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April 25, 2018

VIA ELECTRONIC FILING

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: *State v. Alessi*
Docket No. 079255; App. Div. Docket No. A-2722-14T3

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), kindly accept this letter brief on behalf of *Amicus Curiae* American Civil Liberties Union of New Jersey.

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PRELIMINARY STATEMENT

Donna Alessi did not want to talk to Detective Donaruma when he showed up at her door, so he waited for her to begin driving to work and used his emergency lights to pull her over – not because she had committed a traffic offense, and not because he suspected she was about to commit a crime, but because in this convenient manner he could override her will. The State now asks the Court to shut its eyes to this glaring constitutional violation.

Despite a thorough record evidencing the unconstitutionality of the stop, the State claims that *State v. Witt*, 223 *N.J.* 409 (2015), barred the Appellate Division from considering the stop's Fourth Amendment implications because they had not been raised below. This argument misconstrues *Witt*, which is best understood as a fact-bound holding, interpreting – not replacing – the "plain error" rule. (Point I, A). This Court in *Witt* recognized that a reviewing court is ill-positioned to answer a constitutional question where the record lacks information and testimony that would shed light on it. That finding did not alter the jurisprudential status quo. It simply reinforced the familiar rule that to reverse for an issue presented first on appeal, an appellate court must determine that the failure to address the issue below was plain error capable of producing an unjust result;

a court cannot determine that such an error exists where the record contains insufficient facts to assess the belatedly raised matter.

The fulsome record here, however, leaves no doubt that Detective Donaruma's stop of Alessi was unlawful and that admitting the statements Alessi made in connection with the stop constituted plain error. (Point I, B). Detective Donaruma testified that he pulled over Alessi for the sole purpose of speaking with her as a witness in his investigation of Alessi's ex-boyfriend. In other words, he did not reasonably suspect that Alessi was engaged in, or about to engage in, criminal activity. No kind or quantity of missing testimony - consistent with that statement – could have salvaged the stop's constitutionality.

Even assuming every feature of the record the State claims it was denied the opportunity to make, the stop would not pass constitutional muster. (Point I, C). Had it been on notice of the defendant's later-raised Fourth Amendment challenge at the time of the suppression hearing, the State suggests, it would have developed more testimony regarding Alessi's alleged wrongdoing. But even if Detective Donaruma could have shown that he possessed particularized suspicion at the time of the stop that Alessi had committed the burglary with which she was ultimately charged, Detective Donaruma would still not have been justified in pulling her over. That alleged burglary had long concluded when Alessi was stopped. It involved no violence nor indicia that Alessi was

dangerous. Alessi's whereabouts were not unknown, she was not thought to be a flight risk, and she was not in any sense "wanted." In short, the stop served no law enforcement interest in crime prevention adequate to overcome Alessi's interest in security against the government's intrusion.

Detective Donaruma attempted to use a motor-vehicle stop to make an end-run around Alessi's constitutional rights. The record clearly and fully demonstrates as much and the State could not have defended the stop no matter how much testimony on the subject it proffered. To apply *Witt* here to draw a curtain of legal formalism over this constitutional violation would be to disserve its spirit and the cause of justice.

STATEMENT OF FACTS/PROCEDURAL HISTORY

Amicus curiae, the American Civil Liberties Union of New Jersey, accepts the facts and procedural history set forth by the Appellate Division in *State v. Alessi*, No. A-2722-14T3, 2017 *N.J. Super. Unpub. LEXIS* 796 (App. Div. Mar. 31, 2017) and by Defendant in her brief before the Appellate Division, highlighting the following for clarity:

On June 18, 2017, Donna Alessi went to retrieve a few personal items from her ex-boyfriend Philip Izzo's parked truck. Def. Br. at 11.[1] She also took from the truck documents copied from the

[1] "Def. Br." refers to the Defendant's brief to the Appellate Division in this case. *Amicus* cites to the brief and to the

Raritan Township personnel file of Izzo’s colleague, Mark Fornaciari. *Id.* Izzo had removed the documents from the Township office to prepare his defense to Fornaciari’s whistleblower claim against him and the Township. *Id.* at 9.

On July 3, 2017, Alessi mailed the documents to Fornaciari. *Id.* at 12. The documents did not arrive to him but to a Township secretary whom Alessi had listed as the return addressee. *Id.* at 13. Concerned that the documents had been stolen, the Township administrator contacted the Raritan Township Police Department, which opened an investigation of Izzo. *Id.* at 14.

