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(formerly the Urban Legal Clinic)

Rutgers, The State University of New Jersey
S.I. Newhouse Center for Law and Justice
123 Washington Street, 4th Floor
Newark, New Jersey 07102-3026
P: 973-353-5576 / F: 973-353-3397

Laura Cohen, Esq.
Distinguished Clinical Professor of Law
Director, Criminal & Youth Justice Clinic
Justice Virginia Long Scholar
lcohen@kinoy.rutgers.edu
Also Admitted to Practice in New York

June 1, 2020

Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 Market St
Trenton, NJ 08611

Re: STATE v. ZAKARIYYA AHMAD, Docket No. 083736

Your Honors:

Please accept this letter in lieu of a more formal brief on behalf of the American Civil Liberties Union of New Jersey, the Association of Criminal Defense Lawyers of New Jersey, and the Northeast Juvenile Defender Center, which seek leave to participate in this case as amici curiae.

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STATEMENTS OF INTEREST OF AMICI

The Association of Criminal Defense Lawyers of New Jersey ("ACDLNJ") is a nonprofit voluntary professional association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes.

The American Civil Liberties Union of New Jersey ("ACLU-NJ") is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. ACLU-NJ has long been a strong supporter and protector of the rights of juveniles, whose well-documented vulnerabilities have been a particular concern.

The Northeast Juvenile Defender Center is a regional affiliate of the National Juvenile Defender Center ("NJDC"). NJDC was created to ensure excellence in juvenile defense and promote justice for all children. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC has participated as amicus curiae before the United States Supreme Court, as well as federal and state courts across the country. The Northeast Region of NJDC has co-directors in Delaware and New Jersey and serves Delaware, New Jersey, New York and Pennsylvania.

Amici have a particular interest in this case because this Court's affirmance of the decision of the New Jersey Superior Court, Appellate Division would impact the constitutional rights of defendants, particularly juveniles, statewide. An affirmance would (1) vastly circumscribe the privilege against self-incrimination by permitting courts to disregard a juvenile's age in determining whether he or she is "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), and (2) permit courts to rely on the subjective views of law enforcement in determining whether an individual was in custody.

PRELIMINARY STATEMENT

This case presents an issue of first impression for this Court: what role does age play in determining whether the police have subjected a young person to a custodial interrogation? Although nine years have passed since the United States Supreme Court issued its landmark ruling in J.D.B. v. North Carolina, 564 U.S. 261 (2011), this Court has not yet had the opportunity to consider this issue under our State Constitution.

On the morning of October 27, 2013, Joseph Flagg was shot and killed in the café that he owned in Newark. Shortly afterwards, the police learned that Appellant Zakariyya Ahmad ("Zakariyya"), who had recently turned 17 years of age, was at University Hospital, undergoing emergency surgery for five gunshot wounds he had sustained earlier that same day. Homicide detectives went to the hospital and, when

Zakariyya was released at approximately 2:00 p.m., transported him and his father directly from the hospital to a Newark police station in the back of a police cruiser. Because the police seized his clothing and personal effects, Zakariyya was clad only in a hospital gown. He was on crutches, bandaged from his ankle to his hip, and in substantial pain, for which he had received five doses of the painkiller Fentanyl over the course of several hours at the hospital.

From the police station, Zakariyya and his father were escorted to the Essex County Prosecutor's Office by police. There, Zakariyya was separated from his parents and brought into an interrogation room, where law enforcement officers advised him they were investigating Mr. Flagg's shooting and questioned him at length and in an accusatory manner about his whereabouts that morning and how he sustained his injuries. Neither Zakariyya nor his parents were told that his parents could be present during the interrogation. Questioning ceased only when Zakariyya's mother observed an officer enter the interrogation room with forensics equipment and demanded that her son be released. Although he was permitted to leave the stationhouse with his parents, Zakariyya soon thereafter was arrested and charged with the murder of Mr. Flagg, along with two co-defendants.

Zakariyya was never Mirandized and never waived his Miranda rights. Nevertheless, the trial court denied his motion to suppress and the Appellate

Division affirmed, on the ground that he was not "in custody" at the time he gave the statements.

