SUPREME COURT OF NEW JERSEY
DOCKET NO. A-35-17/A-36-17 (079823/079835)

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **DEYVON T. CHISUM,** Defendant-Appellant. **STATE OF NEW JERSEY,** Plaintiff-Respondent, v. **KESHOWN K. WOODARD,** Defendant-Appellant.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** Sat Below: Allison E. Accurso, J.A.D. Thomas V. Manahan, J.A.D. Joseph F. Lisa, J.A.D.

BRIEF OF *AMICUS CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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SUMMARY OF ARGUMENT

This case is about police suspicion of a group of people of color, and the unlawful detention and pat-down searches that police performed on them without objective, reasonable bases.

Officers were called to a hotel party on a mere noise complaint, and the noise was abated immediately. They observed no evidence of criminal activity, nor had any information that Defendants were involved in criminal activity. Nevertheless, the officers detained Defendants and others in the hotel room for twenty minutes while they ran warrant checks and then, upon arresting Defendant Chisum and discovering a concealed handgun on him, conducted pat-down searches of the remaining guests, including Defendant Woodard. Because the police suspicions were entirely unfounded, neither the detention nor the pat-down pass constitutional muster.

The investigative detention of Defendants Chisum and Woodard was unconstitutional because the police did not have reasonable suspicion of criminal activity particularized to them (Point I). Even if a municipal noise ordinance violation could justify an investigative detention, that justification ceases when the investigation is complete. Here, the renter of the room immediately turned down the music, with apologies, and the guests promptly provided identifying information. There was simply no more

investigation, nor any preexisting or superseding evidence of criminal activity, to justify the twenty-minute detention. Although the Superior Court, Appellate Division was correct that current law does not recognize a protected privacy interest in warrant checks, their performance cannot independently justify detention any more than other "unprotected" activity short of reasonable suspicion can. Additionally, the fact that the Crystal Inn may have been the site of past criminal activity by other people cannot support reasonable suspicion of criminal activity as to these defendants. To hold otherwise would be to allow that every person who stays at the Crystal Inn subjects himself to police detention simply by checking in.

The pat-down search of Defendant Woodard after a concealed handgun was found on Defendant Chisum is also unconstitutional, because the law does not permit guilt – or reasonable suspicion – by association (Point II). As with a detention, reasonable suspicion for a pat-down must be particularized to the individual to be frisked: mere proximity to another who is armed says absolutely nothing about one's own dangerousness, when all objective facts point to peacefulness. Where the record demonstrates that Defendant Woodard had been cooperative, compliant, and non-aggressive throughout the police encounter, and indicates no particular connection between the two defendants, the

discovery of a concealed weapon on Chisum does not give rise to reasonable suspicion that Woodard's behavior would suddenly turn violent. To the contrary, police interactions with, and shootings of, unarmed Black men throughout the country suggest that it is the police's behavior – not the defendant's – that is likely to have changed upon such a discovery.

Finally, *amicus* encourages this Court to recognize the role of implicit bias in officers' on-scene decision-making and to not perpetuate such bias by condoning the police practices in this case (Point III). Of course, it may be difficult to confirm implicit or unconscious bias in a particular case; *amicus* is not asking this Court to speculate as to the subjective intent in officers' minds. But our jurisprudence allows this Court to recognize that the police's assumption, without any particularized facts to support it, that a group of people of color are engaged in criminal activity and are "armed and dangerous" is not constitutionally reasonable. Because suspicions based on race reveal bias, this Court should reject the detention and pat-down search of Defendants as unconstitutional and reverse the Appellate Division decision.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Amicus curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") adopts the facts and procedural history contained in

Defendant Chisum's Supplemental Brief to this Court. *Amicus* also recounts the following facts for clarity, from the opinion of the Appellate Division in *State v. Chisum*, Nos. A-5305-14, A-5603-14, 2017 *N.J. Super. Unpub. LEXIS* 1853 (App. Div. July 21, 2017):

Two Neptune Police Officers were in a patrol car close to midnight when they received a call from their dispatcher about a noise complaint at the Crystal Inn Motor Lodge. The officers went to the hotel and met the complainant, the occupant of room 223, in the hallway outside the room: he had made the call about a loud party, including music and voices, coming from room 221 next door. Based on the multiple voices the officers could hear and the hotel's reputation, the officers called for backup, but nevertheless waited outside the door of room 221.

Before backup arrived, the door opened and a man tried to walk out. When he saw the police, he turned to go back in, but one of the officers put his foot in the door to prevent it from closing behind the man. In the proceedings below, the State conceded that this amounted to a violation of the Fourth Amendment rights of those inside the room. Holding open the door, the officers then addressed the ten occupants of the room, saying they were responding to a noise complaint and asking who the renter was. A woman identified herself as the renter and invited the officers in with apologies. At the same time, three back-up officers arrived.

