IN THE

Supreme Court of New Jersey

Nos. A-33/34-16 (078247)

STATE OF NEW JERSEY,	:	**CRIMINAL ACTION**
Plaintiff-Respondent,	:	ON A PETITION FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW
v.	:	JERSEY APPELLATE DIVISON
NATHAN N. SHAW, a/k/a DION SHAW, a/k/a LEROY ANDERSON,	:	DOCKET NOS. A-02711-13T3, A-4319-13T3
Defendant-Appellant.	:	*Before*: MARIANNE ESPINOSA, J.A.D., *and* GARRY S. ROTHSTADT, J.A.D.
STATE OF NEW JERSEY,	:	ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW
Plaintiff-Respondent,	:	DIVISION, MONMOUTH COUNTY
v.	:	INDICTMENT NOS. 12-03-0469 AND 12-08-1442.
KEON L. BOLDEN,	:	*Before*: JOHN T. MULLANEY, JR., J.S.C.
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

Amicus Curiae American Civil Liberties Union of New Jersey ("ACLU-NJ") respectfully submits this brief in support of Petitioners-Appellants Nathan Shaw and Keon Bolden in the above captioned matter.

This case presents two issues that this Court recently has had cause to address: (1) whether the heavy presumption against a warrantless search of a residence — including a temporary residence such as a motel room — is overcome upon the fortuitous discovery of alleged contraband by a private third party, *State v. Wright*, 221 N.J. 456 (2015); and (2) whether there was sufficient reasonable suspicion of contraband to justify the warrantless search of a car pursuant to consent. *See, State v. Carty*, 172 N.J. 632 (2002).

Intersecting both these issues, however, is the longstanding and undisputed rule, adopted by both this Court and the United States Supreme Court, that "[i]n a warrantless search, *the State bears the burden of proving by a preponderance of the evidence the constitutionality of the search*." *State v. Johnson*, 193 N.J. 528, 548 n.4 (2008)(emphasis added).

Amicus ACLU-NJ agrees with the conclusion of the Appellate Division — and indeed the concession of the State at oral argument below — that "the 'third-party intervention' or 'private search' doctrine did not create an exception to the

requirement that law enforcement obtain a warrant before searching a guest's hotel room, absent exigent circumstances." *State v. Shaw*, Nos. A-2711/4319-13T3, 2016 WL 4474312, type op. at 17 (App. Div. Aug. 25, 2016). Thus, the police clearly violated constitutional requirements when they did not procure a warrant before searching the motel room.

ACLU-NJ disagrees with the Appellate Division, however, that the burden of proof should be upon defendants in these circumstances to prove that they had a reasonable expectation of privacy in any property that was found as result of the unconstitutional search. *Id.*, type op. at 19 (citing *State v. Hinton*, 216 N.J. 211, 233 (2013)). Where the police have engaged in admittedly warrantless, and thereby unconstitutional, search of a residence, the burden should be upon the State to rebut the heavy presumption that the evidence seized from defendants by that search should be excluded. Indeed, ACLU-NJ believes that all persons have a per se expectation of privacy against a warrantless search of a residence, and that once it has been established that the warrantless search of a residence was invalid, the fruits of that search should be automatically inadmissible.

STATEMENT OF FACTS[1]

On December 4, 2011, the manager of the Neptune Hotel entered an empty room registered to Jasmine Hanson to check it for bed bugs. 1T 10-6 to 7; 1T 20-23 to 25; 1T 21-1 to 2. Upon discovering what appeared to be plastic bags with CDS underneath the bed covers, the manager called the police. 1T 13-23 to 24; 1T 23-4 to 6. Neptune Township Police Officer Rademacher responded to the call at 2:34 p.m. and was let into the room by the manager. 1T 147-18 to 23. The officer observed the two bags on the bed: one that seemed to the officer have crack cocaine (1T 25-18 to 20), "smaller cellophane bags with stamps that [he] believed to contain heroin" (1T 26-3 to 4), and another he "believed" to contain "imitation marijuana" (1T 15-24 to 24; 1T 29-4 to 30-20) and other drug paraphernalia.