These decisions were erroneous for several reasons. Instead of engaging in the multi-factor, objective analysis that long-standing constitutional doctrine demands, the courts below improperly focused on the interrogating officer's subjective assertion that, at the time of his interrogation, Zakariyya was not yet a suspect in Mr. Flagg's killing. (Point I). The trial court and Appellate Division also erred in failing to consider Zakariyya's age and developmental immaturity, as required by J.D.B. v. North Carolina. (Point II). In addition, they improperly found the presence of Zakariyya's parents at the prosecutor's office indicated that he was not in custody. (Point III). For these reasons, amici join Appellant in urging reversal.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici hereby adopt the statement of facts and procedural history set forth in Appellant's Brief.[1]

[1] Amici adopt the following citations to the record from appellant's brief:
"2T" refers to the transcript of June 3, 2016;
"3T" refers to the transcript of August 15, 2016;
"4T" refers to the transcript of September 16, 2016.

LEGAL ARGUMENT

I. THE COURTS BELOW IMPROPERLY FOCUSED ON THE ARRESTING OFFICER'S SUBJECTIVE ASSERTION THAT, AT THE TIME OF HIS INTERROGATION, APPELLANT WAS NOT A SUSPECT, RATHER THAN ENGAGING IN THE MULTI-FACTOR OBJECTIVE ANALYSIS THAT BEDROCK CONSTITUTIONAL DOCTRINE DEMANDS.

The Fifth and Fourteenth Amendments of the United States Constitution guard all persons against self-incrimination. U.S. Const. amend. V, XIV; Griffin v. California, 380 U.S. 609, 615 (1965). Although the New Jersey Constitution has no explicit provision against self-incrimination, the privilege is "so venerated and deeply rooted in this state's common law that it has been deemed unnecessary to include the privilege in our State Constitution." State v. O'Neill, 193 N.J. 148, 176 (2007). Indeed, so important is the privilege that this Court has held it "offers broader protection than its Fifth Amendment counterpart." Id. at 176-77.

Any police interrogation will have "coercive aspects to it." Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam). Custodial interrogations "heighten the risk that statements obtained are not the product of the suspect's free choice" J.D.B., 564 U.S. at 268-69 (internal citations omitted), because questioning by the police entails "inherently compelling pressures." Miranda, 384 U.S. at 467. Courts long have recognized, furthermore, that "the physical and psychological isolation of custodial interrogation can 'undermine the individual's will to resist and . . . compel him to speak where he would not otherwise do so freely.'" J.D.B., 564

U.S. at 269 (quoting Miranda, 384 U.S. at 467). For these reasons, statements obtained during custodial interrogations may not be admitted in evidence unless defendants are advised of and validly waive their constitutional rights. Miranda, 384 U.S. at 492. In Miranda, the United States Supreme Court defined a custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444 (emphasis added). Here, the police neither administered the Miranda warnings nor obtained a waiver. Thus, the only relevant inquiry is whether Zakariyya was "in custody" at the time of the questioning. Both the trial court and the Appellate Division erred in finding that he was not.

Whether the police have placed someone in custody is "fact-sensitive and sometimes not easily discernible." State v. Stott, 171 N.J. 343, 364 (2002). "The critical determinant of custody is whether there has been a significant deprivation of the suspect's freedom of action based on the objective circumstances, including the time and place of the interrogation, the status of the interrogator, the status of the suspect, and other such factors." State v. Hubbard, 222 N.J. 249, 266 (2015), quoting State v. P.Z., 152 N.J. 86, 102 (1997). The custody analysis "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." Stansbury v. California, 511 U.S. 318, 323 (1994). See also J.D.B., 564 U.S. at 262; Hubbard,

222 N.J. at 267. As the Appellate Division made clear in State v. Coburn, "[c]ustody exists if the action of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably lead a detainee to believe he could not leave freely." 221 N.J. Super. 586, 596 (App. Div. 1987).

