SUPREME COURT OF NEW JERSEY
DOCKET NO. A-23-16 (077942)

STATE OF NEW JERSEY, Plaintiff-Appellant, v. **ORNETTE M. TERRY a/k/a KEITH TERRY, KEITH M. TERRY, ORHETTE TERRY, AND RASHEIA TERRY**, Defendant-Appellant.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** Sat Below: Michael E. Ostrer, J.A.D. Michael J. Haas, J.A.D. Thomas V. Manahan, J.A.D.

BRIEF OF AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION

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SUMMARY OF ARGUMENT

Warrantless searches are presumptively invalid. In order to justify a warrantless search, the State must establish that the search fell within one of the specific and well-established exceptions to the warrant requirement. One such exception recognized by the Court is the "driving documents exception."

The driving documents exception is not universally recognized, and *Amicus* respectfully suggests that New Jersey's reliance on the exception may be unnecessary since the simplification of New Jersey's automobile exception pursuant to *State v. Witt*, which tracks the federal law. Indeed, the United States Supreme Court has never recognized the driving documents exception. In any event, the search at issue in this case plainly fails under this Court's precedent regarding the exception.

As precondition to any search pursuant to the driving documents exception, an officer must first provide the driver with an opportunity to produce his or her driving credentials. Only after the driver has been provided such an opportunity, and is then unable or unwilling to produce the credentials, may an officer conduct a limited search. These searches are further limited to a singular purpose: establishing evidence of vehicle ownership. Moreover, such searches are also limited in scope to those areas where driving credentials are normally stored.

Here, Mr. Terry was not provided an opportunity to produce his credentials, because at the time production was demanded, he was seized outside the vehicle after having been removed at gunpoint on the basis of two minor traffic violations. Thus, the search fails on the basis of the absence of the mandatory precondition alone.

Furthermore, this search was not conducted for the purpose of establishing ownership. Prior to the search, it is undisputed that officers knew: (1) the vehicle was a rental which had not been reported stolen; (2) Mr. Terry's driver's license was valid; (3) Mr. Terry had no outstanding warrants; and (4) Mr. Terry had been found to have no weapons or contraband on his person pursuant to a frisk. Additionally, the search exceeded the authorized scope when the officer looked under the seat of the car, a place where driving credentials are not normally stored.

Finally, the fact Mr. Terry shrugged when asked for proof of insurance and registration must be interpreted in context. To wit, two officers removed him from the vehicle at gunpoint. If Mr. Terry's behavior is viewed as noncompliance rather than as a manifestation of legitimate fear, serious injustice would result. The Court's search and seizure jurisprudence demands consideration of Mr. Terry's fear in the analysis of whether the actions undertaken by law enforcement were reasonable.

Interpreting a shrug and silence by a suspect held at gunpoint as a refusal to comply – despite the terror associated with being held at gunpoint – renders the searching officer's actions unreasonable.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

For the purposes of this appeal, *amicus curiae* American Civil Liberties Union of New Jersey (ACLU-NJ) accepts the facts and procedural history as recounted by the Appellate Division in the unpublished opinion, *State v. Terry*, No. A-4453-13 (App. Div. June 13, 2016), with the following addition: The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief, pursuant to *Rule* 1:13-9.

Amicus restates the following facts for clarity, which are derived from the testimony of Officer Joseph Devlin at the motion to suppress, as well as the Appellate Division opinion drawn from the same testimony.[2] Mr. Terry was driving a white GMC truck on the evening of December 31, 2010, when Officer Joseph Devlin observed Mr. Terry fail to come to a complete stop at an intersection. 2T7-8; *Terry*, slip op. at 2. Officer Devlin turned on the lights and sirens of his marked-police cruiser, with the

[1] For clarity and for the convenience of the Court, the statement of facts and procedural history have been combined here.

[2] The Appellate Division "derive[d] the relevant facts from the testimony elicited at the motion to suppress." *Terry*, slip op. at 2.

intention of issuing a traffic ticket to the driver. 2T8:23-24; *id.* at 9:20-21. Mr. Terry continued driving for approximately one-half mile, changing lanes a few times without signaling, before pulling into a gas station and coming to a stop. *Id.* at 10:2-15; *id.* at 12:19-25. During that time, Officer Devlin was able to call dispatch, which provided him with the following crucial information: (1) the truck was a rental; (2) it had been rented from the Hertz car rental at Newark Airport; and (3) it had not been reported stolen. *Id.* at 11:16; *id.* at 27:6-13.

At the gas station, Officer Devlin positioned his cruiser behind the rental truck while a second cruiser, also reporting to the scene, blocked Mr. Terry in from the front. *Id.* at 13:6-8. Devlin and the other officer both approached the truck, with their weapons drawn and extended towards the driver, from different angles. *Id.* at 13:5-20. Devlin testified he observed only one person in the truck, the driver, who seemed to have "no affect, as us walking up to him with our guns drawn." *Id.* at 14:3-10. At this time, Devlin began "yelling at" Mr. Terry to show his hands. *Id.* at 29:2-6. Mr. Terry remained still and unresponsive, so Officer Devlin opened the truck's door and ordered Mr. Terry out at gunpoint. *Id.* at 2T29:13-24; *id.* at 15:6-10; *id.* at 14:25.

Once Mr. Terry exited vehicle, Officer Devlin and the other officer directed Mr. Terry to stand with his back against the

truck, while Officer Devlin and the other officer held Mr. Terry in a "triangle formation," as the officers stood in "[c]ombat stance," with their weapons trained on Mr. Terry. *Id.* at 15:22-24; *id.* at 16:15-21; *id.* at 30:1-3; *id.* at 31:1-7.

Officer Devlin instructed Mr. Terry to keep his hands out of his pockets then frisked him, and the frisk revealed no weapons or contraband. *Id.* at 16-17; *id.* at 17:9-10. Officer Devlin asked Mr. Terry for his driver's license, which Mr. Terry promptly provided. *Id.* at 17:13-17. Officer Devlin again called dispatch, which confirmed that Mr. Terry's driver's license was valid and that he had no outstanding warrants. *Terry*, slip op. at 3.