Officer Rademacher contacted headquarters, and Sergeant William Kirchner responded. 1T 27-22 to 24. Together, he and Officer Rademacher seized the evidence and ran a background check on Hanson. 1T 37-17 to 21; 1T 38-6 to 8. They discovered an active arrest warrant and a recent traffic ticket issued to her while driving a black 2012 Tahoe. 1T 38-10; 1T 38-21 to 23. No attempt was made to procure a search warrant by either

[1] The transcript citations are as follows:
"1T" – Motion to Suppress, February 27, 2013
"2T" – Motion to Suppress, February 28, 2013

officer. Officer Rademacher testified that he had never sought a search warrant in his entire two years two month as a patrol officer (1T 110-20 to 25), and that he did not believe he could procure a telephonic warrant on a Sunday (1T 112-6 to 17).

On Sergeant Kirchner's instructions, Officer Rademacher took the evidence to headquarters and returned in an unmarked car to wait in the parking lot next to the motel. 1T 41-12 to 14; 1T 42-3 to 7. Within 15 to 20 minutes after arriving in the adjacent lot, Officer Rademacher observed a black Tahoe pull up, driven by Hanson, whom he recognized from her license. 1T 42-3 to 7; 1T 43-1 to 6; 1T 43-12 to 13; 1T 44-7 to 9. Hanson pulled into a parking space and Mr. Keon Bolden, the front passenger, immediately exited the vehicle. 1T 44-1 to 2. The Officer observed that there were three passengers still in the car: one front-seat passenger and two rear-seat passengers.

Officer Rademacher then approached the vehicle, he immediately "unholstered [his] duty weapon and kept it down at [his] side and ordered them back in to the vehicle." 1T 44-20 to 25. He then asked for Hanson's license, registration, and rental agreement. 1T 45-13 to 17. The officer testified that he waited for back-up to arrive and then told Hanson to step out of the car, as there was an outstanding warrant for her arrest. 1T 47-20 to 25. Officer Rademacher handcuffed Hanson (1T 48-12 to 14), arrested her (1T 47-24 to 48-2), and placed in the rear of

a patrol car. 1T 47-24 to 48-2.

At that point, Officer Rademacher removed each occupant from the car, spoke to them individually, and asked to see their identification. 1T 49-2 to 5. Petitioner-Appellant Nathan Shaw, who had been seated in the back seat, and Petitioner-Appellant Keon L. Bolden, who had been seated in the front seat, were both individually identified, determined to have no outstanding warrants, and detained in separate police cars. 1T 49-18 to 19; 1T 136-11 to 20; 1T 49-20 to 50-1; 1T 53-12 to 54-4.

After Hanson, the female passenger, Bolden, and Shaw had been removed from the black Tahoe and detained in separate police vehicles, Officer Rademacher asked Hanson, the driver, to consent to a search of her vehicle. 1T 55-12 to 14. She refused. 1T 57-23. The officer then told her that a K-9 dog would be coming to do an exterior sniff of the vehicle. 1T 57-25 to 58-2. Officer Rademacher testified that the exterior sniff was being done because of the arrest warrants, the search of the motel room, the other female passenger's original lie about her identity. 1T 58-6 to 12. He suggested that the totality of those circumstances led him to believe that there was criminal activity taking place, possibly involving narcotics. T1 58-14.

Petitioner-Appellants were detained for at least 80 minutes in police vehicles until the the K-9 sniff could take place. 1T 148-8 to 18 (noting that the K-9 was requested at 4 p.m., and

the K9 search ended at 5:20 p.m.). According to Officer Rademacher, an unidentified officer told him that Petitioner-Appellant Shaw had said that he had left marijuana in the vehicle, on the floor of the rear passenger seat. 1T 62-3 to 7. Shaw was immediately arrested and handcuffed. 1T 73-14 to 15.

According to the police, when Hanson was told by of Shaw's alleged statement, she agreed to the consent. 1T 63 to 64-2. She signed a "standard. . . consent to search" form, which Officer Rademacher states that he also read to her. 1T 60-22 to 23. Hanson initialed every box except the one that read: "I have given this permission voluntarily of my own free will, without coercion, fear, or threat." 1T 117-11. Officer Rademacher testified he did not notice that this box was not checked until "way after the fact," when it was too late to do anything to stop the search. 1T 117-17 to 23.

