invalidity of a warrantless search of the home is “overcome only if the search falls within one of the specific exceptions created by the United States Supreme Court.” State v. Hill, 115 N.J. 169, 173 (1989). See also Horton v. California, 496 U.S. 128, 134 n.4 (1990); United States v. Meixner, 2000 WL 1597736, at \*6 (E.D. Mich. Oct. 26, 2000); State v. Cooke, 163 N.J. 657, 664 (2000). Because of the importance of the warrant requirement to the protection of the home, exceptions to the rule are strictly limited and narrowly construed. Flippo v. West Virginia, 528 U.S. 11, 13 (1999); New York v. Belton, 453 U.S. 454, 464 (1981); State v. Hempele, 120 N.J. 182, 218 (1990). And, when the government attempts to justify a warrantless search on the basis of an exception to the warrant requirement, it must meet a “heavy burden” in order to avoid suppression of the fruits of its search. Welsh, 466 U.S. at 749-50. See also State v. Deluca, 168 N.J. 626, 632 (2001); Patino, 83 N.J. at 7.

**II. THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT JUSTIFIES WARRANTLESS SEARCHES ONLY WHEN THE POLICE HAVE A REASONABLE AND OBJECTIVE BELIEF THAT AN EMERGENCY EXISTS.**

The particular exception to the warrant requirement at issue in this matter -- the emergency aid exception -- grew out

of the recognition that life-threatening situations justify swift responses from government officials. In one of the early applications of the emergency aid exception, then- Circuit Judge Warren Burger upheld the warrantless entry of police into a hotel room in response to a report of an unconscious person. He wrote: "But a warrant is not required to break down a door to enter a burning home to rescue occupants or extinguish a fire, to prevent a shooting or to bring emergency aid to an injured person." Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963). The United States Supreme Court subsequently adopted this reasoning, holding that rescue workers may enter a burning building without a warrant. Michigan v. Tyler, 436 U.S. 499 (1978). This Court, too, has held that the New Jersey Constitution permits emergency entries by government rescuers. See, e.g., State v. Stott, 171 N.J. 343, 361 (2002); see also State v. Leandry, 151 N.J. Super. 92, 97 (App. Div. 1977).

As the Appellate Division recognized, the emergency aid exception has come to excuse the warrant requirement in those limited circumstances in which the following three requirements are met:

- 1) there must be a reasonable and objective basis to believe that an emergency exists;
- 2) the resulting search must not be motivated by a desire to find evidence of a crime; and
- 3) there must be a nexus between the search and the emergency.

Frankel, 341 N.J. Super. at 601 (citing State v. Garland, 270 N.J. Super. 31, 44 (App. Div. 1994) and State v. Scott, 231 N.J. Super. 258, 275 (App. Div. 1989)).

Two factors have been most important in determining whether the police's belief that an emergency exists was reasonable and objective. First, when the police have received a reasonably specific eyewitness report of an emergency, courts have tended to uphold warrantless searches. For example, the courts have upheld warrantless searches when police had received a report from an identified caller that a man had been shot, State v. Leandry, 151 N.J. Super. 92, 95 (App. Div. 1977); when an eyewitness had reported that a student had rapidly ingested a bag full of drugs, State v. Castro, 238 N.J. Super. 482, 483-84 (App. Div. 1990); or when they had interviewed a child who told them that other children had been left unattended in a hotel with a reputation for criminal activities, State v. Garland, 270 N.J. Super. 31, 45 (App. Div. 1994).

Second, the courts have upheld warrantless searches when, before making a search, the police have confirmed the probable existence of an emergency situation through their own observations. Thus, the courts have upheld searches when the police observed a hospital bed which confirmed the likely presence of an injured person, Leandry, 151 N.J. Super. at 96; or when they had seen smoke and smelled burning rubber emanating from a garage, State v. Garbin, 325 N.J. Super. 521, 524 (App. Div. 1999).

In contrast, when these factual constellations have not been present, courts have found the resulting warrantless searches unconstitutional, holding them to be supported only by "inarticulate hunches" or the police's "subjective good faith.". State v. Stott, 171 N.J. 343, 362 (2002). This case falls into that category. That is, because the police here lacked an eyewitness report of an emergency in Defendant's home and failed to confirm the presence of an emergency before they entered his home, their warrantless intrusion into Defendant's home cannot satisfy the stringent constitutional requirements for the emergency aid exception to the warrant requirement, particularly in the context of the home. This Court should therefore reverse the decision of the Appellate Division and hold the evidence in this case to have been unconstitutionally seized by the State.