"Devlin was [] aware that the truck was not registered to [Mr. Terry]. Nonetheless, Devlin asked [Mr. Terry] for the vehicle registration and insurance card so he could write a ticket for failure to stop and unsafe lane change." *Terry*, slip op. at 3. Mr. Terry did not respond. "When Devlin requested the ownership credentials a second time, [Mr. Terry] shrugged his shoulders." *Id.* at 4. Mr. Terry was never permitted to return to the vehicle, and Officer Devlin did not ask Mr. Terry what he meant by his shrug. 2T32-33; *Terry*, slip op. at 3.

Thereafter, Officer Devlin proceeded to the passenger side of the rental truck, purportedly to search for the credentials for the stated purpose "issu[ing] a Title 39 Summons for failure

to stop and an unsafe lane change." 2T20:15-25; id. at 20:21-22.[3] Devlin testified that neither the insurance nor registration were necessary for issuance of the tickets. *Id.* at 20:21-22; *id.* at 34:9-10; *id.* at 34-35. Inside, Officer Devlin claimed he opened the glove compartment, which he found to be empty, but then saw something white from under the passenger seat reflected in his flashlight.[4] *Id.* at 22-23. Officer Devlin leaned over for a better look under the seat, where he then saw a handgun. *Id.* at 24:1-21. Mr. Terry was arrested, and a search incident to arrest revealed the Hertz rental agreement, which apparently contained proof of registration, in Mr. Terry's jacket pocket. *Terry*, slip op. at 4.

The vehicle was subsequently impounded, and the handgun was seized several days later pursuant to a warrant. The handgun contained six hollow-point bullets.

[3] A video recording introduced at trial shows Devlin was inside the truck for around ninety seconds. 10T83, 91-93; *id.* at 118:4-13.

[4] Devlin testified, "As I was exiting the vehicle to go find – you know, I asked him if he had any paperwork on him. You know, I had a flashlight on and I saw a reflection on the floor, the white – you know, something reflected back in the flashlight." 2T23:6-10. Later, when he bent down, Devlin discovered that the white "something" was the handle of a white handgun. 2T23:11-13; 2T24-25.

ARGUMENT

I. THE DRIVING DOCUMENTS EXCEPTION IS CONSTITUTIONALY SUSPECT.

There is certainly no consensus within search and seizure jurisprudence that law enforcement may search an automobile to secure evidence of the vehicle's ownership, based solely on a driver's failure to produce driving documents *and* without probable cause. However, that is exactly what the controversial driving documents exception allows. While *Amicus* relies on *Keaton* to advance its argument in support of affirmance of the Appellate Division's suppression order, and this Court has made clear its recognition of the exception, *Amicus* is obliged to preface its argument with its concerns regarding the exception, generally.

"[T]he law of search and seizure with respect to automobiles is intolerably confusing. The [United States Supreme] Court apparently cannot agree even on what it has held previously, let alone on how these cases should be decided." *Robbins v. California*, 453 *U.S.* 420, 430 (1981) (Powell, J., concurring). "Much of this difficulty comes from the necessity of applying the general command of the Fourth Amendment to ever-varying facts; more may stem from the often unpalatable consequences of the exclusionary rule, which spur the Court to reduce its analysis to simple mechanical rules so that the

constable has a fighting chance not to blunder." *Ibid*. However, this Court has done its part to reject what it has perceived as undue complexity within the relevant law. *See*, *e.g.*, *State v. Witt*, 223 *N.J.* 409, 414 (2015) (rejecting the "multi-factor exigency formula [a]s too complex and difficult for a reasonable police officer to apply to fast-moving and evolving events that require prompt action").

The touchstone of a valid, warrantless search is probable cause. At the very inception of the automobile exception, written early in our history as a driving nation, the Supreme Court held: "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." *Carroll v. United States*, 267 *U.S.* 132, 149 (1925). Conversely, absent probable cause, most warrantless searches are invalid.[5]

This Court revisited the breadth of such jurisprudence in *Witt*:

> In nearly identical language, Article I, Paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the United

[5] Of course, there are some few, long-recognized exceptions to the warrant requirement that are not dependent upon probable cause but not relevant here, such as consent.

> States Constitution guarantee that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that warrants shall not issue in the absence of "probable cause." Our jurisprudence under both constitutional provisions expresses a preference that police officers secure a warrant before they execute a search. Warrantless searches are permissible only if "justified by one of the 'few specifically established and well-delineated exceptions' to the warrant requirement." One such exception is the automobile exception to the warrant requirement.
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> . . .
>
> The automobile exception to the warrant requirement – as defined by the United States Supreme Court in construing the Fourth Amendment – authorizes a police officer to conduct a warrantless search of a motor vehicle if it is "readily mobile" and the officer has "probable cause" to believe that the vehicle contains contraband or evidence of an offense. Under federal law, probable cause to search a vehicle "alone satisfies the automobile exception to the Fourth Amendment's warrant requirement."
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> [*Witt*, 223 *N.J.* at 421-22 (citations omitted).]

The United States Supreme Court has never recognized any exception to the warrant requirement permitting law enforcement to conduct a warrantless search, limited or otherwise, of an automobile solely on the basis of a driver's failure to present proof of ownership credentials. While, as will be addressed below, certain states including New Jersey have adopted such an

exception, others have rejected it. *See*, *e.g.*, *Commonwealth v. Silva*, 807 *N.E.*2d 170, 173 (Mass. App. Ct. 2004) ("We are not aware of any legal precedent . . . that would hold constitutionally supportable such a police policy for automobile entries and searches to gather ownership documents precedent to towing of a car").