The woman immediately turned down the music volume and explained she did not realize it was so loud or was disturbing others. At least three officers entered the room upon her invitation and asked the woman and everyone else to produce identification. The officers did not see any evidence of criminal activity but still conducted protective sweeps of the bathroom and balcony for officer safety, finding nothing. In the proceedings below, Defendants challenged the constitutionality of those sweeps.

Some people produced documentation, and those who did not have documents provided other identifying information including name, address, date of birth, and social security number. The officers decided not to issue a summons for a noise violation but detained the hotel guests while they sent the identifying information to dispatchers to perform warrant checks, a process which took about twenty minutes. (In other words, the twenty-minute detention appears to be the time it took for the police to conduct warrant checks, not for the hotel guests to produce identifying information.) The Appellate Division noted that "[t]here is nothing in the record to suggest that any of the participants did anything to cause or contribute to this delay." *Id.* at *16-17.

When guests' warrant checks came back negative, the officers allowed those individuals to leave the room, but continued to detain the others. One woman, who had previously given a false name, was properly identified and discovered to have an open warrant. She was arrested and restrained in the hallway. After approximately twenty minutes, Defendant Chisum's warrant check came back positive. He was arrested on the open warrant, and a search incident to arrest revealed he had a handgun concealed in his waistband. The officers seized the gun and restrained him in the hallway.

The removal of Defendant Chisum from the hotel room left a total of seven officers on the scene and six or fewer occupants in the room.[1] Based solely on the discovery of the handgun on Defendant Chisum, the officers directed those occupants to place their hands on their heads and performed pat-downs searches, leading to the

[1] The Appellate Division noted that there were seven officers on the scene and ten occupants in the room initially. *State v. Chisum*, Nos. A-5305-14, A-5603-14, 2017 *N.J. Super. Unpub. LEXIS* 1853, at *17, *20 (App. Div. July 21, 2017). As to the number of officers, this suggests two more may have arrived, in addition to the three backup officers and two original patrol officers. As to the number of occupants, a process of subtraction demonstrates there were six or fewer remaining at the time of the pat-down searches. Before the pat-downs, Defendant Chisum and another woman had been arrested and detained in the hallway. Individuals whose warrant checks had come back negative had also already been permitted to, and did, leave the room; the Appellate Division noted that "Delgado was one of the individuals released in that process," meaning there was more than one released. *Id.* at *7 n.2. Accordingly, the remaining occupants in the room would have to be six or fewer.

discovery of the handgun on Defendant Woodard. The Appellate Division acknowledged "Woodard had been cooperative throughout the entire episode and did not exhibit any furtive movements or other indicia of aggressive behavior." *Id.* at *20.

This Court granted Defendants' Petitions for Certification, limited to the issues of whether the police were authorized to detain Defendants and to conduct pat-down searches for weapons. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. THE TWENTY-MINUTE DETENTION OF DEFENDANTS CHISUM AND WOODARD TO CONDUCT WARRANT CHECKS WHEN THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY WAS UNCONSTITUTIONAL.

The facts of this case are simple: the police responded to a noise complaint at a hotel, abated the noise, and obtained the names of all individuals present. The police then detained those individuals for another twenty minutes, without any preexisting or superseding suspicion of criminal activity that was particularized to them.

The question before the Court is whether detaining any of the hotel guests, including Defendants Chisum and Woodard, was justified when the only reason for the detention appears to be the performance of the warrant checks. The answer is clearly no. Any detention following the completion of the noise investigation was

unjustified, when there was no objective basis to suspect criminal activity.

A. An Investigative Detention Is No Longer Justified After the Investigation Is Complete.

Police may conduct a *Terry* stop or investigative detention only if based on "'specific and articulable facts which, taken together with rational inferences from those facts,' give rise to a reasonable suspicion of criminal activity." *State v. Rodriguez*, 172 *N.J.* 117, 126 (2002) (quoting *Terry v. Ohio*, 392 *U.S.* 1, 21 (1968)); *see also State v. Arthur*, 149 *N.J.* 1, 8 (1997) (requiring "some objective manifestation that the suspect was or is involved in criminal activity"). An investigative detention must be temporary and may "last no longer than is necessary to effectuate [its] purpose[.]" *State v. Shaw*, 213 *N.J.* 398, 411 (2012). Thus the lawfulness of the detention ceases when its justification ends – in other words, when the "tasks tied to the . . . infraction" are complete. *Rodriguez v. United States*, 135 *S. Ct.* 1609, 1614 (2015).[2]

[2] The Appellate Division mistakes Defendants' positions as requiring more protections ("some lower level of police intrusiveness") than the Fourth Amendment and Article I, Paragraph 7 afford in criminal investigations, emphasizing that police "are entitled to investigate potential ordinance violations in the same manner." *Chisum*, 2017 *N.J. Super. Unpub. LEXIS* 1853, at *12. Although the police response here is particularly unreasonable and disproportionate given the prompt resolution of the noise complaint, this Court need not apply a different jurisprudence to conclude that the detention was constitutionally impermissible.