During the course of that search, the officers found some quantity of CDS on the floor of the rear-passenger seat and in the center-console cup holder. 1T 66-18 to 22. In the middle of the rear seat, there was a large, green fabric tote-bag, which was reported to be open. 1T 69-6 to 8; 1T 70-4 to 6. That bag contained two plastic bags that contained, amongst other things, two "decks" of heroin that seemed to Officer Rademacher to bear the same stamp as the heroin in the motel room. 1T 70-17 to 19. At that point, the police secured Hanson's vehicle, transported

Hanson, the defendants, and the other passenger to police headquarters as they were all under arrest for the items found in Hanson's vehicle. 1T 73-14 to 15.

PROCEDURAL HISTORY

Amicus ACLU-NJ relies upon the procedural history contained in Defendant Shaw's brief in the Appellate Division, and further notes the following.

On appeal, the Appellate Division found the warrantless search of the motel room was illegal. *State v. Shaw*, Nos. A-2711/4319-13T3, type op. at 17, 2016 WL 4474312, *14 (N.J. App. Div. Aug. 25, 2016). The Appellate Division then vacated and remanded Bolden's suppression motion regarding the items seized from the motel room to determine whether Bolden maintained a protected privacy interest in the motel room. *Id.*

The Appellate Division then affirmed the denial of Shaw's motion to suppress the contents of the tote bag found in Hanson's vehicle. *Id.* The Court reversed the denial of his motion suppress his statement to police while in their custody. *Id.*

ARGUMENT

I. THE WARRANTLESS ENTRY BY POLICE INTO THE MOTEL ROOM CLEARLY VIOLATED THE FOURTH AMENDMENT.

"The requirement for [a] search warrant is not a mere

formality but is a great constitutional principle embraced by free men." *State v. Chippero*, 201 N.J. 14, 26 (2009) (quoting *State v. Novembrino*, 105 N.J. 95, 107 (1987)). Thus, warrantless searches are presumptively unreasonable and are prohibited unless they fall within a recognized exception to the warrant requirement. *State v. Johnson*, 193 N.J. 528, 552 (2008); *State v. Wilson*, 178 N.J. 7, 12 (2003).

A. The Warrantless Search of a Residence Carries a Heavy Presumption of Invalidity.

The search of a residence is considered among the most intrusive forms of police investigation, and it is axiomatic that, absent strictly defined exigent circumstances, such a search without a warrant issued by a detached magistrate is unconstitutional. As this Court has repeatedly observed, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *State v. Wright*, 221 N.J. 456, 467 (2015). "[T]hroughout our nation's history, one of our 'most protected rights . . . has been the sanctity and privacy of a person's home.' Those interests 'are entitled to the highest degree of respect and protection in the framework of our constitutional system.'" *Id.* (quoting *State v. Bruzzese*, 94 N.J. 210, 217 (1983)).

Thus, this Court has held that the "third-party intervention" or "private search" doctrine — through which

private actors search an item, discover contraband, notify law enforcement officers who replicate the search without first getting a warrant — does not apply to residences.

> Homes are filled with intimate, private details about peoples' lives that are ordinarily free from government scrutiny. An officer's entry into a home is a far greater intrusion than a search of a package presented to the police. Also, inviting a plumber or dinner guest into a private home does not carry with it an invitation to the police.

Wright, 221 N.J. at 460. Although doubting whether the private search doctrine would be extended to private homes under federal law, this Court definitively resolved the issue in New Jersey.

> Relying on the protections in the State Constitution, we conclude that the private search doctrine cannot apply to private dwellings. Absent exigency or some other exception to the warrant requirement, the police must get a warrant to enter a private home and conduct a search, even if a private actor has already searched the area and notified law enforcement.

Id. at 476.