In *Witt*, this Court overruled its decision in *State v. Pena-Flores*, 198 *N.J.* 6 (2009) and thereby nullified the separate exigency requirement for warrantless, roadside searches of automobiles where officers otherwise have probable cause. *Witt*, 223 *N.J.* at 450. The Vermont Supreme Court noted that our pre-*Pena-Flores* absence of an exigency requirement might have been a reason for our separate driving documents exception:

> [O]ther courts have held that, under the traditional automobile exception to the warrant requirement, a driver's failure to produce documentation of ownership may establish a reasonable suspicion that the vehicle is stolen and thereby establish the basis for a limited search of the vehicle in those places, such as the glove compartment or sun visor, where such documents are normally stored. *See*, *e.g.*, *State v. Holmgren*, 282 *N.J. Super.* 212 (App. Div. 1995) (holding that failure to produce registration allows search of vehicle for evidence of ownership "confined to the glove compartment or other area where a registration might normally be kept in a vehicle") (quotations omitted); *State v. Barrett*, 170 *N.J. Super.* 211 (Law Div. 1979) (invalidating search of vehicle for registration where there was "no expectation that any indicia of title would be found in

> the rear of the vehicle") . . . *These cases rely, however, on either the Fourth Amendment or a state equivalent under which exigent circumstances have not been deemed to be an essential element of a warrantless automobile search. As noted, our law is directly to the contrary.*
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> [*State v. Bauder*, 924 *A.*2d 38, 51 n.8 (Vt. 2007)(emphasis added)].

Notably, this Court decided the case central to this dispute, *State v. Keaton*, 222 *N.J.* 438, 442 (2015), just one month before its decision in *Witt*, and it has not revisited the driving documents exception since.

Indeed, not long ago, this Court affirmed *State v. Lark*, whereby the Appellate Division held: "Since *Boykins,* no Supreme Court has allowed a search based solely on a driver's inability to present driving credentials. In every case we examined, the facts supported probable cause to search or arrest. Notably, the search in *Boykins* itself was based on probable cause." *State v. Lark*, 319 *N.J. Super.* 618, 625-26 (App. Div. 1999), *aff'd o.b.*, 163 *N.J.* 294 (2000) (citing *State v. Boykins*, 50 *N.J.* 73, 78 (1967)).

Perhaps, pre-*Witt* and post-*Pena-Flores*, a distinct exception for a limited search to establish ownership was necessary, but *Amicus* respectfully ask if such an exception has a rightful place in our law now. Certainly, if police have probable cause to believe a vehicle is stolen, they may conduct

a full search under *Witt* – it hardly seems onerous to require police wait to search a vehicle for the purpose of establishing ownership until a suspicion of theft rises to the level of probable cause. Surely, probable cause to believe that a vehicle is stolen may result from as little as additional questioning.

In any event, even if this Court upholds the driving documents exception as constitutional, the search at issue here also fails under that exception.

II. THE APPELLATE DIVISION PROPERLY APPLIED THIS COURT'S UNANIMOUS DECISION IN *KEATON* IN HOLDING THAT THE WARRANTLESS SEARCH WAS IMPROPER.

This Court has recognized and clearly defined the driving documents exception to the warrant requirement, and this search plainly violated that precedent.[6]

"Article I, Paragraph 7 of the New Jersey Constitution, like its federal counterpart, protects against 'unreasonable searches and seizures.'" *State v. Bacome*, __ *N.J.* at __ (slip op. at 11) (quoting *N.J. Const.* art. I, ¶ 7; citing *U.S. Const.* amend. IV). "Under our constitutional scheme, the clear

[6] *Amicus* does not argue that the stop was unlawful. "To be lawful, an automobile stop 'must be based on reasonable and articulable suspicion that an offense, including a minor traffic offense, has been or is being committed.'" *Bacome*, __ *N.J.* at __ (2017) (slip op. at 11) (quoting *State v. Carty*, 170 *N.J.* 632, 639-40 (2002)); *see also*, *State v. Locurto*, 157 *N.J.* 463, 470 (1999). Here, the record is clear that Mr. Terry was stopped for failure to come to a complete stop at a traffic sign.

preference is that police officers secure a judicial warrant before executing a search." *State v. Gonzales*, 227 *N.J.* 77, 90 (2016) (quoting *N.J. Const.* art. I, ¶ 7; citing *U.S. Const.* amend. IV). "For that reason, 'a warrantless search is presumptively invalid.'" *Ibid.* (quoting *State v. Edmonds*, 211 *N.J.* 117, 130 (2012)).

"To justify a warrantless search, the State must establish that the search falls into 'one of the "few specifically established and well-delineated exceptions to the warrant requirement."'" *Ibid.* (quoting *Edmonds*, 211 *N.J.* at 130 (quoting *State v. Frankel*, 179 *N.J.* 586, 598, *cert. denied*, 543 *U.S.* 876 (2004))).

One such exception is the "automobile exception," under which this Court has permitted the warrantless search of a vehicle where unforeseeable and spontaneous circumstances give rise to probable cause and there is some degree of exigency. *Pena-Flores*, 198 *N.J.* at 28 (requiring that "exigent circumstances exist under which it is impracticable to obtain a warrant"); *see Witt*, 223 *N.J.* at 423-25, 427, 450 (prospectively overruling this requirement of *Pena-Flores*, and requiring no exigency beyond "the inherent mobility" of the vehicle).[7]

[7] Here, the State does not argue that the search was permissible under the automobile exception, and it is undisputed that the search was not predicated on probable cause.

"[S]eparate and apart from the automobile exception," this Court has recognized another exception permitting a limited warrantless search of a vehicle to uncover proof of ownership or insurance. *Pena-Flores,* 198 *N.J.* at 31.[8] However, in order to conduct such a "limited search," the police are "*required* to provide [the] defendant with the opportunity to present his credentials *before* entering the vehicle." *Keaton*, 222 *N.J.* at 442 (emphasis added). Only after "such an opportunity is presented, and the defendant is unable or unwilling to produce his registration or insurance information, . . . may an officer conduct a search for those credentials." *Id.* at 443.[9]

Under the "driving documents" exception, when a driver is unable or unwilling to produce the relevant driving credentials, after having been provided an opportunity to do so, "the officer may search the car for evidence of ownership." *Id.* at 448

[8] *Amicus* acknowledges that it was not improper for police to ask Mr. Terry for his driving credentials, and that pursuant to *N.J.S.A.* 39:3-29, defendant was required to produce them when requested by a police officer performing his duties. *See also*, *State v. Perlstein*, 206 *N.J. Super.* 246, 253 (App. Div. 1985).