In the present case, the State does not claim there was any reasonable suspicion of criminal activity specific to Defendants, either existing prior to police entry into the hotel room or developing upon entry. There could thus be no basis independent of the noise complaint to justify an investigative detention. Moreover, even if an ordinance violation could justify a twenty-minute investigative detention, it does not on these facts because the investigation into the violation was complete. The noise was abated – voluntarily and with apologies from the renter of the room – as soon as the officers entered. The twenty minutes that Defendants were detained was therefore not spent investigating or abating the noise, but rather waiting for the results of warrant checks.

The State contends, and the Appellate Division accepts, that ascertaining identity and running warrant checks were a typical and necessary part of the police response to a noise complaint, such that those processes properly extended the investigation and corresponding investigative detention.[3] *See Chisum*, 2017 *N.J.*

[3] In the following two sentences, the Appellate Division first allows that the ascertainment of identity of everyone in the hotel room must be a necessary part of the investigation and then assumes, without explanation, that warrant checks are a necessary part of that very ascertainment: "We agree with the State that ascertaining the identity of all participants was a legitimate part of the investigation, and therefore part of the mission of the police during this encounter. Until the identity of each

Super. Unpub. LEXIS 1853, at *17-18. *Amicus* agrees with counsel for Chisum that "there is no logical reason why the identities of people at a loud party 'ha[ve] to be ascertained,' because if there is a callback, the police can only issue summonses to those persons who are seen violating the noise ordinance." Supp. Br. 23.[4] But even if ascertaining identification was necessary, nothing in the record indicates that that process took twenty minutes. To the contrary, the occupants of the room appear to have provided identifying information almost immediately. As to the warrant checks, it is legally untenable to maintain they are necessary for – or otherwise constituent to – a police response to a noise complaint. Although in the context of traffic enforcement such checks might possibly "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly," *Rodriguez*, 135 *S. Ct.* at 1611, they are

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individual could be verified *and a warrant check obtained*, the mission was not complete." *Id.* at *17 (emphasis added). This assumption is without basis in the record or the law.

[4] The following abbreviations will be used:

"Supp. Br." refers to Defendant Chisum's supplemental brief to this Court.

"SCb" refers to the State's brief to the Appellate Division in *State v. Chisum*.

"SWb" refers to the State's brief to the Appellate Division in *State v. Woodard.*

absolutely untethered to the objective of resolving a municipal noise ordinance violation.[5]

Strangely, the State points to *State v. Kaltner*, 420 *N.J. Super.* 524 (App. Div. 2011), *aff'd* 210 *N.J.* 114 (2012), for support, "noting a similar procedure followed by the officers there." SCb 29; SWb 23. But that case involved a noise complaint response in which officers did not seek identification, did not detain the college party guests, and did not perform warrant checks. The purported "similar procedure" was merely to issue either a verbal warning or a written summons. *Kaltner*, 420 *N.J. Super* at 529. Such a procedure is not disputed in this case, nor does it raise constitutional concerns.

Instead, the relevant question before this Court is the lawfulness of a different "standard procedure to obtain warrant checks . . . on any call for service," and the detention required to obtain them. *Chisum*, 2017 *N.J. Super. Unpub. LEXIS* 1853, at *6. The State offers no legal support for *that* procedure. Indeed, this

[5] The typical "checks" contemplated in *Rodriguez* included checking the driver's license and inspecting the registration and proof of insurance. In that context, the U.S. Supreme Court noted that a "'warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses[,]'" which was relevant to the purpose of the traffic stop: to ensure the safe and responsible operation of the vehicle. *Rodriguez*, 135 *S.Ct.* at 1615 (quoting 4 W. LaFave, *Search and Seizure* § 9.3(c), 516 (5th ed. 2012)). No analogous reasoning can be made in the present case.

Court has already rejected the State's position and held that warrant checks "may not be performed 'in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.'" *State v. Dunbar*, 229 *N.J.* 521, 533-34 (2017) (quoting *Rodriguez*, 135 *S.Ct.* at 1615).