Furthermore, "No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v. California*, 376 U.S. 483, 490 (1964)(internal citation omitted); *see also, Chapman v. United States*, 365 U.S. 610, 616-617 (1961); *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951); *State v. Mollica*, 114 N.J. 329, 342 (1989); *State v. Hathaway*, 222 N.J. 453, 468 (2015)(all noting protections given to hotel rooms as similar to other

residences); *State v. Rose*, 357 *N.J. Super.* 100, 103 (App. Div. 2003) (hotel occupants have a constitutionally protected expectation of privacy).[2]

It is a straightforward analysis, therefore, to complete the syllogism and conclude that the private search doctrine does not apply to hotel or motel rooms, i.e. specific forms of homes or residences, that have not been abandoned or where the guest has not been definitely dispossessed. This Court in *Wright* strongly suggested as much (221 N.J. at 472) when it cited with approval the Sixth Circuit's decision in *United States v. Allen*, 106 F.3d 695 (6th Cir. 1997), which involved essentially similar facts to this case (motel manager entered a customer's room, saw marijuana inside, and called the police who initially entered the room without a warrant). This Court also cited *United States v. Young*, 573 F.3d 711, 721 (9th Cir. 2009)(hotel staff searched guest room, found a firearm, and called the police). *Wright*, 221 N.J. at 472.

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[2] Since the middle of the nineteenth century, courts have recognized that constitutional protections apply to all sorts of homes. *See, Chapman v. United States*, 365 U.S. 610 (1961) (extending privacy expectations to tenants of apartments); *Stoner v. California*, 276 U.S. 483 (1964)(guests of hotels); *United States v. Domenech*, 623 F.3d 325 (6th Cir. 2010) (motels); *United States v. Anderson*, 453F.2d 174 (9th Cir. 1971) (same); *McDonald v. United States*, 335 U.S. 451 (1948) (resident in a rooming house); and *Commonwealth v. Porter*, 923 N.E.2d 36 (Mass. 2010)(occupant of homeless shelter).

No exigent circumstances having been even colorably articulated or demonstrated, the warrantless search of the hotel room was therefore unconstitutional under both the Fourth Amendment of the United States Constitution or Art. I, ¶ 7 of the New Jersey Constitution.

B. Officer Rademacher's Belief that He Had Probable Cause to Procure a Warrant Did Not Excuse Him from the Requirement of Getting One.

As a corollary to the nearly absolute requirement of a search warrant issued by a detached magistrate in order to search a home, it is also well settled that the mere ability by police to procure a warrant (by establishing probable cause) does not excuse the police from actually doing so, absent exigent circumstances. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Johnson v. United States*, 333 U.S. 10, 14 (1948). "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925). "It is settled doctrine that probable cause for belief

that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant." *Payton v. New York*, 445 U.S. 573, 588 n.26 (1980).

As this Court has also stated:

> [O]ur jurisprudence expresses a clear preference for police officers to secure a warrant before entering and searching a home. For that reason, generally, the probable-cause determination for the search of a home is made "by a judicial officer, not by a policeman or Government enforcement agent." Because securing a warrant is the default position in our constitutional jurisprudence, warrantless searches are presumptively invalid. The State bears the burden of proving by a preponderance of evidence that the warrantless search of a home falls within one of the few "well-delineated exceptions" to the warrant requirement.

State v. Brown, 216 N.J. 508, 527 (2014)(internal citations omitted).

In this case, there was no colorable assertion of exigent circumstances that would justify search of a hotel room without a warrant. Officer Rademacher responded to the call at 2:34 p.m., but made no attempt to secure a warrant prior to entering the room. The hotel room could have been secured by other police officers while the warrant was obtained. Officer Rademacher simply failed to do so.

According to Rademacher, he had no familiarity with or understanding as to how to apply telephonically for a search warrant (*State v. Shaw*, Nos. A-2711/4319-13T3, type op. at 3-4), and indeed had no experience with procuring a search warrant *at*

all, but that feeble justification can hardly be sufficient:

> No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement.

Johnson, 333 U.S. at 15 (Where officers detected the odor of burning opium emanating from a hotel room, entered without a search warrant searched the room and found opium and smoking apparatus, the search violated the Fourth Amendment).