[9] The few jurisdictions that have upheld the exception have relied on New Jersey as the model, providing the following synopsis of our approach. "The state courts of New Jersey have adopted a sagacious approach to the issue: in the event of a traffic stop, a police officer must afford a driver a *reasonable opportunity* to retrieve his registration, but if the driver fails or is unable to do so, the officer may perform a limited search for the paperwork in those areas where it might be found, such as the glove compartment." *United States v. Kelly*, 267 *F. Supp.* 2d 5, 13 (D.D.C. 2003)(emphasis added)(citing *State v. Jones*, 195 *N.J. Super.* 119, 123 (App. Div. 1984)).

(citing *Boykins*, 50 *N.J.* at 77); *accord Pena-Flores* 198 *N.J.* at 31; *State v. Patino*, 83 *N.J.* 1, 12 (1980); *State v. Gammons*, 113 *N.J. Super.* 434, 437 (App. Div.), *aff'd o.b.*, 59 *N.J.* 451 (1971); *State v. Hock*, 54 *N.J.* 526, 533 (1969), *cert. denied*, 399 *U.S.* 930 (1970). This limited exception to the warrant requirement is necessary because, for example, "the inability of a driver to produce driving credentials" may raise "a reasonable suspicion that the vehicle was stolen." *Holmgren*, 282 *N.J. Super.* at 216. Notably, however, the failure to produce credentials "does not constitute probable cause to believe that the vehicle was stolen." *Ibid.*

Moreover, under the driving documents exception, a "search must be reasonable in scope and tailored to the degree of the violation." *Keaton*, 222 *N.J.* at 448-49 (quoting *Patino,* 83 *N.J.* at 12). For example, "[a] search to find the registration would be permissible if confined to the glove compartment or other area where registration might normally be kept in a vehicle." *Id.* at 449 (quoting *Patino,* 83 *N.J.* at 12); *accord Pena-Flores*, 198 *N.J.* at 31 (upholding such a search).

In *Keaton*, an officer "enter[ed] an overturned car to obtain information required to complete an accident report mandated by statute," without first providing the defendant with the opportunity to produce the credentials, and in so doing "observed a handgun and a small amount of marijuana." 222 *N.J.*

at 442. When the officer arrived to the scene of the accident, the defendant-driver had been removed from the overturned vehicle and was receiving on-site medical treatment for cuts to his face. *Id.* at 443. The officer did not ask the defendant for his credentials and instead entered the vehicle in an attempt to personally retrieve the credentials. This Court unanimously held that even the limited search of the vehicle to obtain driving credentials was unlawful, because the officer "was required to provide defendant with the opportunity to present his credentials before entering the vehicle." *Id.* at 442.

The search of Mr. Terry's rental car was similarly unlawful.

A. MR. TERRY WAS NOT GIVEN A REASONABLE OPPORTUNITY TO PRODUCE HIS CREDENTIALS.

Mr. Terry was not provided an opportunity to produce the registration or insurance credentials. As a prerequisite to a limited search under the driving documents exception to the warrant requirement, Officer Devlin was "*required* to provide [the] defendant with the opportunity to present his credentials before entering the vehicle." *Keaton*, 222 *N.J.* at 442 (emphasis added). Here, Mr. Terry was immediately ordered from the vehicle at gunpoint, and Officer Devlin testified that Mr. Terry was not permitted to re-enter the vehicle to retrieve or produce his credentials. *Terry*, slip op. at 12-13. Accordingly, on the basis

of the failure of the State to satisfy that prerequisite alone, the search was unlawful.[10]

The State argues that because Officer Devlin demanded Defendant provide his registration and insurance card, and Mr. Terry shrugged in response and did not immediately produce such documents, Officer Devlin was entitled to conduct a warrantless search pursuant to the driving documents exception. SBr11-12.[11] However, at the time Officer Devlin made this demand, Mr. Terry was detained at gunpoint, had been frisked, and was denied access to the truck. Accordingly, the State's argument ignores the critical precondition to a search pursuant to the driving documents exception.

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[10] The State argues that Mr. Terry did refuse the request for production, because the rental truck's registration packet was later found in Mr. Terry's coat. However, this assertion seems unlikely given Mr. Terry's compliance in providing his valid driver's license. What seems likely is that Mr. Terry forgot that he placed the registration packet in his jacket, or was unaware that the rental agreement contained proof of registration, and thus his shrugs were an indication that he was unsure where the credentials were located. In any event, the analysis of whether a search was objectively reasonable must be based on "facts known to the law enforcement officer at the time of the search." *State v. Bruzzese*, 94 *N.J.* 210, 221 (1983), *cert. denied*, 465 *U.S.* 1030 (1984). "Facts learned by the authorities after the search and seizure occurs will not validate unreasonable intrusions. It is beyond dispute, for example, that '[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.'" *Ibid.* (quoting *Byars v. United States*, 273 *U.S.* 28, 29 (1927)). Thus, the State may not point to later discovery of the rental agreement as support for the reasonableness of Devlin's actions.

[11] "SBr" refers to the State's July 9, 2015, brief on behalf of plaintiff-respondent before the Appellate Division.

Second, as the Appellate Division correctly held, if Mr. Terry was unable to produce credentials, that inability was based solely on the officers' disallowance of any opportunity for Mr. Terry to retrieve them. Officer-created "inability" does not comport with *Keaton*, and such an interpretation of *Keaton* would produce an absurd result, whereby officers would be able to forbid drivers from retrieving and producing credentials in order to achieve *de facto* authority to conduct a warrantless search. *See*, *State v. Bogan*, 200 *N.J.* 61, 77 (2009) (quoting *State v. D'Amour*, 834 *A.*2d 214, 217, 218 (N.H. 2003)) (rejecting an interpretation of the community caretaking exception that "could lead to absurd results").

Thus, the search was invalid because the mandatory prerequisite, providing Mr. Terry with a reasonable, meaningful opportunity to produce credentials, was not met.