In this case, the transcript of the Miranda hearing teems with facts that would signal to any similarly-situated person that they were not at liberty to leave and that serious consequences would ensue if they attempted to do so. The police appeared at the hospital while Zakariyya, who had just turned 17, was still undergoing treatment. Although he had just come out of surgery, was able to walk only with the aid of crutches, had one leg bandaged from his ankle to his thigh, and had just received multiple doses of pain medication, the police would not permit him to go home with his parents. (3T27:18; 3T50:6-10). Instead, they took his belongings and ordered him to go to the precinct and, later, the Essex County Prosecutor's Office ("ECPO") in a hospital gown. (3T30:15; 3T52:10-13).

By insisting that Zakariyya accompany them to the police station immediately, and in that condition, the police made clear that compliance with their demands was not optional. In fact, both Zakariyya and his mother testified that the police said he "had no choice" about submitting to questioning, even when Zakariyya told them he wanted to go home with his family. (3T28:5; 3T51:3-7).

The police placed Zakariyya in the back seat of a marked patrol car, leading him to believe that he was under arrest. (3T52:10-13). Once they arrived at the Newark Police Department, Zakariyya and his father were brought to a room, where they remained for several hours. During that time, Zakariyya was "in pain [and] very agitated." (3T52:12). Ultimately, two detectives instructed him and his father to follow them to the ECPO. (2T12:25). There, they separated Zakariyya from his parents, took him into an interview room, and commenced interrogating him at 5:07 p.m. – seven hours after he arrived at the hospital.

Although the State contends the police were interested in Zakariyya as a victim, rather than a suspect, the tone and tenor of the interrogation suggest otherwise. The questioning began not with a reference to Zakariyya's injuries but, instead, with the police stating that they were investigating "a homicide [at] 282 Chancellor Avenue in the City of Newark, New Jersey." (2T25:11-18). From there, they proceeded to interrogate this teenage boy, who had just endured a highly traumatic event and sustained significant injuries, for approximately 30 minutes. They asked about his whereabouts earlier that day, who he was with, and the circumstances surrounding his shooting, conveying their incredulity through repetitive questioning and an aggressive tone. (2T:25-58). Although he was bandaged, bloodied, and in a hospital gown, at no time did they ask how he was feeling, whether he was in pain, whether he needed anything to eat or drink, or

whether he was cold and wanted warmer clothing. They never said they were there to help him or offered to let him speak with a victim-witness advocate. They never asked whether he wanted to have his parents in the room for support and comfort.

Respondents argue, and the courts below agreed, that because Zakariyya "presented himself to officers as a victim of a shooting several blocks from where another man had just been murdered" (4T15:23-25), and because the detectives did not ask any questions pertaining to the murder itself (4T16:9-13), it was not a custodial interrogation.[2] This analysis, however, turns well-settled doctrine on its head. The relevant question is not the officers' subjective casting of the inquiry; if this were the case, police could evade constitutional scrutiny simply by dubbing the subject of any interrogation a witness rather than a suspect. And, even if the police truly did not view Zakariyya as a suspect at this point, their subjective belief is irrelevant to the question of whether he was in custody for Miranda purposes. As the United States Supreme Court explained in Stansbury v. California:

[2] In determining that Zakariyya was not in custody, the courts below accorded undue weight to other factors, including, among others, that he was not told he was not free to leave; that he did he not ask to use the bathroom; that he did not ask to speak with an attorney or to see his parents; and that he did not attempt to end the questioning. State v. Ahmad, No. A-1141-17 (App. Div., Nov. 18, 2019) (slip op. at 7); (4T11:2-8). It is contrary to the basic dictates of Miranda, however, to place the burden of requesting counsel or terminating an interrogation on a teenager who has neither been Mirandized nor waived his legal rights. Also accorded undue weight was Zakariyya's mother's decision to stop the questioning when the police attempted to take photos of her son. Ahmad, slip op at 9-10 (4T16:21-25).

> One cannot expect the person under interrogation to probe the officer's innermost thoughts. Save as they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the Miranda custody inquiry.
>
> An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. . . . Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.
>
> [511 U.S. at 324 (emphasis added; internal citation omitted).]