**III. THE DECISION OF THE APPELLATE DIVISION SHOULD BE REVERSED BECAUSE THE WARRANTLESS SEARCH OF DEFENDANT'S HOME DOES NOT FALL WITHIN THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT.**

The information available to the police when they entered Defendant's home was insufficient to create a reasonable and objective belief that an emergency existed. The police had no identifiable witness or informant who had reported an emergency, had received no information regarding the nature of an imagined emergency, and had made no direct observations that would have confirmed the presence of an emergency at Defendant's home.

Instead, the police undertook a warrantless search based entirely upon: 1) an open 9-1-1 call which conveyed no

information regarding the presence of an emergency; 2) a busy signal received by the police dispatcher when she attempted to call the telephone number from which the open 9-1-1 call had emanated; and 3) Officer Gelber's disquiet as a result of Defendant's perceived nervousness at finding a policeman on his doorstep before 8:00 a.m. and assertions of his right to refuse a search of his home and to the presence of counsel. Neither singly nor in combination do these factors give rise to a reasonable and objective belief that an emergency entry into Defendant's home was necessary.

**A. An open or dropped 9-1-1 call does not create a reasonable and objective belief that an emergency exists.**

As courts throughout the country have expressly recognized, an open or dropped 9-1-1 call does not provide enough information to police to create a reasonable and objective belief that an emergency exists. While such a call usually provides cause for investigation, the police must have more information before they may enter a home without a warrant.

For example, in United States v. Meixner, 2000 WL 1597736 (E.D. Mich. Oct. 26, 2000), the court held unconstitutional a warrantless search of a home made by police in response to a dropped 9-1-1 call. As in the present case, the Meixner 9-1-1 call conveyed no information to the police other than the origin of the call. And, as in this matter, the responding police officer was able to observe the home's residents without entering the home and, thus, confirm that there was no

indication of a fight or injuries. Still, the police officer entered the home over the protests of its residents. Id. at \*4.

Although the Meixner court recognized that "the possibility of an emergency justified a limited response by the police, consisting of a personal trip to the premises to investigate," it held the search unconstitutional because the 9-1-1 call "conveyed no information [and] more was required to support a warrantless entry into the defendant's home." Id. at \*8. The court recognized that the responding police officers may not have been satisfied with the explanation of the call provided by the home's residents, but emphasized that without "some objective manifestation of the existence of an emergency situation demanding immediate action[,] the officers were not justified in physically intruding into the sanctity of the home." Id. at \*9. See also United States v. Meixner, 128 F. Supp. 2d 1070 (E.D. Mich. 2001) (rejecting government's motion to reconsider court's previous order suppressing evidence found during warrantless search of home).

Other courts have emphasized that, before entering a home without a warrant, police officers must have more than just a 9-1-1 call to indicate the presence of an emergency. For example, in Thacker v. City of Columbus, 328 F.3d 244 (6<sup>th</sup> Cir. 2003), the court found constitutional a warrantless entry of a home because, in addition to receiving a 9-1-1 report of a wounded individual at the home, the police observed a drunken, bleeding man when they arrived at the home. Still, the court noted that

the "911 call reporting an emergency justified a police response to investigate the situation further, but did not necessarily justify entry into a private home. Only when the police arrived at the home and observed facts indicative of exigent circumstances, were they justified in entering the home." Id. at 254 n.2 (internal citation omitted).

The United States Court of Appeals for the Seventh Circuit has provided similar guidance to the police. In United States v. Richardson, 208 F.3d 626 (7<sup>th</sup> Cir. 2000), the court permitted the use of evidence discovered during a warrantless search prompted only by a 9-1-1 call. The court wrote, however, that two facts regarding the call were essential to its decision: 1) the 911 call reported a specific emergency -- that is, a murder victim in a home; and 2) the 9-1-1 caller identified himself. Id. at 630. See also United States v. Pihlbad, 142 F.3d 437, 1998 WL 165150, at \*4 (6<sup>th</sup> Cir. Apr. 3, 1998) (suppressing evidence found during warrantless search because police must have "more than an 'inchoate hunch' that someone inside [the home] might be injured"). Neither of these factors were present in this matter when the police searched through Defendant's home.