ACLU-NJ therefore is in substantial agreement with the Appellate Division below that the third-party intervention or private search doctrine cannot be applied to searches of a validly occupied hotel room. *Cf. State v. Hinton*, 216 N.J. 211 (2013)(after an eviction proceeding has advanced to the point that a warrant of removal has been executed, tenant does not have a reasonable expectation of privacy in the premises and the police action in apartment was not a "search" under United States or New Jersey Constitutions).

C. The Appellate Division Erred In Imposing the Burden on Bolden to Establish an Individual Expectation of Privacy in the Hotel Room in Order to Challenge the Warrantless Search.

ACLU-NJ respectfully disagrees, however, with the Appellate Division, when it ruled, under the facts of this case, that "[t]he burden of proof to establish a reasonable expectation of

privacy is on the defendant seeking to suppress evidence." *State v. Shaw*, Nos. A-2711/4319-13T3, type op. at 19 (citing *Hinton*, 216 N.J. at 233). Because this case indisputably deals with a warrantless search of a residence, it is completely distinguishable from *Hinton*, where this Court found that the police had not even conducted a "search," much less a warrantless one.

In *Hinton* the Court did reject a defendant's suppression motion because he failed to establish a privacy interest in the location searched. However, the Court confined its decision in *Hinton* to its uncommon set of facts. *Hinton*, 216 *N.J.* at 236. In *Hinton*, the premises where defendant had been living had already been the subject of a judicially issued warrant of removal under New Jersey's Anti-Eviction Act, N.J.S.A. § 2A:18-61.1, by which a prior tenant loses all legal possessory interest in the premises and the owner recovers the right to full present possession. A Special Civil Part Court Officer found drugs while effectuating a lockout of the apartment that deprived the defendant of a license to exclude others from it. *Hinton*, 216 *N.J.*at 217. In deciding the case, the Court noted, "[t]his is not a typical case in which the defendant seeks suppression of items found in his or her home." *Id.*

The Court therefore found that defendant had not established any reasonable expectation of privacy. *Hinton*, 216

N.J. at 239. This Court went on to explain that, "this novel case arises in unusual circumstances." *Id.* at 236. Because of the unique facts of the case, the Court cabined its inquiry, asking only about "the reasonable expectation of privacy in a setting of an eviction that has proceeded to an advanced stage." *Id.* Indeed, it was by narrowing the inquiry and holding to those specific circumstances that the Court's decision remained consonant with the robust protections afforded by New Jersey's search and seizure jurisprudence. *Id.* ("Our holding thus comports with the jurisprudence cited by the dissent."). Essentially, the Court treated evictees in a similar way as trespassers.

The holding therefore differs little from the well-understood premise that a defendant does not have grounds to protest a search conducted on a property upon which they are a trespasser. *See, e.g.*, *State v. Brown*, 216 *N.J.* 508, 529 (2014) ("defendants do not have standing to object to the warrantless search of the property if the building was abandoned or, alternatively, if they were trespassers."); *see also*, *State v. Wilson*, 442 *N.J. Super.* 224, 232 (App. Div.), *certif. granted in part on other grounds*, 224 *N.J.* 119 (2015). Indeed, in *Wilson*, the Appellate Division drew this precise parallel by applying a *Hinton* expectation of privacy test *because* the defendant was a trespasser in the area of the search. In *Wilson*, as in *Hinton*,

the defendant demonstrably had no legal right to occupy the area searched. *Id.* In *Wilson*, as in *Hinton*, the officers had already learned of the presence of drugs at the scene. *Id.* Such similarities do not apply to the instant case. As such, the Court should continue to confine the *Hinton* expectation of privacy analysis to cases with similar facts and not apply it here.