In fact, an officer's views or beliefs are only relevant to the custody analysis if they "were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." Id. at 326. In this case, the record is bereft of any indication that the officers ever told Zakariyya they considered him a victim, and he certainly was never told he was free to leave.

The facts in this case are remarkably similar to those of Hubbard. In that case, the defendant's infant daughter was found unresponsive in the family's home. Hubbard, 222 N.J. at 254. After she was transported to the hospital, a detective drove the defendant to the police station in a marked patrol car to answer questions that "might be helpful to medical professionals treating his daughter. . . ." Id. at 255.

During the 40-minute, un-Mirandized interview, the detective's questions skirted around the periphery of the defendant's responsibility for his daughter's injuries but had an accusatory tone. Id. at 258-59. At the conclusion of the interview, the police drove the defendant home. Id. at 259. The Court held that a reasonable person in defendant's position would have believed that he was not free to leave and reversed the denial of suppression. Id. at 272.

The courts below thus erred in according the officers' stated subjective beliefs substantial weight in the custody analysis. Affirmance of the denial of suppression in this case would, therefore, precipitate a sea change in the constitutional protections afforded to people subjected to police questioning in this state. It would essentially erode the well-established, objective determinants of when a person is "in custody" and instead permit courts to consider, among other things, police officers' unspoken subjective opinions about a suspect's status. To do so allow would be to contravene the well-settled case law of this Court and the United States Supreme Court. For this reason, the decision of the Appellate Division should be reversed.

II. THE COURTS BELOW ERRED IN FAILING TO ACKNOWLEDGE THAT APPELLANT'S AGE WAS RELEVANT TO WHETHER HE WAS IN CUSTODY AT THE TIME OF THE INTERROGATION.

The Appellate Division and the trial court improperly disregarded Zakariyya's age in determining that he was not in custody. For this reason, the analyses of both courts were incomplete and constitutionally defective.

Age and developmental status profoundly affect human dynamics and, in particular, the way one perceives and processes interactions with the police. Social and neuro-sciences establish convincingly that adolescents are more likely to accede to authority, and less able to weigh the risks and benefits of their decisions, than adults. See, e.g., Elizabeth Cauffman et al., How Developmental Science Influences Juvenile Justice Reform, 8 UC IRVINE L. REV. 21 (2018). Taking account of and acknowledging the fundamental impact that developmental immaturity has on adolescent judgement, decision-making, and culpability, both this Court and the United States Supreme Court have carved out still-evolving jurisprudence of youth over the last 15 years. See, e.g., Miller v. Alabama, 567 U.S. 460 (2012); J.D.B., 564 U.S. 261; Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005); State ex rel. A.A., 240 N.J. 341 (2020); State ex rel. C.K., 233 N.J. 44 (2018); State v. Zuber, 227 N.J. 422 (2017); State ex rel. P.M.P., 200 N.J. 166 (2009); State ex rel. A.S., 203 N.J. 131 (2010). Individually and collectively, these cases stand for the proposition that children are different and that youth matters, in sentencing,

due process, and other areas of constitutional importance. As the United States Supreme Court observed in J.D.B. v. North Carolina, "'our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." 564 U.S. at 274 (quoting Eddings v. Okla., 455 U.S. 104, 115-16 (1982)).

Perhaps nowhere is the impact of age and developmental immaturity more keenly felt than in the interrogation room. See Steven A. Drizin & Richard A. Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. REV. 891 (2004). As early as 1948, the United States Supreme Court declared that, in the context of police interrogations, circumstances that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. . . . Mature men possibly might stand the ordeal . . . [b]ut we cannot believe that a lad of tender years is a match for the police in such a contest." Haley v. Ohio, 332 U.S. 596, 599-600 (1948). For this reason, a juvenile "needs counsel and support if he is not to become the victim first of fear, then of panic . . . lest the overpowering presence of the law . . . crush him." Id. at 600. See also Gallegos v. Colorado, 370 U.S. 49, 54 (1962) ("[N]o matter how sophisticated," a juvenile subjected to police interrogation "cannot be compared" to an adult). And, in extending the privilege against self-incrimination to youth, the Court in In re Gault warned that "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was

not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." 387 U.S. 1, 55 (1967).