B. THE EXCEPTION EXISTS TO ALLOW EXPEDIENT WARRANTLESS SEARCHES WHEN NECESSARY TO ESTABLISH EVIDENCE OF OWNERSHIP; HERE, THERE WAS NO REASONABLE QUESTION AS TO OWNERSHIP.

The search was further invalid because it was not conducted pursuant to the only acceptable purpose under the exception, to seek evidence of the vehicle's ownership.

Officer Devlin entered the vehicle and searched the glove compartment "for the stated purpose of issuing a motor vehicle

summons" for failure to stop and unsafe lane change. *Terry*, slip op. at 4-5. At that time, Officer Devlin knew that: (1) Mr. Terry had produced a valid and accurate driver's license; (2) Mr. Terry had no outstanding warrants; (3) that the vehicle was a rental; and (4) that the vehicle had not been reported stolen.

Searches pursuant to the driving documents exception are limited in purpose. This Court and others have repeatedly held that the driving documents exception exists to permit officers to establish evidence of vehicle ownership. *See e.g.*, *Keaton*, 222 *N.J.* at 448 ("If the vehicle's operator is unable to produce proof of registration, the officer may search the car for evidence of ownership"); *Boykins*, 50 *N.J.* at 77 ("the officer may search the car for evidence of ownership"); *Pena-Flores*, 198 *N.J.* at 31 (quoting *State v. Jones*, 195 *N.J. Super.* 119, 122-23 (1984)) ("'where there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may [conduct a] search [of] the car for evidence of ownership'"); *State v. Hill*, 217 *N.J. Super.* 624, 628, 526 (App. Div. 1987), ("while conducting an investigation of a traffic offense, a policeman may conduct a limited search of the vehicle for evidence of ownership when the operator is unable or unwilling to produce evidence of ownership") *rev'd on other grounds*, 115 *N.J.* 169 (1989); *Gammons*, 113 *N.J. Super.* at 437 ("When defendant could not

produce his registration certificate at the hospital, [the officer] made the perfectly logical deduction that it might still be in the damaged car which the police had the right to search for evidence of ownership"); *United States v. Kelly*, 267 *F. Supp.* 2d 5, 13 (D.D.C. 2003) (quoting Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.4(d) (3d ed. 1996))("in certain unusual circumstances, 'it is reasonable for the police to make a limited search of a vehicle in an effort to determine ownership.'"); *State v. Taras*, 504 *P.*2d 548, 552 (Ariz. Ct. App. 1973) ("if a driver is unable to produce proof of registration, the officer may conduct a limited search of the car for evidence of automobile ownership"); *United States v. Ferri*, 357 *F. Supp.* 487, 490 (W.D. Wis. 1973) (analogizing to *Harris v. United States*, 390 *U.S.* 234 (1968) in holding that such searches are acceptable, because "determining the ownership of a car, like protecting it from the rain, is a normal incident of seizure"); *United States v. Lata*, 2004 *DNH* 63 (D. N. H. 2004) (quoting Wayne R. LaFave, Search and Seizure § 7.4(d) (3d ed. 1996) ("if an officer has probable cause to believe that a vehicle has been the subject of . . . theft, he may make a limited entry and investigation . . . of those areas he reasonably believes might contain evidence of ownership").

Indeed, in Wayne R. LaFave, Search and Seizure (5th ed. 2005), the basis for what New Jersey calls the "driving

documents exception" is found under § 7.4(d), aptly entitled "Determining ownership of car." Therein, LaFave explains:

> *Assuming good reason to determine the ownership of the car* . . . if the driver has been given an opportunity to produce proof of registration but he is unable to do so, and even if he asserts that there is no such proof inside the car, the officer is not required to accept such an assertion at face value, at least when his 'previous conduct would . . . cast doubt upon his veracity'; at that point, the officer may look for registration papers 'on the dashboard, sun visor and steering column' and, if not found in those places or seen in plain view, in 'the glove compartment,' all 'places where it may be reasonably found.'
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> [*Id.* at 870-71 (citation omitted).]

Additionally, "[s]ometimes it will be reasonable for the police to search an unoccupied vehicle for evidence of ownership." *Id.* at 871-72. "'A police officer has the right to investigate vehicles abandoned along public highways and in doing so is permitted to undertake a limited search for a certification of registration for the vehicle [in] those areas of a vehicle where is would reasonably be expected that such a certification of registration might be found.'" *Ibid.* (quoting *Muegel v. State*, 272 *N.E.*2d 617 (Ind. 1971); *see also*, *People v. Grubb*, 480 *P.*2 100 (Cal. 1965)(where a "car was apparently abandoned at night," "was parked on the wrong side of the road," and "protruded into the . . . highway . . . creat[ing] a hazard," the facts heightened the suspicion that the vehicle had

been stolen and authorized officers to conduct a limited search for title and registration), *but see*, *Shum v. State*, 621 *P.*2d 1114 (Nev. 1981) (where a car parked in the emergency lane of the highway that had not been part of an accident and was not obstructing traffic did not permit officers to conduct such a warrantless search).[12]

Indeed, in a great many cases upholding the driving documents exception, the factual circumstances have exacerbated the question of ownership. *See*, *e.g.*, *Pena-Flores*, 198 *N.J.* at 16, 31 (because dispatch confirmed the driver had given a false name, and where the out-of-state license plate was registered to a different vehicle, the officer "as entitled, separate and apart from the automobile exception, to look into the areas in the vehicle in which evidence of ownership might be expected to be found"); *Hock*, 54 *N.J.* at 533 (because "no registration certificate . . . was produced, and it appeared that the license plates on the car related to a different vehicle" then "[s]earch of the vehicle for evidence of ownership could have been made immediately at the scene"); *see also State v. Hayburn*, 171 *N.J. Super.* 390, 394-95 (App. Div. 1979), *certif. denied*, 84 *N.J.* 397 (1980) (explaining that cases upholding searches pursuant to the

[12] As noted in Point I, *supra*, while the driving documents exception has been recognized by several courts, including this one, the United States Supreme Court has never recognized that the Fourth Amendment provides for such an exception.

exception "invariably have other elements that serve to justify the search").[13]

Here, there were no additional factual circumstances that contributed to a reasonable belief the vehicle was stolen. Instead, the facts known by Officer Devlin at the time of the search established ownership and revealed the rental vehicle had not been reported stolen.