Put simply, the police are not permitted to define their standard procedure however they like and then claim that expansive purpose justifies their actions. The State's endorsement of the procedure here for "any call for service" is, troublingly, without limiting principle. If permitted under such broad circumstances, it encourages pretextual stops for the sole purpose of running warrant checks on anyone the police suspect – without reasonable suspicion of criminal activity – may have an open warrant.

B. Although Warrant Checks Themselves May Not Implicate a Protected Privacy Interest, Their Performance Does Not Justify an Otherwise Illegal Detention, or a Fishing Expedition.

As people who are the targets of pretextual police stops know well, warrant checks themselves may be performed in a broad array of circumstances. Warrant checks have been held not to amount to a search under the Fourth Amendment and Article I, Paragraph 7, because there is no reasonable expectation of privacy in the underlying information. *State v. Sloane*, 193 *N.J.* 423 (2008). However, an officer's ability to perform warrant checks "is not without limitations." *Dunbar*, 229 *N.J.* at 533. While a warrant

check may be conducted incidentally to an *otherwise* justified detention, *Dunbar*, 229 *N.J.* at 533-34, the "random detention of an individual for the purpose of running a warrant check" is prohibited. *Shaw*, 213 *N.J.* at 421. Clearly, a warrant check does not justify a detention where the requirements laid out in Point I(A), *supra*, are not independently satisfied.

Thus the Appellate Division misses the mark when it finds no constitutional error in the performance of the warrant checks because they do not involve a Fourth Amendment privacy interest. Because the officers did not have an independent basis to detain the hotel guests, they could not detain them to run the "unprotected" warrant checks any more than they could detain them to recite their favorite poem – even though such recitation involves no expectation of privacy. In other words, regardless of whether the additional interaction or activity had constitutional implications itself, it was insufficient justification for an investigative detention. Accordingly, the police could not detain the partygoers in room 221 any more than they could detain the complainant in room 223 or any unknown occupants of room 219.

Alternately, the State seeks to justify the detention on two policy grounds: that the warrant checks were necessary for officer safety and that they were justified in light of the "the strong government interest in solving crimes and bringing offenders to

justice." SCb 24-25; SWb 19 (quoting *United States v. Villagrana-Flores*, 467 *F.*3d 1269, 1277 (10th Cir. 2006)). The first claim is specious and unsupported by the facts. There is nothing in the record to suggest the officers actually feared for their safety at the time the noise had been abated, given they had already performed a protective sweep of the premises (the constitutionality of which is suspect but not before this Court). Moreover, the appropriate response to concerns about officer safety is a pat-down search for weapons, not a twenty-minute investigative detention and warrant check, during which any reasonable safety concerns could have actually materialized. No one asserts such a pat-down was justified at this stage of events.

The State's service of justice claim rings equally hollow. The government presumably always has a strong interest in solving crimes, but that does not give police *carte blanche* to detain individuals to investigate without reasonable suspicion. The *Villagrana-Flores* quote the State cites for support is unavailing, as it does not stand for such a proposition. The quoted language is originally from *United States v. Hensley*, 469 *U.S.* 221, 229 (1985), which addressed the police's ability to briefly stop, ask questions, and check identification when they were attempting to locate a particular person suspected of a particular crime. *Hensley*

is entirely silent as to a general ability to detain and says nothing about warrant checks specifically.

The non-individualized possibility that someone among a group of people – here, specifically a group of people of color – may have an open warrant is decidedly not the equivalent of reasonable, particularized suspicion of criminal activity. Allowing this conflation would further embolden officers to conduct fishing expeditions "in the hope that something would turn up[,]" *Taylor v. Alabama*, 457 *U.S.* 687, 691 (1982), and would invite decision-making based upon implicit racial bias (attitudes and stereotypes about race that are not conscious; *see, infra,* Point III). While the law may foreclose an inquiry into the subjective intent of a pretextual stop, even that foreclosure assumes an alternative, objective basis. *See State v. O'Neal*, 190 *N.J.* 601, 614 (2007); *Whren v. United States*, 517 *U.S.* 806, 813-15 (1996). There is simply no permissible one on these facts.

C. Mere Presence at a Location Known For Past Criminal Activity, Unrelated to These Defendants, Does Not Give Rise to a Reasonable Suspicion of Present Criminal Activity by Them.

Lastly, the State and Appellate Division emphasize that the Crystal Inn was known to be the site of extensive past criminal activity. The characterization of an area as "high-crime" and therefore deserving of greater police suspicion is commonplace but precarious, both as a matter of law and as an invitation for

implicit bias. *See*, *e.g.,* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 *Mich. L. Rev*. 946, 1044 n.40 (2002) (noting this designation "lends law enforcement wider latitude in exercising its search-and-seizure powers" and enumerating critiques of "overly simplistic reliance on neighborhood reputation in justifying police stops").