Recently, New Jersey courts have honored the narrow circumscription of the holding, confining the expectation of privacy interest inquiry. In *State v. Bacome*, the Appellate Division rejected the State's argument that a showing of Defendant's individual privacy interest was required, noting that in *Hinton*, the Court emphasized it was dealing with a "novel case" that "arose in unusual circumstances." *State v. Bacome*, 440 *N.J. Super*. 228, 245 n.12 (App. Div. 2015) (quoting in part, *State v. Hinton*, 216 *N.J.* 236), *cert. granted in part*, 223 *N.J.* 279 (2015). It concluded: "We, therefore, reject the argument that *Hinton* has any bearing on the significantly different circumstances presented here." *Id.*

This Court made clear in Hinton that the doctrinal result of the lack of reasonable expectation of privacy under the unique facts of that case was that the "police action in his apartment *was not a 'search'* for purposes of either the Fourth Amendment of the United States Constitution or Article I,

Paragraph 7 of the New Jersey Constitution." *Hinton*, 216 N.J. at 239-40 (emphasis added). Because of *Hinton*'s predicate "holding that the police action did not constitute a search," *id.* at 240, it was unnecessary for the Court to determine whether a warrant was required, since absent a "search," no further Fourth Amendment analysis is necessary.

This holding, however, makes *Hinton* completely inapposite to the current case. First, it is undisputed in this case that there was a "search." The hotel room was validly occupied and nevertheless the police searched the room. Moreover, this was a warrantless search. "Because a warrantless search of a home is presumptively invalid, *the State bears the burden* of establishing that such a search falls within one of the few 'well-delineated exceptions' to the warrant requirement." *State v. Vargas*, 213 N.J. 301, 314 (2013)(quoting *State v. Frankel*, 179 N.J. 586, 598 (2004)).

A warrantless search of residence is a completely different circumstance than police action that does not even constitute a "search."

> A "warrantless seizure is 'presumptively invalid as contrary to the United States and the New Jersey Constitutions.' Because our constitutional jurisprudence evinces a strong preference for judicially issued warrants, the State bears the burden of proving by a preponderance of the evidence that a warrantless search or seizure falls within one of the few well-delineated exceptions to the warrant requirement."

State v. Mann, 203 N.J. 328, 337-38 (2010)(quoting *State v. Elders*, 192 N.J. 224, 246 (2007)); *see also, California v. Acevedo*, 500 U.S. 565, 589 n.5 (1991)("Because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to show the need for it.')(quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

Because a warrantless search of a residence by police is already *presumptively unreasonable*, there can logically be no further burden on a defendant to establish that this warrantless search is also individually unreasonable with regard to him. Such a requirement of a "supersaturated" expectation of privacy would undermine the "faithful adherence to the dictates of the warrant requirement and to the limiting principles in the well-delineated exceptions to the warrant requirement [that] will better advance the twin goals of evenhanded law enforcement and protecting the individual against unreasonable searches and seizures." *State v. Gonzales*, 227 N.J. 77, 100 (2016).

The relevant inquiry is whether the police had a right to be in the residence in the first place, not if a social visitor or colleague of the hotel guest has an independent property interest in specific items in the residence. The tenant's or

lawful resident-owner's reasonable expectation of privacy extends to his or her guests, co-residents, and visitors regardless of whether their names appear on the lease or contract. *See Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990)(overnight guest has a reasonable expectation of privacy in the residence where he is staying); *Minnesota v. Carter*, 525 U.S. 83, 91 (1998)(reasonable expectation of privacy may apply for non-overnight social guests for longer than 15 minutes in a non-commercial transaction). A guest, visitor, or co-resident can have a reasonable expectation of privacy (1) in general in a residence leased or owned by a different party or (2) in a particular room or area located on the premises, as long as she or he has permission from the tenant or owner in legal possession to visit, reside, and/or store items on her or his property. *See Olson*, 495 U.S. 91, 96-97 (1990)(finding an overnight guest has a reasonable expectation of privacy); *State v. Stott*, 794 N.J. 343, 356 (2002)(finding a patient at State psychiatric hospital, had a reasonable expectation of privacy in area of room searched by detective).

Especially when searching a dwelling, the State should not, absent exigent circumstances, be able to shield itself from the clear and unequivocal requirement of a warrant by imposing on a defendant the burden of dispelling the nuances and uncertainty that proving individualized expectations of privacy inevitably

create. Were it otherwise, then there could be created a perverse practical incentive to flout the warrant requirement, especially in cases with multiple defendants, since even if a warrant were clearly required, the State might seek to impose upon each defendant the individualized evidentiary burden to show that the warrantless search further invaded that defendant's personal expectation of privacy. It is for good reason, however, that "the burden falls on the State to demonstrate that a warrantless search is justified." *State v. Hathaway*, 222 N.J. 453, 468 (2015). The interests of efficient and certain application of the law are not well served by obfuscating the clear and unmistakable mandate of a warrant.