The State argues that Mr. Terry's unresponsiveness and shrug when asked for the credentials "alone gave rise to at least a reasonable suspicion that the car was stolen, which in turn allowed the officer to search the vehicle's glove compartment for proof of ownership." SBr11. However, in making this assertion, the State disregards the aforementioned facts

[13] The *Hayburn* court noted that the cases relied on in *Bokins*, the apparent genesis of the driving documents exception in New Jersey, *People v. Prochnau*, 59 *Cal. Rptr.* 265 (D. Ct. App. 1967), and *Draper v. State*, 265 *F. Supp.* 718 (D. Md. 1967), demonstrate "other elements that serve to justify the search." *Hayburn*, 171 *N.J. Super.* at 394. For example, *Prochnau* involved the search of an already impounded vehicle, impounded after the driver had been arrested for a parole violation, whereby the warrant indicated that the defendant was armed and in possession of drugs with intent to sell, and the officer required certain information from the credentials to complete a tow form. *Id*. at 394-95. "In *Draper . . .* defendant produced a registration in a name other than his own, but said he had no driver's license. He was arrested and taken to the sheriff's office so that he could post bail, but the car was left at the scene. At the sheriff's office defendant said he had no identification and that he had no hope of raising bail. As a result, the police went back to the scene to secure the car." *Id.* at 395. "In these circumstances the search was upheld." *Ibid.*

that made any such suspicion objectively unreasonable,[14] as well as Officer Devlin's own testimony that he did not undertake the search for that reason. 2T20:15-25.

Officer Devlin did not testify that he searched the glove compartment based on a suspicion that the vehicle was stolen; he was clear that he sought the credentials – though admittedly unnecessary – for the purpose of issuing two minor traffic citations. *Id.* at 20:21-22; *id.* at 34:9-10; *id.* at 34-35. While the State alleges Officer Devlin had a reasonable suspicion that the vehicle was stolen based on Mr. Terry's one minute, or one-half mile, of driving before pulling over, what matters is what Officer Devlin knew and reasonably suspected at the time of the search. "[T]he basic test under both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7, of the New Jersey Constitution is the same: was the conduct objectively reasonable in light of 'the facts known to the law enforcement officer at the time of the search.'" *State v. Handy*, 206 *N.J.* 39, 46-47 (2011) (quoting *Bruzzese*, 94 *N.J.* at 221). Here, it is undisputed that by the time Officer Devlin conducted the search, dispatch had advised him that the rental truck was *not* reported

[14] "[T]he proper inquiry for determining the constitutionality of a search-and-seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent." *Bruzzese*, 94 *N.J.* at 219.

stolen, so any initial suspicion was by then assuaged and no longer reasonable. And again, Officer Devlin's own testimony reveals that he had no such suspicion at the only *relevant time*, reasonable or otherwise, and sought only to issue the traffic tickets. 2T20:21-22; *id.* at 34:9-11; *id.* at 34-35.

Because it is undisputed that the search was not conducted for the required purpose of establishing ownership, where ownership was previously established and there was no reasonable suspicion that the vehicle was stolen, the search was invalid.

C. THIS SEARCH EXCEEDED THE PERMISSIBLE SCOPE.

Finally, the search was further invalid because it was neither reasonable in scope nor tailored to the degree of the violation. *Keaton*, 222 *N.J.* at 448-49.

Officer Devlin exceeded the permissible scope of a search pursuant to the driving documents exception when he bent down to look under the passenger seat. "'[A] search to find the registration would be permissible if confined to the glove compartment or other area where a registration might normally be kept in a vehicle.'" *Patino*, 83 *N.J.* at 12 (quoting *Barrett,* 170 *N.J. Super.* at 215; *see also Pena*-Flores, 198 *N.J.* at 31; *Boykins*, 50 *N.J.* at 77; *Hayburn,* 171 *N.J. Super.* at 394-95.

Here, video of the incident reveals that Officer Devlin was inside the vehicle for approximately ninety seconds, far longer

than what would be necessary to look inside an "empty" glove compartment. 10T118:4-13. He testified that in so doing, he saw something reflected in his flashlight from under the seat, so he bent down and looked under the seat. 2T22-23. In bending down and looking under the seat, Officer Devlin plainly exceeded the permissible scope of such a search. Furthermore, the search was not "tailored to the degree of the [traffic] violation[s]." *Keaton*, 222 *N.J.* at 442. Therefore, the search cannot be justified by the driving documents exception.

III. MR. TERRY'S ALLEGED UNRESPONSIVENESS AND SHRUG SHOULD NOT BE INTERPRETED AS UNWILLINGNESS TO PRODUCE CREDENTIALS, AND NEW JERSEY JURISPRUDENCE REQUIRES HIS FEAR BE TAKEN INTO ACCOUNT.

The factual circumstances surrounding the request for the rental truck's credentials are critically important. Mr. Terry is a young, Black man who was stopped on the basis of two minor traffic violations; during the course of that traffic stop, two police cruisers blocked his vehicle in at both ends and Mr. Terry was ordered from the vehicle at gunpoint. At the time Mr. Terry was ordered from the truck, the arresting officers knew the vehicle was a rental that had not been reported stolen. At the time of the search, the officers had determined that the driver's license Mr. Terry had produced was valid and accurate and that Mr. Terry had no outstanding warrants. Officer Devlin testified that his intention in entering the vehicle was to

gather credentials for the singular purpose of issuing two traffic tickets, despite his acknowledgement that neither insurance nor registration was necessary in issuance of the tickets, particularly because the truck was a rental. Furthermore, Devlin had no reasonable suspicion the vehicle was stolen, nor did he have probable cause to search the vehicle on any other basis. These facts, when taken together, matter a great deal.