The law is clear that the mere presence of individuals in a "high crime" area does not, without more, justify an investigative detention. *See State v. Kuhn*, 213 *N.J. Super.* 275, 281 (App. Div. 1986); *State v. Williams*, 381 *N.J. Super.* 572, 584 (App. Div. 2005) (finding the "time and place of a police encounter . . . cannot, standing alone, justify an investigatory stop."). Justice Albin has cautioned that "[t]he words 'high crime area' should not be invoked talismanically by police officers to justify a *Terry* stop that would not pass constitutional muster in any other location." *State v. Pineiro*, 181 *N.J.* 13, 31 (2004) (Albin, J., concurring) (collecting cases). As this Court has admonished, an investigative detention and resulting seizure "*cannot* – we emphasize *cannot* – be justified merely by a police officer's subjective hunch." *State v. Davis*, 104 *N.J.* 490, 505 (1986) (emphasis in original).

Indeed, the Appellate Division panels in *Kuhn* and *Williams* did not go far enough. Of course presence in a high crime area cannot, on its own, justify a stop; but nor should it be a factor

given significant weight in *any* case. Put differently, if the totality of the circumstances are insufficient to justify a stop in Cherry Hill, so too should they be insufficient in Camden. If all factors taken together do not allow police to stop a person in Newton, that person should also be free to leave in Newark. The protections of Article I, Paragraph 7 must be equally strong in all New Jersey neighborhoods, for all New Jersey residents.

It may well be that the Crystal Inn is known for past criminal activity, but that reputation is entirely unconnected to the objective facts officers knew as to these defendants, who were at most participants in a noise violation. Even if this Court were to consider past criminal activity at this location under a totality of the circumstances – which *amicus* discourages for the above reasons – there are simply no other parts to the sum total: the police saw no drugs, weapons, contraband, or other indicia of past or present criminal activity upon entry into the room or after their protective sweep. Thus the hotel's reputation cannot provide particularized suspicion to detain these defendants. To hold otherwise would be to proclaim that anyone who stays at the Crystal Inn subjects themselves to investigative detention at the police's suspicionless will. Our Constitution does not permit this.

II. THE PAT-DOWN SEARCH OF DEFENDANT WOODARD WAS UNCONSTITUTIONAL, BECAUSE NEW JERSEY COURTS DO NOT COUNTENANCE "GUILT BY ASSOCIATION."

The Appellate Division's approval of the pat-down search of Defendant Woodard is based on flawed logic: that police officers' reasonable suspicion that a person is "armed and dangerous" can rest on mere association, when all other indicia point to that person's cooperation with and non-aggression towards the police. Because courts do not allow for "guilt by association" and because the reality of police encounters with Black men suggests someone in Defendant Woodard's position would be even more compliant upon discovery of another person's weapon, the police's subjective belief was insufficient to justify a pat-down search.

A. The Discovery of a Concealed Weapon on Someone Else Does Not Imply Defendant Is Armed and Dangerous, Where All Objective Circumstances Show Otherwise.

"Recognizing the significant deference that should be afforded to police to protect themselves in potentially dangerous situations," the Appellate Division concluded that the police were justified in conducting pat-down searches of the remaining hotel guests. *Chisum*, 2017 *N.J. Super. Unpub. LEXIS* 1853, at *20. The question is thus whether the discovery of Defendant Chisum's

concealed weapon makes the situation as to Defendant Woodard "potentially dangerous."[6]

A police officer may conduct a pat-down search for weapons only if he has "reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 *U.S.* at 27. The law prohibits an officer from "simply assum[ing] that everyone is armed and dangerous until proven otherwise." *State v. Garland,* 270 *N.J. Super.* 31, 43 (App. Div. 1994). Instead, the officer must point to specific facts and may not rely on "his inchoate and unparticularized suspicion or 'hunch.'" *Id.; see also Sibron v. New York,* 392 *U.S.* 40, 64 (1968) (requiring the officer to be able "to point to particular facts" with respect to the individual); *State v. Thomas*, 110 *N.J.* 673, 685 (1988) (declining to find a "specific, particularized basis for an objectively reasonable belief that defendant was armed and dangerous").

Mere association with or presence around someone who possesses weapons or contraband, without more, does not justify reasonable suspicion for a pat-down search. In the full search context, the U.S. Supreme Court has held that the requirement of

[6] The Appellate Division also credited the hotel's reputation for past criminal activity among the totality of the circumstances that made the officers reasonably fear for their safety. The problematic nature of that inclusion is addressed in Point I(C). Neither the court nor the State suggests the pat-downs would have been justified before the discovery of Chisum's weapon, so the impact of that discovery is the focus of the present discussion.

probable cause "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra v. Illinois*, 444 *U.S.* 85, 91 (1979); *see also id.* at 95 (extending the principle to reasonable suspicion because "[t]he 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked.").