The investigation led to the discovery of Izzo’s relationship with Alessi. *Id.* at 16. Detectives then matched Alessi’s driver’s license photo to surveillance footage from the post office at the time the documents were mailed. *Id.* Detective Donaruma went to Alessi’s home on a few occasions to speak with her and ascertain how she acquired the documents but on each occasion she was away or did not respond. *Id.* at 16-17.

On July 30, 2017 – 42 days after Alessi took the documents from Izzo’s truck days and 27 days after she mailed them – Detective Donaruma found Alessi at home. *Id.* at 17. Alessi declined to answer the door for Detective Donaruma, so he went back to his car and waited for Alessi to leave. *Id.*

Appellate Division opinion because *amicus* has not been provided the voluminous underlying record.

When she began driving to work, Detective Donaruma activated his emergency lights, forcing her to pull over. *Id.* His sole purpose in making the stop was to question Alessi in furtherance of the Izzo investigation. *Alessi*, 2017 *N.J. Super. Unpub. LEXIS* 796 at *5. All that Detective Donaruma knew at this point was that Alessi had mailed the file – he did not know why or at whose behest, if anyone's. *Id.* at 6-7. And notably, he did not know that Alessi had removed the file from Izzo's truck. *Id.* at 7. He proceeded to question Alessi for over an hour. Def. Br. at 26.

At the *Rule* 104 hearing, Detective Donaruma testified that he activated his emergency lights and pulled Alessi over because he had been unsuccessful in his attempts to contact her at home. *Id.* at 33. He emphasized that Alessi was not the target of his investigation. *Id.*

Finding that Alessi's Fifth Amendment rights had not been violated, the trial court admitted the statements Alessi made in connection with the stop and a jury convicted her of burglary, filing false reports, and hindering. *Alessi*, 2017 *N.J. Super. Unpub. LEXIS* 796 at *1. The Appellate Division reversed the latter two charges, holding on Fourth Amendment grounds not raised below that Alessi's statements were provided after an unconstitutional stop and seizure. *Id.*

ARGUMENT

I. THE APPELLATE DIVISION PROPERLY FOUND THAT THE SUSPICIONLESS MOTOR-VEHICLE STOP OF DEFENDANT ALESSI WAS UNCONSTITUTIONAL.

A. *State v. Witt* Does Not Preclude an Appellate Court from Considering the Constitutionality of a Stop for the First Time on Review Where the Record Contains Sufficient Facts to Conduct the Constitutional Analysis.

State v. Witt, 223 *N.J.* 409 (2015), is a fact-bound holding that elucidated but did not supplant the plain-error standard for reviewing issues raised first on appeal. In general, appellate courts enjoy "the inherent authority to 'notice plain error not brought to the attention of the trial court[,]' provided it is 'in the interests of justice' to do so." *State v. Robinson*, 200 *N.J.* 1, 20 (2009)(quoting *R.* 2:10-2). This principle, known as the "plain error" rule, empowers appellate courts to reverse based on such an error where it was "clearly capable of producing an unjust result." *R.* 2:10-2. The appellate court must order a new trial if it finds a reasonable doubt as to whether the error led a jury to a result it might not otherwise have reached. *State v. Macon*, 57 *N.J.* 325, 336 (1971).

The State seems to suggest that, following *Witt*, appellate courts may no longer conduct a "plain error" analysis but must instead categorically refuse to consider an issue not raised in a pretrial motion to suppress. It calls this notion "the *Witt* rule."

See St. Pet. at 13.[2] But *Witt* created no such rule. Rather, *Witt* was an application – not abrogation – of the well-established "plain error" standard.

In *Witt*, police initiated a stop of the defendant's car after he failed to dim his high beams. 223 *N.J.* at 416. A warrantless search of the car turned up a handgun. *Id.* The defendant successfully moved to suppress the gun, arguing that the police could point to no exigent circumstances to justify the warrantless search. *Id.* He did not challenge the validity of the motor-vehicle stop. The Appellate Division affirmed the suppression based on the absence of exigency and also accepted the defendant's argument, raised for the first time on appeal, that the police officer did not have reasonable and articulable suspicion to stop the defendant's car. *State v. Witt*, 435 *N.J. Super*. 608, 610–11, 614-16 (App. Div. 2014), *aff'd in part* and *rev'd in part*, 223 *N.J.* 409 (2015).