A bare 9-1-1 call, without confirmation of an emergency situation, does not justify a warrantless search of a home because it is a commonplace that the majority of 9-1-1 calls relate to non-emergency situations. The United States Department of Justice, for example, has recently reported that

50 to 90 percent of all 9-1-1 calls do not relate to emergencies. Office of Community Oriented Policing Servs., U.S. Dep't of Justice, 311 For Non-Emergencies (Aug. 25, 2003) (available at: <http://www.cops.usdoj.gov/mime/open.pdf?Item=314>). There are a host of reasons for these many false alarms, including phantom wireless calls, misdials, hang-up calls, and prank calls. Rana Sampson, Office of Community Oriented Policing Servs., U.S. Dep't of Justice, Misuse and Abuse of 911, at pp. 2-7 (2002) (available at: <http://www.cops.usdoj.gov/mime/open.pdf?Item=470>). Because of these well-known problems, many localities have explored methods of reducing the burden of non-emergency calls that flood their 9-1-1 call centers, including New York City, see Trudy Walsh, New Yorkers Dial 311 for Routine Info, Gov't Computer News, June 2, 2003; Martha's Vineyard, see Brian MacQuarrie, Vineyard Institutes 311, Boston Globe, June 27, 2003, at B2; Louisville, see 211 System will Connect People with Services, Courier-Journal (July 11, 2003), at 6A; and Winnipeg, see Winnipeg, Broadcast News, Feb. 26, 2002. Thus, the State's argument that a 9-1-1 call which provides no information, such as the open call at issue in this matter, provides a reasonable and objective basis on which to presume the existence of an ongoing emergency is truly baseless.

Because the open 9-1-1 call received by the police in this case did not provide reasonable and objective grounds to believe

that there was an emergency inside Defendant's home, this Court should suppress the evidence resulting from the warrantless entry into the home.

**B. The busy signal received by the police dispatcher when calling Defendant's home telephone did not support a reasonable and objective belief that there was an emergency.**

Although both the State and Appellate Division accord great weight to the busy signal encountered by the police dispatcher when she called the number from which the open 9-1-1 call emanated, neither plausibly explains how this busy signal creates or supports a reasonable and objective belief of an emergency within Defendant's home. To be sure, in its brief to the Appellate Division, the State argued that Officer Gelber could have believed at this point that "the phone was busy because it had either been cut off or taken off the hook to preempt the emergency communication." State's App. Div. Br. at 27. However, neither supposition is reasonable.

First, because Defendant demonstrated to Officer Gelber that his telephone remained in working order, there was no reason to believe that his phone had been cut off. After Defendant permitted Officer Gelber entry into his foyer, Defendant "reappeared with two cordless phones. . . . [He] used one cordless phone to call the number which was traced to the 9-1-1 call [and] the other cordless phone rang." Frankel, 341 N.J. Super. at 598-99. Thus, Officer Gelber could not, when he

undertook the warrantless search, have reasonably believed that Defendant had disabled his phone to prevent an emergency call.

The other speculative possibility advanced by the State -- that Defendant might have taken his phone off the hook in order to prevent an emergency call -- does not suffice to demonstrate a reasonable basis to believe an emergency exists. First of all, telephones are taken off the hook to prevent incoming calls and not, as the State argues, in order to prevent outgoing calls. Moreover, a telephone taken off the hook can be replaced and used almost instantly. To prevent an emergency call, Defendant would have had to hide the telephone entirely or, perhaps, incapacitate the person attempting to make a call. In neither case, however, would Defendant have needed to leave his telephone off the hook.

In sum, the busy signal received by the police operator when she called Defendant's telephone number did not increase the likelihood, let alone establish, that there was an emergency situation within Defendant's home. Thus, this fact fails to demonstrate that Officer Gelber "reasonably and objectively believed" that an emergency situation existed inside Defendant's home at the time of his warrantless entry. Accordingly, the search was unconstitutional and the Appellate Division's decision to the contrary should be reversed.