Relying on *Ybarra*, New Jersey courts have similarly rejected the notion of guilt by association. For example, in the context of probable cause, the Appellate Division has written: "We stress that 'mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause' to search a person or automobile." *State v. Dolly*, 255 *N.J. Super*. 278, 283 (App. Div. 1991) (quoting *Ybarra*, 44 *U.S.* at 91); *see also State v. Dale*, 271 *N.J. Super.* 334, 339 (App. Div. 1994) (acknowledging that "happenstance presence, unconnected to the lawfully permitted search [is] insufficient to support a patdown[,]" although finding reasonable suspicion in that case); *State v. Rivera*, 276 *N.J. Super*. 346, 351 (App. Div. 1994) (holding the existence of a fleeing suspect does "not confer broad authority on the police to subject those in the vicinity to the indignity of searches because they happen to be there"). As another court has

summarized it well, “we do not believe that the *Terry* requirement of reasonable suspicion . . . has been eroded to the point that an individual may be frisked based upon nothing more than an unfortunate choice of associates.” *United States v. Bell*, 762 *F*.2d 495, 499 (6th Cir. 1985).

Accordingly, the law prohibits the police from concluding that Defendant Woodard was armed and dangerous based merely on the fact that Defendant Chisum possessed a handgun. The facts that that weapon was concealed, that Chisum was one among nine other partygoers and showed no special relationship to or common plan with Woodard in particular, and that Defendants were involved in a simple noise complaint give no reason to believe that their both ultimately having weapons was anything more than coincidence. Where all facts in the record demonstrate Woodard’s peacefulness at the scene, the police’s suspicion that he (and all others remaining in the room, whose pat-downs for weapons presumably yielded nothing) was armed and dangerous merely because he attended a party with Chisum relies on an impermissible assumption of guilt – or suspicion – by association.

B. There Is Nothing To Suggest Discovery of Someone Else's Weapon Would Lead to Dangerous Behavior; To the Contrary, Police Killing of Unarmed Black Men Suggests Defendant Would Be More Compliant Upon Its Discovery.

At the conclusion of its opinion, the Appellate Division acknowledged the significant number of officers present compared to occupants remaining in the room at the close of the twenty-minute period, and remarked upon Defendant Woodard's cooperativeness and non-aggressive behavior "throughout the entire episode[.]" Yet in the very next breath the court cautioned that "that could have all changed . . . once [Woodard] knew a gun had been found on Chisum[.]" *Chisum*, 2017 *N.J. Super. Unpub. LEXIS* 1853, at *20. The Appellate Division provided no explanation as to why "that could have all changed," and *amicus curiae* submits that none exists.

As this Court considers whether the discovery of Chisum's weapon would suddenly make a cooperative Woodard "dangerous," *amicus* notes the role of implicit – and sometimes explicit – racial bias in such subjective determinations and the realities of how police react to people of color once they fear a weapon is involved, and how people of color are taught to react in response to police's fear of them. Quite the opposite of the Appellate Division's unfounded assumption, the lived experiences of communities of color suggest that someone in Woodard's position

would become even more compliant once police found Chisum's weapon, knowing how police respond when they believe a Black man is "armed and dangerous," even when he is not.

It is no secret that police in America have used disproportionate force against Black people in shocking ways and with shocking frequency, often because they fear a weapon is involved. *See, e.g.*, Mark Berman, *Stephon Clark was shot eight times, mostly in his back, autopsy requested by his family shows*, Wash. Post, Mar. 30, 2018, https://www.washingtonpost.com/news/post-nation/wp/2018/03/30/stephon-clark-was-shot-eight-times-mostly-in-his-back-according-to-autopsy-requested-by-his-family; Mercy Benzaquen et al., *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. Times, Mar. 28, 2018, https://www.nytimes.com/interactive/2017/08/19/us/police-videos-race.html (collecting the graphic videos and accompanying stories of excessive police violence that have led to nationwide protests). The evidence of that is the tragic loss of life: Twenty-three unarmed Black men have been shot and killed by police since January 2017 alone. *Fatal Force,* Wash. Post, https://www.washingtonpost.com/graphics/national/police-shootings (last visited Apr. 3, 2018). In each of these cases and literally hundreds more in recent years, officers have assumed

Black men were armed and dangerous. Their reaction has been fatal and, *amicus* submits, in many cases unjustified.

The country may just now be recognizing these patterns of police violence, as videos become increasingly available and as community members raise their voices in protest, but it has long been understood by those who are over-policed. As Justice Sotomayor has explained,

> For generations, black and brown parents have given their children 'the talk'— instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them.
>
> [*Utah v. Strieff*, 136 *S. Ct.* 2056, 2070 (2016) (Sotomayor, J., dissenting).]

