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VIA ELECTRONIC FILING

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

**Re: A-1-17 State v. Melvin T. Dickerson (079769)
App. Div. Docket No. A-002734-16**

Honorable Chief Justice and Associate Justices:

Please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ).

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PRELIMINARY STATEMENT

The issue in the case is a simple one: can a court order that a presumptively innocent criminal defendant who has been arrested in his workplace be detained when his lawyer is denied any information regarding a connection between the defendant and the contraband seized there? The Court need not determine whether prosecutors must provide affidavits in support of search warrants in all cases. However, where police arrest a defendant in a place other than his home and where there is no evidence that contraband is found in a place making defendant's control over it plain, the affidavit must be disclosed. Without the affidavit in support of the search warrant in such cases, Defendant is denied the information required to ensure that detention hearings comport with due process.

In cases where there exist legitimate, specific security concerns that would arise if the information in the affidavit in support of the search warrant became available to the defendant, prosecutors have the opportunity to seek a protective order. Where no order is sought and where the evidence in the case does not make clear a connection between the defendant and the contraband

(which is the basis for the pretrial detention motion), search warrant affidavits must be provided.

**STATEMENT OF
FACTS/PROCEDURAL HISTORY**

Amicus curiae, American Civil Liberties Union of New Jersey, relies on the procedural history and statement of facts contained within the unpublished Appellate Division opinion in this matter, *State v. Melvin T. Dickerson*, 2017 N.J. Super. Unpub. LEXIS 1617 (App. Div. July 5, 2017), with the following addition:

The trial court explained to the State that it could seek a protective order and the assistant prosecutor indicated that he understood, but believed the State could avoid production of the affidavit of probable cause altogether. 2T 14:10-24.¹ After the Appellate Division's decision, the State sought Leave to Appeal, which this Court granted.

¹ 2T refers to the transcript dated February 8, 2017. LTABr refers to the State's Brief seeking leave to appeal. SA refers to the State's appendix.

ARGUMENT

- I. IN CASES WHERE SEIZED CONTRABAND IS THE BASIS FOR DETENTION, WHERE A DEFENDANT'S CONNECTION TO THE CONTRABAND IS NOT EVIDENT FROM THE LOCATION OF THE SEIZURE, AND WHERE THERE EXIST NO SPECIFIC SECURITY CONCERNS, THE STATE MUST PROVIDE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT AS PART OF AN APPLICATION FOR PRETRIAL DETENTION.

In asking the Court to review the scope of its discovery obligation in this case, the State reads the Court's decision in *State v. Robinson*, 229 N.J. 44 (2107) too narrowly and the Appellate Division's decision here too broadly. This Court has already determined that the State must turn over all documents "relating to the pretrial detention application" *id.*, not simply those documents on which it relies. That does not mean that the State must provide affidavits in support of search warrants in all cases. Indeed, in several sorts of cases (*e.g.*, where the information in the affidavit would not have an impact on the detention application because the evidence seized is not used in seeking detention or because the location of the seizure itself plainly establishes the nexus to defendant), the State can avoid providing the affidavits; in still other cases (where safety concerns exist), the State can obtain a protective order to prevent disclosure of certain information contained within the affidavit.

A. The State Must Provide All Documents Related to the Pretrial Detention Application, Not Just Those Upon Which It Relies.

It is now well established that "because the [Pretrial Justice Reform] Act calls for a determination of probable cause and an assessment of the risk of danger, flight, and obstruction, which may include consideration of the nature and circumstances of the offense and the weight of the evidence, discovery should likewise be keyed to both areas." *Robinson*, 229 N.J. 44, 69 (citing N.J.S.A. 2A:162-18(a)(1); -19(e)(2); -20(a), (b)). Notwithstanding that, the State maintains the ability to circumscribe discovery based on limitations in its pretrial detention application. That is, if the State restricts the information contained in the affidavit of probable cause and the evidence presented at the pretrial detention hearing, it can likewise limit the discovery provided to only those documents related to the facts on which it relies.

However, the State cannot constrain the discovery provided to only those *pieces* of evidence upon which it relies. Where, as here, the basis of the State's pretrial detention motion is an allegation that the Defendant possessed certain contraband, it cannot simply pick and choose which pieces of evidence it wishes to use to prove possession. The Defendant is entitled to all documents and reports *relevant* to the claimed possession.

B. The Appellate Division's Holding Does Not Apply to Every Case Involving a Search Warrant.

The State suggests that the Appellate Division's determination that the State must provide the affidavit of probable cause would cause widespread disclosure of those affidavits. LTABr 7-8 ("This issue will uncertainly [sic] continue to reoccur on a regular basis throughout the State"). This is not so. Affidavits in support of search warrants are not generally provided as a mechanism to challenge the admissibility of seized contraband - the existence of a search warrant, which is presumptively valid (*State v. Jones*, 179 N.J. 377, 388 (2004)), suffices to achieve that purpose. Rather, they are provided to establish a nexus between the defendant and the contraband.

Neither Defendant's presence at the barbershop nor the location of the contraband within the barbershop constitutes sufficient evidence to either establish probable cause or justify detention. While the documents seized at the barbershop make clear - or, at a minimum, create probable cause - that Defendant has a connection to the barbershop, that alone is insufficient to show a nexus between Defendant and the contraband.