**C. Defendant's assertion of his constitutional rights and Officer Gelber's subjective perception of his nervousness do not support a reasonable and objective belief that an emergency existed inside Defendant's home.**

The State has strenuously argued that Defendant's refusal to voluntarily admit Officer Gelber into his home and suggestion that he might call an attorney justifies Officer Gelber's suspicion that there was an emergency inside the home. State's App. Div. Br. at 27-28. This alarming argument is contrary to the law and must be rejected.

It is well-established as a matter of New Jersey constitutional law that a refusal to comply with police requests does not give rise to a reasonable inference of criminality. For example, in State v. Rice, 251 N.J. Super. 136 (App. Div. 1991), the police had received an anonymous tip of drug activity in a home. After observing several people enter and leave the home, the police approached the door and knocked. The door opened but, once the police identified themselves, was immediately slammed shut. Id. at 138. The court held that the subsequent warrantless entry by the police was unconstitutional and specifically rejected the State's argument that the resident's act of closing the door on the police supported the finding of probable cause: quite simply, "[t]he exercise of a constitutional right may not be the basis of an adverse influence." Id. at 143. See also State v. Flint, 126 N.J. Super. 182 (App. Div. 1973) (suppressing evidence found during

warrantless search of home entered when resident slammed door on police).

Indeed, it is well-established that when police seek the voluntary assistance of a person to investigate suspicions of criminality, that person's refusal to cooperate may not elevate the police's authority to search or seize. To hold otherwise would be to render illusory the voluntary nature of the questioning. See, e.g., Florida v. Bostick, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); State v. Maryland, 167 N.J. 471, 483 (2001) (holding that person need not answer police questions and that such refusal does not provide grounds for a stop); State v. Richards, 351 N.J. Super. 289, 305 (App. Div. 2002) (defendant's silence in face of police questioning "gave rise to only a subjective hunch" which did not rise to level of "an objective articulable and reasonable basis" for an investigatory stop).

Similarly, Officer Gelber's perception that Defendant reacted nervously to his appearance at Defendant's home does not provide a reasonable and objective basis to believe that there was an emergency inside the home. First, it bears repeating that Officer Gelber knocked on Defendant's door before 8:00 a.m. and subjected Defendant to a pat-down search in front of his home. Frankel, 341 N.J. Super. at 597-98. It is not surprising, under such circumstances, that Defendants exhibited

some nervousness. Indeed, New Jersey courts have long recognized that innocent people often react nervously to police questioning. See, e.g., State v. Tucker, 136 N.J. 158, 169 (1994) ("That some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true."); State v. Rice, 251 N.J. Super. 136, 139 (App. Div. 1991) ("We suggest that the presence of three policemen at their threshold would excite many innocent occupants of a residence."). A police officer's perception of nervousness is thus not sufficient to overcome the warrant requirement, both as a matter of fact and of law. Yet, this was a reason for upholding the warrantless search of a citizen's home.

Accordingly, Defendant's refusal to permit Officer Gelber to search his home, his musing regarding whether he should call an attorney, and his nervousness at an early morning police visit did not, singly or in combination with the other facts invoked by the State and relied upon by the Appellate Division, provide the police with an objective and reasonable basis to believe that there was an emergency in his home. Accordingly, the Court should reverse the decision of the Appellate Division permitting the State to use the evidence discovered during the police's warrantless search of Defendant's home.

**CONCLUSION**

The United States Constitution and the New Jersey Constitution of 1947 accord the highest level of protection to the home. Only in the rarest circumstances, therefore, may the police enter a home without first obtaining a warrant. This case, in which the police searched a home based only upon an open 9-1-1 call, a busy signal, and an officer's perception of Defendant's nervousness, is not one of those rare circumstances. Instead, it is a case in which the police had only an inarticulate hunch that an emergency existed. Thus, the ACDL-NJ respectfully urges this Court to reverse the decision of the Appellate Division and hold unconstitutional the warrantless search of Defendant's home.

Respectfully submitted,

GIBBONS, DEL DEO, DOLAN,  
GRIFFINGER & VECCHIONE  
A Professional Corporation  
Attorneys for Amicus Curiae  
Association of Criminal  
Defense Lawyers of New Jersey

By: \_\_\_\_\_  
Lawrence S. Lustberg  
Philip G. Gallagher

Dated:       October 7, 2003