See also Carbado, *(E)racing the Fourth Amendment*, 100 *Mich. L. Rev.* at 953-54 (describing "the racial conventions of black and white police encounters, the so-called rules of the game: "'Don't move. Don't turn around. Don't give some rookie an excuse to shoot you . . . Comply with whatever the officer is asking you to do.'"); Geeta Gandbhir & Blair Foster*, A Conversation With My Black Son*, N.Y. Times, Mar. 17, 2015, https://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html (presenting parent perspectives on "what it means to be a black man here."). In short, as most Black men know, once officer safety is feared, the police behavior – *not* the

defendant's – is likely to "have all changed," whether or not the defendant ultimately has a gun.[7]

Such general knowledge suggests that Defendant Woodard (and the other partygoers who were patted down) might have been more compliant after the discovery of a weapon on another Black man for fear of police reaction. At the very least, there is absolutely no evidence – in the record or the research – that *his* behavior would "have all changed" so as to put the officers objectively at risk of danger. Instead, the only evidence upon which the officers' fear was based was itself highly suspect – namely guilt by association, upon discovery of a gun on one person among a group of people who were fully complying with the instructions of the approximately seven police officers detaining them.

III. A POLICE OFFICER'S PRESUMPTION THAT A GROUP OF PEOPLE OF COLOR ARE ENGAGED IN CRIMINAL ACTIVITY AND ARE "ARMED AND DANGEROUS" IS NOT REASONABLE SUSPICION; IT IS RACIAL BIAS.

The dearth of facts to justify reasonable suspicion to detain and pat-down Defendants in this case highlights the risk that racial bias can impact officers' decision-making. *Amicus* submits that the role of racial bias is particularly concerning – and

[7]Here, of course, Woodard did ultimately have a gun; the lawfulness of his pat-down would not be before this Court otherwise. But before the police had that information, any suspicion that he was armed was not based on objective facts particularized to him.

merits the careful attention of this Court – when the law empowers officers to act upon their suspicions.

Of course, on its face, the law proscribes "reasonable suspicion" based on race alone. *Kuhn,* 213 *N.J. Super.* at 281. Yet correct as this proscription is, an insistence on face-value colorblindness risks an easy comfort: courts should not shy away from questioning the biases undergirding police judgments – or those of any actor in the criminal justice system.[8] As the District of New Mexico recently concluded in a powerful decision:

> Omitting consideration of the ways in which race influences encounters with law enforcement and insisting on a colorblind system of justice perpetuates a system in which constitutional protections are severely weakened for people of color. . . . The Court must faithfully apply the Fourth Amendment in order to ensure equal protection for all. Ignoring the fear-infused racial dynamics in a police encounter weakens if not eviscerates Fourth Amendment protections for people of color.
>
> [*United States v. Easley*, No. 16-1089-MV, 2018 *U.S. Dist. LEXIS* 4472, at *42, *54-55 (D.N.M. Jan. 10, 2018).]

[8] Because these biases impact who ends up in the courtroom – and how jurors respond to them – the United States District Court for the Western District of Washington has created a video for its *venire* and jury instructions that introduces jurors to the concepts and dangers of implicit bias. *See Unconscious Bias* (video), U.S. District Court for the Western District of Washington, http://www.wawd.uscourts.gov/jury/unconscious-bias (last visited Mar. 28, 2018); *Criminal Jury Instructions – Unconscious Bias*, U.S. District Court for the Western District of Washington, http://www.wawd.uscourts.gov/sites/wawd/files/CriminalJuryInstructions-ImplicitBias.pdf.

Accordingly, the uncomfortable question is this: Why did police officers suspect these Black defendants were engaged in criminal activity or were armed and dangerous, when none of the facts pointed to the reasonableness of such suspicion, and would officers have had the same suspicion if Defendants were white?

This Court is well placed to ask such questions, and indeed has done so in the past. For example, in *State v. Maryland*, the Court noted "[w]e consider the question whether defendant was selected for questioning because of his race to be critical." 167 *N.J.* 471, 477 (2001). There, in assessing the credibility of the State's proofs, the Court acknowledged that the officers' reasons to question or stop three Black men – whichever version of their reasons was credited – was insufficient, either because they conducted a field inquiry that was based on impermissible race criteria or an investigatory stop unsupported by reasonable suspicion. *Id.* at 484-88. In so concluding, this Court looked beyond the officers' claimed suspicions, devoid of legally sufficient objective facts, to examine potentially "invidious and selective law enforcement" practices. *Id.* at 485.