This Court, too, has long recognized the particular vulnerability of young people to standard police questioning techniques. See State ex rel. Carlo, 48 N.J. 224 (1966); State ex rel. A.W., 212 N.J. 114 (2012) (Albin, J., dissenting). For these reasons, it repeatedly has extended heightened protections to children subjected to interrogation, including, most notably, parental presence and consultation before any waiver of rights by children. State v. Presha, 163 N.J. 304, 308 (2000); A.S., 203 N.J. at 136; A.A., 240 N.J. at 358-59.

The United States Supreme Court wove these considerations into the Miranda doctrine in J.D.B., where it declared age to be a relevant factor in determining whether young people feel free to extricate themselves from interactions with police. 564 U.S. at 264-65. Looking to social science, the Court declared that the impact of age and developmental immaturity on perceptions of custodial status is "a reality that courts cannot simply ignore." Id. at 277.

In J.D.B., the Court explicitly integrated age into the "reasonable person" test, rather than carving out an exception for youth. The Court noted that "some undeniably personal characteristics" such as "blindness," "are circumstances relevant to the custody analysis." Id. at 278. Thus, the simplistic categorization of age as a "personal characteristic" was insufficient to exclude it as an appropriate

factor for consideration in determining whether a similarly-situated person would feel free to leave. Id.

The J.D.B. Court also rejected the prosecution's claim that the "reasonable person" standard precluded individualized assessment:

> Because the Miranda custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an 'internal' or 'psychological' impact on perception. Were that so, there would be no objective circumstances to consider at all.
> [Id. at 279 (emphasis added).]

Finally, the Court refused to embrace the government's argument that rejection of the "one-size-fits-all reasonable-person" standard would obfuscate the objective test, which was "designed to give clear guidance to the police." Id. (citing Yarborough v. Alvarado, 541 U.S. 652, 668 (2004)). The Court made clear that ignoring a factor as fundamental and concrete as age undermined the utility of the inquiry, adding that concerns about injecting some degree of individualized consideration into the process did not justify ignoring age altogether. Id.

Even before J.D.B., at least one state Supreme Court held that a young person's age was a relevant factor in determining whether a 15-year-old felt "free to leave" in the Fourth Amendment context. State v. Jason L., 2 P.3d 856, 862 (N.M. 2000) ("Characteristics such as . . . [age] . . . are objective and relevant to the question of whether a reasonable person would feel free to leave."). Similarly, lower courts

in other jurisdictions had recognized that the "reasonable person" analysis must take into account certain individual characteristics, such as age and intellectual disability, at least within the context of custodial interrogations. See, e.g., State v. Freeman, 298 S.E.2d 331 (N.C. 1983) (concluding that, where 50-year-old police officer picked up 17-year-old defendant at his home and drove him to police station, a "reasonable person" would not have believed he was "free to leave."); People v. Leonard, 157 P.3d 973, 997 (Cal. 2007)(holding defendant's age, low intelligence, and developmental disability were relevant factors in "free to leave" test); People v. Braggs, 810 N.E.2d 472 (Ill. 2004) (holding that reasonable person standard was subject to modification to take into account defendant's intellectual disability with respect to custody inquiry).

In contravention of the dictates of J.D.B., neither the Appellate Division nor the trial court accorded Zakariyya's young age any weight in determining that he was "in custody." Yet, this "lad of tender years" had experienced the trauma of gunshot wounds just hours before his interrogation. He was compelled to go from the hospital to the police station in the back of a police cruiser, clad only in a hospital gown. (4T5:21-25; 8:23-9:5; 3T51:1-22; 57:1-2). After waiting there for some period of time, he was ordered to accompany two detectives to the prosecutor's office, where he was separated from his parents and subjected to a 30-minute,

accusatory interrogation. (3T:52:24-54:15; 4T10:9-13).[3] It is doubtful that an adult would have felt free to leave under such circumstances, but certainly no reasonable teenager would have believed they were able to walk out the door.[4]

Although J.D.B. is well-settled law, this Court has not yet squarely addressed the centrality of age to the custody analysis. We ask that the Court do so here, and on this ground, too, reverse the decisions below.