Amicus has often articulated before this Court the broader cultural contexts at the nexus of race, fear, and use of force by law enforcement;[15] moreover, the Court has independently demonstrated its awareness of such contexts.[16] However, it bears

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[15] *See*, *e.g.*, *Amicus'* submissions in *Bacome*, __ *N.J.* __ (2017) and *State v. S.S.*, 226 *N.J.* 207 (2016) (granting leave to appeal).

[16] Indeed, for over a quarter of a century, this Court has acknowledged, "[t]hat some city residents may not feel entirely comfortable in the presence of some, if not all, police is regrettable but true." *State v. Tucker*, 136 *N.J.* 158, 168-69 (1994). In *Tucker*, this Court held that, in light of the fear that some suspects feel when interacting with law enforcement, flight from an approaching officer, absent some other indicia of criminality, was an insufficient basis for the articulable suspicion needed to justify defendant's seizure. *Id.* at 169-70. Indeed, this Court declined to abide by United States Supreme Court dictum, rejecting bald reliance on the saying that, "'"[t]he wicked flee when no man pursueth."'" *Id.* at 169 (quoting *California v. Hodari D.*, 499 *U.S.* 621, 623 n.1 (1991) (quoting *Proverbs* 28:1)). In *State v. Maryland*, this Court further acknowledged the scholarship on race and policing when it ordered the suppression of evidence seized during a stop predicated on racial profiling. *See State v. Maryland*, 167 *N.J.* 471, 485-86 (2001) (citing Carl J. Schifferle, Comment, *After*

repeating that when a young, Black man is ordered from his vehicle at gunpoint on suspicion of a traffic violation, it is reasonable for an officer to assume the suspect is afraid. "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*, __ U.S. __, __, 136 *S. Ct.* 2056, 2070 (2016) (Sotomayor, J., dissenting (citing, W.E.B. DuBois, *The Souls of Black Folk* (1903); J. Baldwin, *The Fire Next Time* (1963); T. Coates, *Between the World and Me* (2015)).

"Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but, with or without justification, believes that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence." *Illinois v. Wardlow*, 528 *U.S.* 119, 132 (2000) (Stevens. J., concurring in part and dissenting in part). "Moreover, these concerns and fears are known to the police officers themselves, and are validated by law enforcement

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Whren v. United States: Applying the Equal Protection Clause to Racially Discriminatory Enforcement of the Law, 2 MICH. L. & POL'Y REV. 159, 168 (1997); *and* Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect,* 93 YALE L.J. 214, 241 (1983)).

investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient." *Id.* at 134-35.

Indeed, Justice Stevens cited our former Attorney General (and, later, Associate Justice of this Court) as support:

> New Jersey's Attorney General, in a recent investigation into allegations of racial profiling on the New Jersey Turnpike, concluded that "minority motorists have been treated differently [by New Jersey State Troopers] than non-minority motorists during the course of traffic stops on the New Jersey Turnpike." "The problem of disparate treatment is real -- not imagined," declared the Attorney General. Not surprisingly, the report concluded that this disparate treatment "*engenders feelings of fear,* resentment, hostility, and mistrust by minority citizens."
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> [*Id.* at 133 n.10 (emphasis added) (citations omitted).]

Other courts have also expounded upon this unfortunate reality and noted its relevance in analyzing the reasonableness of police action. "[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department report documenting a pattern of racial profiling of black males in the city of Boston." *Commonwealth v. Warren*, 58 *N.E.*3d 333, 342

(Mass. 2016) (citing *Boston Police Commissioner Announces Field Interrogation and Observation (FIO) Study Results*, BPD NEWS: THE OFFICIAL WEBSITE OF THE BOSTON POLICE DEPARTMENT, http://bpdnews.com/news/2014/10/8/boston-police-commissioner-announces-field-interrogation-and-observation-fio-study-results). "[T]he finding that black males in Boston are disproportionately and repeatedly targeted for FIO encounters suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity." *Ibid*; *see also*, *State v. Edmonds*, 145 *A.3d* 861, 889-91 (Conn. 2016) (Rogers, C.J., concurring) ("[s]uspicionless stops are not only a violation of an individual's constitutional rights, they often breed fear and distrust toward police, which, in my view, is an additional unacceptable burden to place on the shoulders of citizens living in high crime areas."); *State v. Hicks*, 488 *N.W.2d* 359, 364 (Neb. 1992) (per curiam) (citing *In re D.J.*, 532 *A.2d* 138 (D.C. App. 1987)) ("[A]n intense desire to avoid contact with the police [is not] necessarily indicative of a guilty conscience. Fear or dislike of authority, distaste for police officers based upon past experience, exaggerated fears of police brutality or

harassment, and fear of unjust arrest are all legitimate motivations for avoiding the police.")

While *Amicus* does not suggest that the use of force, here, was dispositive of the legality of the search, the likely fear it inspired, particularly considering Mr. Terry's age and race, is relevant. However, regardless of race or gender, being ordered to exit a vehicle at gunpoint is likely to illicit fear in any suspect.

An overwhelming amount of data and scholarship bolster this point. "Young black males in recent years were at a far greater risk of being shot dead by police than their white counterparts – 21 times greater, according to a ProPublica analysis of federally collected data on fatal police shootings." Ryan Gabrielson, Ryann Grochowski Jones, Eric Sagara, *Deadly Force, in Black and White*, PROPUBLICA: JOURNALISM IN THE PUBLIC INTEREST (October 10, 2014) https://www.propublica.org/article/deadly-force-in-black-and-white. Based on "[t]he 1,217 deadly police shootings from 2010 to 2012 captured in the federal data show that blacks, age 15 to 19, were killed at a rate of 31.17 per million, while just 1.47 per million white males in that age range died at the hands of police." *Ibid.* Unsurprisingly, research has shown that minority groups have a greater fear of violence at the hands of law enforcement:

> Blacks are more likely to say police violence against the public in the United States is a very or extremely serious problem (73 percent) than are whites (20 percent). Just about half, 51 percent, of Hispanics describe police violence as a very or extremely serious problem . . . Similarly, 85 percent of blacks think police are more likely to use force against a black person in most communities, compared with 63 percent of Hispanics and 39 percent of whites. Nearly as many, 71 percent, of blacks say police in their own community are more likely to use force against a black person compared with 47 percent of Hispanics and 24 percent of whites.
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> [*Law Enforcement and Violence: The Divide between Black and White Americans*, THE ASSOCIATE PRESS-NATIONAL OPINIONS RESEARCH CENTER ("NORC"): CENTER FOR PUBLIC AFFAIRS RESEARCH (Last Updated 2017), http://www.apnorc.org/projects/Pages/HTML%20Reports/law-enforcement-and-violence-the-divide-between-black-and-white-americans 0803-9759.aspx ("The nationwide poll was collected July 17 to 19, 2015 . . . with 1,223 adults, including 311 blacks who were sampled at a higher rate than their proportion of the population for reasons of analysis.")].

It is not only increasing media coverage of extra-judicial killings of young Black men that contribute to this pervasive fear. "Countless incidents that do not result in death . . . occur every day and escape public notice. But they contribute to a well-grounded fear among minorities that the police will assume the worst about them, and on a dark street corner that assumption can be fatal." Wade Henderson, *Justice on Trial: Racial Disparities in the American Criminal Justice System* 9

(2000). "[B]lack and Hispanic parents say they talk to their children about dealing with the police. It is just a matter of time, they tell them, before they encounter a police officer who sees dark skin as synonymous with crime." Felicia R. Lee, *Young and in Fear of the Police; Parents Teach Children How to Deal with Officers' Bias*, NEW YORK TIMES (October 23, 1997), available at: http://www.nytimes.com/1997/10/23/nyregion/young-fear-police-parents-teach-children-deal-with-officers-bias.html.

Indeed, the *Times* has reported how Black and Hispanic parents "coach [their children] on how to behave [when interacting with police]: don't hang out in crowds, be polite, don't make any sudden moves, carry identification, ask to make a phone call, refuse to answer incriminating questions." *Ibid.*[17] In one journalist's personal account of this phenomenon, she explained her own reluctance to call police after hearing shots fired near her home:

> [C]alling the police posed considerable risks. It carried the very real possibility of inviting disrespect, even physical harm. We had seen witnesses treated like suspects, and knew how quickly black people calling

[17] Furthermore, *Amicus*, through its "Know Your Rights" trainings and public education materials, provides the public with similar advice. For example, *Amicus* teaches people that, if stopped by police, they should: "Stay calm. Don't run. Don't argue, resist or obstruct the police, even if you are innocent or police are violating your rights. Keep your hands where police can see them." *If You Are Stopped for Questioning,* AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/know-your-rights/what-do-if-youre-stopped-police-immigration-agents-or-fbi.

> the police for help could wind up cuffed in the back of a squad car. Some of us knew of black professionals who'd had guns drawn on them for no reason.
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> [Nikole Hannah-Jones, *Yes, Black America Fears the Police. Here's Why*, PROPUBLICA: JOURNALISM IN THE PUBLIC INTEREST (March 4, 2015), available at: https://www.propublica.org/article/yes-black-america-fears-the-police-heres-why.]

Thus, it was only reasonable to interpret Mr. Terry's behavior, which Officer Devlin described as having "no affect," unresponsive, silent, and including a shrug, as the result of fear. 2T14:3-10. For this Court to articulate the role of race in that analysis would be neither radical, a departure from past precedent, nor without significant empirical support.

The State has argued that Mr. Terry was "unresponsive to the officer's requests" for his additional credentials "and merely shrugged them off" in an attempt to characterize Mr. Terry's behavior as a refusal to comply with Officer Devlin's demands (SBr11), but that assertion absent any acknowledgement of the context under which the shrug and silence arose is preposterous and demeans the experience of many New Jerseyans.

As the Court held in *Ravotto*, a "[d]efendant's fear is relevant to our analysis. A suspect's reaction to law enforcement officials is part of the fact pattern considered by a reviewing court when it determines whether police behavior was

objectively reasonable." *State v. Ravotto*, 169 *N.J.* 227, 241 (2001) (citing *Wardlow*, 528 *U.S.* at 124).

Here, Officer Devlin's demanded that Mr. Terry produce registration and insurance for a vehicle known to be a rental, after Mr. Terry had been removed from the vehicle at gunpoint. So, as a preliminary matter, Officer Devlin's belief that Mr. Terry had been provided an opportunity to produce his credentials was objectively unreasonable. Additionally, Mr. Terry's shrug could not, in this context and without follow up, provide a reasonable basis for the proposition that he was unwilling to comply. Indeed, he had willingly turned over his valid driver's license. Finally, *Amicus* contends the only objectively reasonable interpretation of Mr. Terry's quiet, affectless stillness was that he was afraid. For all of these reasons and those aforementioned herein, Officer Devlin's actions were objectively unreasonable.

Accordingly, *Amicus* respectfully cautions against a finding that it was reasonable to interpret Mr. Terry's shrug as tantamount to a refusal or unwillingness to proffer credentials under *Keaton*, 222 *N.J.* at 443.

CONCLUSION

Amicus hopes that this Court will repudiate the driving documents exception to the warrant requirement. However, if this Court does not, this case then turns squarely on this Court's

unanimous decision in *Keaton*. Mr. Terry was not provided a reasonable opportunity to produce his own credentials, given the extreme circumstances of his seizure. Additionally, the search was not conducted for the purpose of establishing ownership of the vehicle, exceeded the limited permissible scope of such a search, and was not tailored in any way to the degree of the traffic violation.

Finally, Mr. Terry's shrug cannot reasonably be construed as a refusal or unwillingness to comply with the request for driving documents. Even if a shrug might otherwise provide indicia of refusal or unwillingness, the analysis of the reasonableness of Officer Devlin's actions must account for a suspect's fear. In light of the inherent fear of being held at gunpoint, Devlin's interpretation of the shrug was not objectively reasonable.

Accordingly, the suppression of the evidence should be affirmed.

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