If *Maryland* speaks to this Court's wisdom in asking the racial bias question, another case provides evidence that officers may respond far differently when not dealing specifically with a group that is people of color. In *Kaltner*, discussed *supra*, police

responded to a noise complaint at a college party, where 120 to 150 people were present. The police allowed the partygoers to leave the house; they did not perform investigative detentions and did not even ask the guests for identification. Instead, "[a]ccording to [the officer], their purpose was to identify and locate the residents in order to clear out the party, abate the noise and ensure that no individual was in need of medical assistance, even though there were no reports of anyone in need of assistance or in physical distress." *Kaltner*, 420 *N.J. Super.* at 530. This was hardly the approach taken in the present case.

While the difference in officers' responses in *Kaltner* and the present case highlights concerns about racial bias, such bias need not be explicit or intentional to nevertheless be constitutionally problematic.[9] This Court is no stranger to the risks of *explicit* racial bias, for example that which emerges in

[9] *Amicus* also notes that other kinds of implicit bias besides racial bias may be at play in the different police responses in *Kaltner* and the present case, including considerations of economic status. On the connection between race, class, and implicit bias in the context of housing opportunity and neighborhood disinvestment, *see, e.g.,* Jillian Olinger & Kelly Capatosto, *Chipping Away at Implicit Bias*, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University (Aug. 23, 2017), http://kirwaninstitute.osu.edu/chipping-away-at-implicit-bias/ (noting "many Americans developed an association between blackness and poverty. . . . Repeated exposure to these associations translated to a pervasive implicit association of race with risk, or more precisely, blackness with risk, and whiteness with security and safety.").

unspoken policies of racial profiling. *See*, *e.g., State v. Carty*, 170 *N.J.* 632 (2002) (following history of racial profiling on the New Jersey Turnpike and U.S. Department of Justice Consent Decree). *Amicus* submits that *implicit* biases may also "alter and affect numerous behaviors that police regularly engage in - visual surveillance, recall, and even armed response." Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. Rev.* 1124, 1139 (2012).

Specifically, the social science suggests that implicit racial bias may factor into police calculations about a Black man's activity or dangerousness, thereby affecting decisions about whether detention and/or pat-down searches are justified. A robust body of research reveals that police officers, and the general public, associate Black men with violence and dangerousness. *See, e.g.,* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 *Harv. C.R.-C.L. L. Rev.* 159, 168 (2016) (citing empirical evidence); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J*. Personality & Soc. Psychol.* 181, 185–86 (2001) (finding participants identified guns more quickly, and incorrectly, when primed with Black faces); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 *J. Personality & Soc. Psychol*. 1314, 1315–17 (2002) (finding participants thought they

saw a weapon and shot more quickly when the target was Black); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. Personality & Soc. Psychol*. 876, 879-881, 885-87 (2004) (finding participants, including specifically police officers, were more attentive to Black male faces when primed with images of weapons). Analyzing these studies as they apply to law enforcement, a group of scholars and jurists concluded:

> The research suggests both that the idea of Blackness triggers weapons and makes them easier to see, and, simultaneously, that the idea of weapons triggers visual attention to Blackness. How these findings translate into actual police work is, of course, still speculative. At a minimum, however, they suggest the possibility that officers have an implicit association between Blackness and weapons that could affect both their hunches and their visual attention.
>
> [Kang*, supra* at 1137.]

Amicus curiae is not suggesting that the Neptune Police went to the Crystal Inn with consciously racist motivations, nor that they were intentionally abusing their authority or the law. Instead, *amicus* simply asks this Court to consider that police suspicion cannot be "reasonable" when it is based, in whole or in part, on implicit racial bias. Given the record before this Court, there is no other explanation for why the police detained this group of people of color for twenty minutes to run warrant checks, or assumed that a peaceful, compliant Black man would be armed and

dangerous by virtue of attending a party along with another Black man whose concealed weapon was discovered.

While the work America must do to confront implicit racial bias is daunting, the judiciary is well placed to limit the impact of such bias in criminal justice decision-making. In the words of Justice Sotomayor (dissenting in a recent qualified immunity case), the law's consideration of what amounts to "reasonableness" must not become

> an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment. The majority today . . . sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished.
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> [*Kisela v. Hughes,* 584 *U.S.* __ (Apr. 2, 2018), *slip op.* at 15 (Sotomayor, J., dissenting).]

This Court has the opportunity to ensure no such signal is sent in New Jersey. Because racial bias is an unreasonable – and constitutionally impermissible – basis for police suspicion, and the suspicion here was not otherwise justified by the facts, the Appellate Division was wrong to condone the detention and pat-down in this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Appellate Division.

Respectfully submitted,

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Dated: April 11, 2018