II. BECAUSE THE POLICE ENGAGED IN AN IMPROPER SEARCH OF THE HOTEL ROOM, ANY RESULTS OF THAT SEARCH CANNOT BE USED TO PROVIDE REASONABLE SUSPICION TO JUSTIFY THE SEARCH OF THE VEHICLE.

This Court has held that a police officer must first have a reasonable and articulable suspicion that a motorist or passenger of an automobile is or is about to engage in criminal activity *before* requesting consent to search an automobile. *State v. Carty*, 170 N.J. 632, 647 (2002) ("[S]uspicionless consent search shall be deemed unconstitutional whether it is preceded or followed completion of the lawful traffic stop."). Requesting consent to search an automobile without reasonable and articulable suspicion is thus unconstitutional. *Id.*

This Court has extended the reasonable and articulable basis requirement to disabled vehicles on the shoulder of highways. *State v. Elders*, 192 N.J. 224, 251 (2007) ("Law enforcement officers cannot request consent to search a disabled vehicle on the shoulder of a roadway unless they have reasonable and articulable suspicion to believe that evidence of criminal wrongdoing will be discovered in the vehicle."). *Cf., State v. Domicz*, 188 N.J. 285, 406 (2006) (declining to extend the *Carty* reasonable and articulable suspicion requirement for consent to search a home). The requirement of reasonable and articulable suspicion is derived from the New Jersey Constitution and serves "the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the lawful stop." *Carty*, 170 N.J. at 647.

A. The Stated Reasons Proffered by Police to Justify the Search of the Car Were Innocuous and Readily Explainable and Fail Entirely to Meet the Burden Required for a Consent Search.

As explained above in Part I, the search of the hotel was unconstitutional and thus the State cannot rely on any evidence found from the hotel room to form a reasonable and articulable suspicion of criminal activity in the motor vehicle for a consent search. *Carty*, 170 N.J. at 651 ("[C]onstititu-tionalization of the reasonable and articulable suspicion standard will permit invocation of the fruit of the poisonous

tree doctrine.").

Apart from the evidence seized as a result of the improper search of the hotel room, any further reasons proffered by the police to justify the search of the automobile are innocuous and readily explainable, and thus fail the reasonable and articulable suspicion of criminal activity requirement this Court defined in *Carty*. In justifying his request for consent to search the automobile, Patrolman Rademacher said he "knew Hanson was an out-of-state resident from Florida" and that she rented her car and motel room for one week. (2T55-24 to 7). This search occurred in Neptune, New Jersey. Known for its beaches and tourist attractions,[3] Neptune frequently has drivers with out-of-state licenses and motel rooms for short periods of time. Additionally, Hanson rented the car and motel room for one week. A one week duration does not signify anything suspicious and is a typical amount of time to rent a car and motel room to visit a township. This Court should not permit these factors to be the basis of reasonable and articulable suspicion, especially in a town that boasts its tourist attractions. Since a "hunch" of criminal activity is insufficient to request consent to search an automobile, and because the police officer failed to form a

[3] Neptune's catchphrase on its township website is, "Where Community, Business & Tourism Prosper." http://www.neptunetownship.org/.

reasonable and articulable suspicion of criminal activity in the automobile, any evidence found from the unconstitutional search is inadmissible as fruits of an unlawful search.

Patrolman Rodemacher was waiting for the Tahoe to return to the motel in order to effectuate the arrest warrant for Ms. Hanson. When Ms. Hanson parked in the motel parking lot, Patrolman Rodemacher approached the vehicle and when one of the passengers, Defendant Shaw, exited the vehicle, Patrolman Rodemacher, "immediately unholstered [his] duty weapon and . . . order[ed] them back into the vehicle." Patrolman Rodemacher called for backup and once backup arrived, each occupant was systematically removed from the vehicle, identified, and put into a separate police vehicle.