Law enforcement acknowledged that presence at the barbershop alone was insufficient to prove possession of the contraband

contained there² when officers released the two men found in the barbershop who indicated that they did not work there. *Dickerson*, Slip Op. at 3. Employment alone cannot change the calculus, because the State provided no information indicating that the police found

² Not only does presence not necessarily prove possession, it does not always justify a search. Indeed, when police execute a search warrant, they cannot necessarily search (no less arrest) every person found on the premises. *Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979). Police must still have probable cause to search individuals present at the target location. *Id.* In some cases, however, mere presence at a target location provides the requisite probable cause to sustain a search. Where a warrant is being executed at a location that has been continuously used for selling drugs, unless there is an obvious, innocent explanation for the person's presence, courts have permitted searches of those present. *State in the Interest of L.Q.*, 236 N.J. Super. 464, 470-71 (App. Div. 1989) (warrant that authorized search of those "reasonably believed to be connected with the said property and investigation" authorized "search all persons found on the premises other than those whose presence is innocently explainable on its face, such as a uniformed postman or utility meter reader"). As the Court explained in *State v. De Simone*, "[w]hether a search of a person present during the execution of a search warrant is authorized is a fact-sensitive determination: [T]he sufficiency of a warrant to search persons identified only by their presence at a specified place should depend upon the facts." 60 N.J. 319, 321-322 (1972). See also *State v. Sims*, 75 N.J. 337, 351 (1978) (rejecting search of individuals found in an office at a service station suspected of hosting illegal gambling); *State v. Hall*, 253 N.J. Super. 84, 96-97 (Law Div. 1990) (suppressing the fruits of the search of a person who arrived at a house where police were executing a search warrant looking for evidence of drug distribution because the police failed to inquire about why he was at the house and, instead, immediately undertook a search); *State v. Carlino*, 373 N.J. Super. 377, 392-393 (App. Div. 2004) (allowing search where man appeared, after midnight, at a one-family home where a search warrant was being executed and upon seeing the police, became nervous and clutched a fanny pack he was wearing). Without the affidavit in support of the search warrant, there is no way to know whether police were even entitled to search everyone found at the barbershop.

contraband in a location that indicated that all employees necessarily knew about its existence. For example, if police found the guns sitting on a table in the employee lounge or in Defendant's private office, the State would have a persuasive argument that he must have known about their existence. On the other hand, if police found the guns hidden in bags, drawers, or lockers, a judge cannot impute such knowledge. In the present case, there exists no information about where the guns and drugs were found and therefore, without more, no connection can be made between Defendant and the contraband.

Despite the State's suggestion³ that it will need to turn over affidavits in many cases (LTABr 7-8), the Appellate Division's holding need only apply where the seizure of contraband serves as a basis for pretrial detention and the location of the seizure alone is insufficient to show a nexus between the defendant and the contraband. There are several situations where the State would not be obligated to turn over an affidavit in support of a search warrant in advance of a pretrial detention hearing.⁴ For example,

³ The County Prosecutor's Association has indicated that it will make a similar argument in its *amicus curiae* brief. See Certification in Support of the County Prosecutors Association of New Jersey's Motion to Appear as *Amicus Curiae*, dated September 18, 2017.

⁴ If, however, the affidavit indicated that the target of the search warrant was someone other than the defendant in the case, the affidavit would be exculpatory and disclosure would be required pursuant to R. 3:4-2(c)(1)(B), which commands that "[a]ll exculpatory evidence must be disclosed."

assume that based on eyewitness statements or DNA evidence found at the crime scene law enforcement suspected a person of participation in a murder. If police then obtained a search warrant for that person's home, arrested defendant, and seized contraband, prosecutors could withhold the search warrant as long as they did not seek detention based on items that police seized during the execution of the search warrant.

Alternatively, if police obtained a search warrant for a room in a boarding house associated with a particular person and found contraband in that room, the facts contained in the affidavit in support of the search warrant would not need to be disclosed at the pretrial detention stage (this situation is most akin the facts in *State v. Daniels*, upon which the State relies. See LTABr 9-10, citing SA 1-5.). The State could likewise withhold the affidavit in support of the search warrant in cases where the contraband that forms the basis for the pretrial detention motion is found on the defendant's person. In those cases, the nexus between the defendant and the contraband is clear. Here, it was not.

C. In Cases Where the State Has a Significant, Particularized Safety Concern, It Can Seek a Protective Order.

The State contends that requiring the provision of affidavits in support of search warrants "carries safety concerns." LTABr 12. In some cases that may be true, but not in this one. Prosecutors have the ability to "apply for a protective order to redact, delay, or withhold the disclosure of materials that would expose witnesses and others to harm, hinder or jeopardize ongoing investigations or prosecutions, undermine the secrecy of informants and confidential information which the law recognizes, or compromise some other legitimate interest." *State in Interest of N.H.*, 226 N.J. 242, 256 (2016) (citing R. 3:13-3(a)(1), (e)(1)).

The State was aware of the availability of protective orders, but explicitly chose not to seek one. 2T 14:22-23. After the trial court provided a lengthy explanation of availability of protective orders to address safety concerns (*id.* at 12:13-14:17), the prosecutor explained that "this is not a matter of we want to redact this, we want to withhold this." *Id.* at 14:22-23. Additionally, as the Appellate Division noted, "the production of the search warrant without a companion application for a protective order demonstrates that, in this case, there were no confidentiality concerns." *Dickerson*, Slip Op. at 14. Thus, to whatever extent the safety concerns raised by the State are applicable to some cases involving search warrants they are not

germane to this case and, in any event, mechanisms exists to address them.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Division should be affirmed.

Respectfully submitted,



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