This Court held that the Appellate Division should have declined to consider the validity of the stop. *Witt,* 223 *N.J.* at 419. State law only requires drivers to dim their high beams when approaching an oncoming vehicle within five hundred feet. *Id.* at 418 (citing *N.J.S.A.* 39:3-60). The record before the Appellate Division, however, did not disclose whether the police officer was

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[2] "St. Pet." refers to the Petition for Certification on behalf of the State of New Jersey in this case.

in his car facing the defendant's vehicle, whether the officer's vehicle was in operation, on which side of the road the officer's vehicle was positioned, or whether any other cars were travelling in the opposite lane at the time of the stop. *Id.* at 418-19. This missing information – which might have been elicited through "a few questions" - left the record "barren of facts that would shed light on [the validity of the stop]." *Id.* at 419, 418. As such, "*under the circumstances* . . . the lawfulness of the stop was not preserved for appellate review." *Id.* at 419 (emphasis added).

This holding did not break new ground; it did not install a "*Witt* rule." Rather, it reinforced an understanding of the "plain error" rule that has been embedded in this Court's jurisprudence since at least 1971. It is an understanding so fundamental as to be virtually axiomatic: an appellate court cannot notice a constitutional error on a record incomplete and insufficient to resolve the constitutional question. "In other words, if upon a timely objection a different or further record might have been made at the trial level, and the claim of error might thereby have been dissipated, we will neither reverse on an assumption that there was error nor remand the matter to explore that possibility." *Macon*, 57 *N.J.* at 333. Quite simply, "a claim of error will not be entertained unless it is perfectly clear that there actually was error." *Id.* *Witt* tells us nothing more and nothing less.

Indeed, just last year this Court confirmed that *Witt* does not bar an appellate court from considering an issue not raised in a pretrial hearing where the record contains information sufficient to resolve it. *State v. Scott*, 229 *N.J*. 469, 480 (2017). What's more, it did so *at the State's urging*. In *State v. Scott*, the Appellate Division accepted a theory adopted by the State for the first time on appeal. The State argued that the panel's consideration of the theory was "consonant with *Witt*" because there was "a fulsome record sufficient to resolve the legal issue on appeal." *Scott*, 229 *N.J.* at 478. The Court agreed, reasoning that it was "appropriate to review" the argument because it did not "find the current record 'barren of facts that would shed light on [the] issue.'" *Id.* (quoting *Witt*, 223 *N.J.* at 418).

The Court also pointed out that a blanket prohibition on the consideration of issues raised first on appeal would, in certain instances, perpetuate one of the chief evils at which *Witt* was aimed: the needless protraction of pretrial hearings. The Court in *Witt* worried that the specter of belated challenges would compel prosecutors to disprove "shadow issues." *Witt*, 223 *N.J.* at 418. But where such "shadow issues" rest on an overlapping record, the coin is flipped. In *Scott*, for example, requiring "the State to submit every potential justification for the admission of evidence in fear that the reversal of one explanation on appeal would deny it the benefit of other reasons for admissibility" would lead to

"an enormous waste of judicial resources." 229 *N.J.* at 480. Likewise, here, requiring Alessi to submit Fourth Amendment grounds for the exclusion of her statements on top of the Fifth Amendment grounds she presented – or else permanently waive the argument – would have needlessly lengthened and complicated the suppression hearing.

As the State itself has asserted, *Witt* stands for the limited and sensible proposition that an appellate court cannot recognize a "plain error" on a record lacking relevant facts. Where a record contains sufficient information to allow an appellate court to identify an issue raised first on appeal that is clearly capable of producing an unjust result, nothing in *Witt* prevents the court from doing so. Indeed, it must.

B. The Record Here Amply and Unequivocally Evidences the Unconstitutionality of the Motor-Vehicle Stop of Alessi.

Unlike the "barren" record in *Witt*, the record in this case provided the Appellate Division more than sufficient information to find that the motor-vehicle stop of Alessi was unconstitutional.

Under both the Fourth Amendment to the United States Constitution and Article I, Paragraph 7 of our State Constitution, searches and seizures conducted without warrants issued upon probable cause are presumptively unreasonable and, as such, invalid. *State v. Pineiro,* 181 *N.J.* 13, 19 (2004). 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. Maryland*, 167 *N.J.* 471, 482 (2001).