III. IN FINDING THAT THE PRESENCE OF APPELLANT'S PARENTS AT THE PROSECUTOR'S OFFICE INDICATED APPELLANT WAS NOT IN CUSTODY, THE COURTS BELOW MISAPPLIED STATE v. PRESHA AND ITS PROGENY.

Both the trial court and the Appellate Division based their determinations that Zakariyya was not "in custody" in part on the presence of his parents at the prosecutor's office. This analysis turns established case law governing juvenile interrogations on its head.

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[3] That Zakariyya was permitted to go home with his parents after his mother terminated the interview is irrelevant to the analysis. See, e.g., Hubbard, 222 N.J. at 254 (defendant in custody even when driven home after interrogation).

[4] While it is true that the appellant in J.D.B. was younger than Zakariyya, a large body of recent science has established that brain development and psycho-social maturation continue well into one's twenties. Consequently, older teens continue to exhibit the same immature judgement and decision-making capabilities that gave rise to the recent jurisprudence of adolescence. See Elizabeth S. Scott et al., *Young Adolescence as a Transitional Legal Category: Science, Social Change, and Justice Policy,* 85 FORDHAM L. REV. 641 (2016).

This Court has consistently embraced parental involvement in and consent to juvenile interrogations as essential protective factors for youth who engage with police. Consequently, courts examine parental participation in the interrogation process as an indicator of the voluntariness of young people's statements. Presha, 163 N.J. at 308 (2000); A.W., 212 N.J. at 116; A.A. 240 N.J. at 345. These cases rest on the longstanding judicial recognition of young people's vulnerability to police interrogation strategies discussed above and their lack of understanding of their legal rights. Thus, failures of the police to notify a parent of a child's interrogation, to administer the Miranda warnings in the presence of a parent, or to provide parent and child an opportunity to discuss the waiver decision all have invalidated juvenile waivers of Miranda rights and led to suppression of statements.

The reasoning of the lower courts perverts the protective goals of Presha and its progeny, as it erodes the intended shield of parental presence at interrogations. And, even if the presence of a parent could provide enough of a buffer between the police and a young person to outweigh of the other factors relevant to the custody determination, this would only be possible if parent and child both were in the interrogation room.

Here, although Zakariyya's parents were at the prosecutor's office, they were forced to wait in a different room. Because Zakariyya was never Mirandized, neither he nor his parents were advised of his right to counsel or the potential consequences

of answering the officers' questions. Similarly, Zakariyya was deprived of any opportunity to consult with either parent about the crucial decision to submit to the interrogation – a decision that may well have determined the course of the rest of his life. In short, the mere presence of Zakariyya's parents in an adjoining room was insufficient to neutralize the inherently coercive power of the police. Any young person placed in this situation would, indeed, be "overawe[d] and overwhelm[ed]. Haley, 332 U.S. at 599.

CONCLUSION

For the reasons expressed above, and for those reflected in Appellant's brief, we respectfully request that this Court reverse the decisions of the courts below denying suppression and remand for further proceedings.

Respectfully submitted:

WHIPPLE AZZARELLO, LLC
Attorneys for Amicus Curiae
Association of Criminal Defense
Lawyers of New Jersey
/s/ William J. Munoz, Esq. (141632014)

RUTGERS CRIMINAL AND YOUTH JUSTICE CLINIC
Attorneys for Amicus Curiae
American Civil Liberties Foundation of
New Jersey and Northeast Juvenile
Defender Center

Laura A. Cohen

Laura Cohen, Esq. (047102006)

AMERICAN CIVIL LIBERTIES FOUNDATION OF NEW JERSEY

Alexander Shalom, Esq. (021162004)
Counsel of Record