While it was proper for Patrolman Rodemacher to effectuate the arrest warrant on Ms. Hanson, it does not then follow that police may then conduct a warrantless search of an automobile absent either probable cause or a reasonably articulated suspicion accompanied by consent. An arrest warrant, standing alone, does not give police unbridled discretion to conduct full vehicular searches. *See, State v. Eckel*, 185 N.J. 523, 541 (2006)(rejecting the federal search-incident-to-arrest rule of *New York v. Belton*, 453 U.S. 454 (1981), and holding the warrantless search of an automobile is impermissible under the search-incident-to-arrest exception once a vehicle's driver or

occupant has been arrested, removed, and secured).

After securing all of the passengers, the police officers repeatedly requested consent to search the automobile from the driver, Ms. Hanson, despite her repeated refusals. This Court has addressed the historical abuses of consent searches and, as a result, has safeguarded that procedure to protect an individual's right from unreasonable searches and seizures. *See State v. Witt*, 223 N.J. 409, 415 (2015) ("The heavy reliance on consent searches is of great concern given the historical abuses associated with such searches and the potential for future abuses."); *State v. Elders*, 192 N.J. 224, 251 (2007) ("Indeed, it is a sad fact that not all persons feel comfortable in the presence of the police."); *State v. Tucker*, 136 N.J. 158, 169 (1994) (recognizing "[t]hat some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true"). Given the troubled history of consent searches, this Court has required police to have a reasonable and articulable suspicion that criminal activity is or is about to be occurring in the automobile before requesting consent.

Here, the police relied on entirely innocuous factors to justify the request to the consent search. These factors, even taken together, do not amount to anything more than a "hunch" and, if accepted by this Court, would allow police to circumvent

the carefully crafted jurisprudence on the standard to conduct consent searches.

B. Even Assuming Arguendo that the Hotel Search Was Proper, That Does Not Create Reasonable Suspicion that There Was Contraband in the Car.

Even if this Court determines the motel room search was proper and that the evidence is thus admissible, the police officer still did not have reasonable suspicion that criminal activity was or was about to be occurring in the automobile. First, this Court has rejected the automatic search-incident-arrest of an automobile. *State v. Eckel*, 185 N.J. 523, 541 (2006)("Once the occupant of a vehicle has been arrested, removed and secured elsewhere, the considerations informing the search incident to arrest exception are absent and the exception is *inapplicable*.")(emphasis added). However, given what the police officer knew at the time he executed the arrest warrant of the driver, Ms. Hanson, he did not have the sufficient reasonable suspicion of criminal activity, *as related to the automobile*, to request consent.

While reasonable suspicion is determined based on the totality of the circumstances, *State v. Thomas*, 110 N.J. 673, 678 (1988), it cannot merely be based on general suspicion an officer might find evidence of a crime. Hence, courts do not grant carte blanche for police to conduct warrantless searches for evidence based on reasonable suspicion of any past crime.

Rather a search for evidence must be based on reasonable suspicion of finding evidence of a present crime. See *Elders*, supra, 192 N.J. at 251.

The reasonable suspicion requirement has a temporal component. As this Court emphasized in *State v. Stovall*, 170 N.J. 346 (2002), "[a] police officer may conduct an investigatory stop if, based on the totality of the circumstances, the officer had a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." Id. at 356 (emphasis added). Therefore, a generalized suspicion that defendant may have committed some undetected crime in the past is insufficient. Absent reasonable suspicion that Ms. Hanson was about to engage in criminal activity, evidence of which would be found in her automobile, there was no basis upon which to effect a consent search of the automobile.

CONCLUSION

Amicus urges the Court to reject attempts to misuse *State v. Hinton* as a justification for imposing the burden on the defendant to establish the impropriety of a warrantless search of a home. For the reasons expressed herein, Amicus ACLU-NJ respectfully therefore urges this Court to reverse the decision of the Appellate Division vacate the judgments of conviction,

and remand this matter for further proceedings at which the evidence resulting from the illegal searches is suppressed.

Respectfully submitted,

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