A warrantless "investigatory stop," which permits law enforcement officers to temporarily detain a person for questioning, "involves a seizure in the constitutional sense." *Id.* at 486. It is lawful only if the officer who initiates it has "a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." *State v. Stovall*, 170 *N.J.* 346, 356 (2002) (citing *Terry v. Ohio*, 392 *U.S.* 1 (1968)). In the context of a motor-vehicle stop – a type of investigatory stop – "a police officer must have a reasonable and articulable suspicion that the driver of a vehicle, or its occupants, is committing a motor-vehicle violation or a criminal or disorderly persons offense to justify a stop." *State v. Scriven*, 226 *N.J.* 20, 33–34 (2016).

Assessing whether an officer possessed reasonable suspicion to justify a stop is often a challenging task; here it is not. The State does not allege that Alessi had "just engaged in" or was "about to engage in" any criminal activity at the time of the stop. It does not allege that Alessi had committed a motor-vehicle violation. As the State recounts, "Detective Donaruma decided to activate his patrol lights [to pull her over] because he and other Officers from his department had gone to defendant's home on

multiple occasions without success and wanted to talk to her about the investigation against Mr. Izzo." St. Pet. at 9. In other words, Detective Donaruma stopped Alessi (1) because he was impatient and (2) he wanted to speak with her about someone else's possible wrongdoing. These are not the ingredients of reasonable suspicion.

The State protests that only three pages of the suppression hearing testimony concerned Detective Donaruma's reason for the stop, while 91 pages addressed whether Alessi was subject to custodial interrogation for the purposes of *Miranda*[3] analysis. St. Pet. at 14. This argument is flawed for two reasons. First, "a few questions" are often adequate to resolve a constitutional issue. *Witt*, 223 *N.J.* at 419. This case is a prime example. Detective Donaruma plainly testified that Alessi was not a suspect and his only purpose in stopping her was to discuss the Izzo investigation. *Alessi*, 2017 *N.J. Super. Unpub. LEXIS* 796 at *12. This statement marks the beginning and the end of the constitutional inquiry. It foreclosed the potential for redeeming testimony. It is logically and semantically inconsistent with any testimony that would render the stop lawful – for instance, testimony that Detective Donaruma reasonably suspected that Alessi had just committed an offense and that he stopped her for the purpose of questioning her about it.

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[3] *Miranda v. Arizona*, 384 *U.S.* 436 (1996).

Second, the 91 pages of testimony addressing "the circumstances of Detective Donaruma's questioning of defendant," St. Pet. at 14, also shed light on the validity of the motor-vehicle stop. Detective Donaruma testified that he did not issue *Miranda* warnings to Alessi "as she was not the target of the investigation and was free to leave at any time." St. Pet. at 10. But if Detective Donaruma had reasonable suspicion to support stopping (that is, detaining) Alessi, she would not have been free to leave "at any time." Restricting a person's freedom to leave is a hallmark of both investigatory stops and custodial interrogations. Therefore, attempting to deny that Alessi was held while she was questioned is sauce for the goose and the gander: it served the State's interest in rebutting a *Miranda* challenge but also bolsters Alessi's position that there was an inadequate foundation to justify pulling her over. All 94 pages of the suppression hearing transcript supply relevant information and point definitively to the stop's unconstitutionality.

C. The Testimony the State Claims It Was Denied the Opportunity to Develop Still Would Not Have Justified the Stop.

Effectively conceding that Detective Donaruma did not suspect Alessi when he stopped her, the State argues that "objective facts" nevertheless furnished reasonable suspicion that "defendant may have committed an offense." St. Pet. at 14. The State could have

drawn out more of those facts at the suppression hearing had the reason for the stop been a more prominent subject, it maintains.

A motor-vehicle stop is valid if there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States v. Cortez*, 449 *U.S.* 411, 417 (1981). But the State does not contend that it could have produced objective evidence that Alessi was, or was about to be, engaged in criminal activity when Detective Donaruma stopped her. Rather, it contends that it could have produced objective evidence that Alessi had at some point in the past engaged in criminal activity. There are two problems with this argument: first, in light of the facts known to Detective Donaruma at the time of the stop, he could not have possessed objectively reasonable suspicion that Alessi had committed a crime; and second, even if the State had presented clear, objective evidence that Alessi had broken into Izzo's truck, as she was eventually charged, the elements of concurrence or imminence ("is, or is about to") were absent.

To justify an investigatory stop based on reasonable suspicion, "a police officer must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." *Stovall*, 170 *N.J.* at 357. When Detective Donaruma stopped Alessi, he knew a few disconnected facts: Alessi's ex-boyfriend, Phillip Izzo, had been sued by an employee; Izzo had removed documents from the employee's personnel file; and Alessi had attempted to

mail those documents to the employee. *See Alessi*, 2017 *N.J. Super. Unpub. LEXIS* 796 at *2-5. In the most generous light, the facts endowed Detective Donaruma with an "inchoate and unparticularized suspicion or hunch" about Alessi. They fell well short of establishing objectively reasonable suspicion that Alessi had committed a crime, let alone the particular crime of burglary. Additional suppression hearing testimony would not have altered the facts available to Detective Donaruma when he stopped Alessi.

More importantly, no amount of information about Alessi's alleged criminal activity would have justified Detective Donaruma's decision to pull her over. The test used to identify the proper bounds of investigatory stops "balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 *U.S.* 221, 228 (1985). The government's interests supporting an investigatory stop of a person suspected of a completed crime are significantly diminished:

> A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly as a stop to investigate suspected ongoing criminal activity. Similarly, the exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful

> business than it is by a suspect who is currently in the process of violating the law. Finally, officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.
>
> [*Hensley*, 469 *U.S.* at 228–29.]

In *United States v. Hensley*, the Supreme Court carefully cabined its approval of an investigatory stop based on suspicion of a completed crime. Thomas Hensley was wanted for armed robbery. *Id.* at 223. The local police department in the town where the robbery occurred issued a "wanted" flyer describing Hensley and asking other departments to pick up and hold him if he was found. *Id.* The flyer also warned other departments to practice caution and to consider Hensley armed and dangerous. *Id.* Twelve days after the robbery, officers on patrol saw Hensley, whom they recognized from the flyer, and, while waiting for dispatchers to confirm whether an arrest warrant had been issued, pulled him over. *Id.* The Court acknowledged that where police have been unable to locate a suspect, where waiting for probable cause to make an arrest might enable the suspect to flee and remain at large, and where the suspected crime involved a threat to public safety, law enforcement interests may outweigh the individual's interest to be free from the intrusion of an investigatory detention. *Id.* at 229.

Meanwhile, the courts of this State have assumed that the police may only conduct an investigatory stop on reasonable

suspicion that a crime has just occurred, is ongoing, or is imminent. *See, e.g.*, *State v. Gamble*, 218 *N.J.* 412, 428 (2014)(investigatory stop is permitted "if there is reasonable suspicion that the person being stopped is engaged, or is about to engage, in criminal activity"); *Stovall*, 170 *N.J.* at 356 (investigatory stops must be based on "reasonable and particularized suspicion . . . that an individual has just engaged in, or was about to engage in, criminal activity"); *State v. Davis*, 104 *N.J.* 490, 505 (1986)(investigatory stops "are justified only if the evidence . . . shows that the encounter was preceded by activity that would lead a reasonable police officer to have an articulable suspicion that criminal activity had occurred or would shortly occur"); *State v. Bernokeits*, 423 *N.J. Super.* 365, 371 (App. Div. 2011) (investigatory stops "are permitted where police officers have a reasonable suspicion of ongoing criminal or unlawful activity"); State *v. Costa*, 327 *N.J. Super.* 22, 31 (App. Div. 1999)(investigatory stops "must be justified by a 'particularized suspicion' a crime is occurring or about to occur").

None of the factors that persuaded the Supreme Court in *Hensley* to find, for the first time, that a police officer acted within constitutional bounds in stopping a person suspected only of non-proximate criminal activity are present here. Detective Donaruma did not suspect Alessi had committed a violent crime, she

was not "wanted," her location was not unknown, she was not a flight risk, and she did not pose a potential threat to public safety. Even if the State could have established a record demonstrating that Detective Donaruma knew, at the time of the stop, every fact about Alessi that would later surface, it could not have defended the stop's constitutionality. The State was not prejudiced by belated consideration of the issue.

CONCLUSION

For the foregoing reasons, the Appellate Division's decision to reverse should be affirmed.

Respectfully submitted,

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Dated: April 25, 2018