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VIA NEW JERSEY LAWYERS SERVICE

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625
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Re: *State v. Gathers*, A-80-16 (079274)
App. Div. Docket No. A-4772-15

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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Summary of Argument

The Appellate Division held that in order to conduct a search by taking a buccal swab from Gathers, the State was required to show probable cause - that holding was correct, and this Court should affirm it.

The State mischaracterizes the Appellate Division’s holding as requiring more than it does, and the State introduces new evidence in a belated attempt to make a probable cause showing that it failed to make when it submitted the motion to take a DNA sample from Mr. Gathers. The Court should reject this untimely introduction of evidence and conclude that the State failed to make a probable cause showing before either the trial court or the Appellate Division. (Point I).

Moreover, the evidence the State now submits does not demonstrate probable cause to conduct the search, because the State cites no evidence for why it could not have used the sample it had previously obtained from Gathers as a comparator. (Point II). The State's argument implies that - at least in some categories of cases - the DNA Act is not useful for solving future crimes, the primary purpose that justifies the warrantless searches the Act authorizes.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

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 *State v. Gathers*, 449 N.J. Super. 265 (App. Div. 2017), with the following addition: The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this letter brief.

Amicus also recounts the following facts for clarity:

The Hudson County Prosecutor's Office charged Defendant Tariq S. Gathers with second-degree possession of a weapon for an unlawful purpose in violation of N.J.S.A. 2C:39-4, second-degree unlawful possession of a weapon in violation of N.J.S.A. 2C:39-5(b), and fourth-degree certain persons not to have weapons in

¹ The statement of facts and procedural history have been combined for the convenience of the Court.

violation of *N.J.S.A. 2C:39-7(a)*, for allegedly possessing a gun on August 1, 2015. Eight months later, on April 22, 2016, Gathers was in jail pending trial when the State moved for an order authorizing it to take a buccal swab from him in order to collect a DNA sample.

In support of that motion, the assistant prosecutor submitted a certification attesting that:

- police received a call that "shots [were] fired near 67 Clinton Avenue;
- in canvassing the area, police found a revolver lying "behind the back passenger tire of" a Chevrolet parked near 86 Sackett Street;
- police examined the revolver and discovered it contained five live rounds and one spent shell casing;
- police dusted the handgun and five bullets for fingerprints "with no results";
- police swabbed the handgun and prepared the swabs for submission to the state police [Combined DNA Index System] lab;
- a police detective went to a nearby hospital to speak with defendant, who had sustained an "entry wound . . . on the top part of his left knee with an exit wound on the lower part of his left leg," and, from the area of the wound and other information, officers "deduced that defendant likely shot himself";
- in the interview that followed, defendant "shouted out, 'so I shot myself, that ain't no charge!'" ;
- when asked to identify the weapon, defendant told police, "I don't know, a big ass revolver and it went off"; and
- upon inquiry about the location of the weapon, defendant said he "just 'dropped it.'"

[*Gathers*, 449 *N.J. Super.* at 268.]

The State relied on this information, which the assistant prosecutor did not know first-hand, in seeking to take a buccal swab from Gathers. Gathers objected on the ground that he had already provided DNA at the time of a previous conviction and that the State's application consisted solely of hearsay. The trial court granted the motion and denied Gathers's motion for a stay pending appellate review. Gathers sought interlocutory review, which the Appellate Division granted. The Appellate Division stayed the order and subsequently reversed it. The State sought certification, which this Court granted.

ARGUMENT

I. THE STATE FAILED TO SHOW PROBABLE CAUSE AT THE TIME IT SOUGHT THE ORDER FOR WHY IT WAS NECESSARY TO TAKE A DNA SAMPLE FROM GATHERS.

The buccal swab was a search, and so in order to obtain a warrant to conduct the search, the State was required to show that there was probable cause to believe that taking the swab would produce evidence of the crime, and that in light of alternative ways of obtaining the evidence, swabbing the defendant was a reasonable way of advancing the State's interests.

A. The State Describes the Application to Take the Buccal Swab as a Motion, But a Warrant, and its Attendant Protections, is Necessary in Order to Effect a Search.

There is no dispute that a buccal swab constitutes a search. *See, e.g., State v. O'Hagan*, 189 N.J. 140, 149 (2007); *Maryland v.*

King, ___ U.S. ___, 133 S. Ct. 1958, 1968-69 (2013). In executing a search, the State must either have a warrant or demonstrate an exception to the warrant requirement. See *O'Hagan*, 189 N.J. at 149-50.

Though Rule 3:5A allows the State to move by application supported by affidavits to detain a suspect before the filing of a formal complaint for up to five hours to conduct "non-testimonial identification procedures for the purpose of obtaining evidence of that person's physical characteristics . . .", including "blood samples, urine samples, [and] saliva samples . . ." Rule 3:5A-9, that rule does not apply here, where the State sought to take Gathers's DNA months after the complaint had issued.

Moreover, while routine DNA testing of arrestees without a particularized showing of probable cause has been upheld, such testing is justified on the ground of law enforcement's special needs. See, e.g., *O'Hagan*, 189 N.J. at 161; *King*, 133 S. Ct. at 1980. Here, the State sought to collect Gathers's DNA not for a "special purpose," but for a core law enforcement purpose - "the immediate objective of gathering evidence against the offender." *O'Hagan*, 189 N.J. at 160. A search conducted for that investigative purpose requires a warrant or an exception to the warrant requirement, and so the State was required to show probable cause to support its application to take Gathers's DNA. See, e.g., *State v. Novembrino*, 105 N.J. 95, 107 (1987) ("This Court has steadfastly

recognized the historical significance of probable cause as the indispensable criterion for determining the validity of a search.").

B. The Motion was Defective Because the HCPO Failed to Show the Necessity of Taking a Buccal Swab to Conduct the DNA Comparison.

In addition to showing probable cause that taking the swab would produce evidence of the crime, the State was required to show that this method of gathering information was reasonable. The state and federal constitutions protect people from "unreasonable searches and seizures." U.S. Const. amend. IV; N.J. Const. Art. I, Para. 7. Reasonableness is determined by "examining the totality of the circumstances," *State v. Ravotto*, 169 N.J. 227, 235 (2001), an assessment that involves comparing the government's interest to the individual's reasonable expectation of privacy. See, e.g., *King*, 133 S.Ct. at 1969; *Ravotto*, 169 N.J. at 249 (comparing limited law enforcement interest because of quasi-criminal nature of offense and other evidence available for prosecution with compelling private interest of fear of needles and violent manner in which blood was taken). See also, e.g., *Schmerber v. California*, 384 U.S. 757, 768 (1966) (A search is unreasonable if it is "not justified in the circumstances[.]").

In order to allow the Court to make the determination of whether collecting Gathers's DNA was reasonable, the State was required to explain its interest in this method of collection, and

it failed to do so. *See, e.g., Ravotto*, 169 N.J. at 247-49 (reasonableness is fact-specific determination, and a method of searching that is reasonable under some circumstances may be unreasonable under others).

The State introduced none of the evidence before the trial court or the Appellate Division that it has submitted to this Court about the lab procedures it claims require it to take an additional buccal swab from Gathers. Instead, before the lower courts, the State merely put forth the conclusion, without citation or explanation, that "the DNA sample must be obtained in order for a comparative analysis to be performed," and "any exemplars from the gun can not be accurately matched to defendant without his DNA swab." State App. Div. Br. at 7.

The Appellate Division concluded that the State had not demonstrated "a legitimate governmental need for defendant's biological material," *Gathers*, 449 N.J. Super. at 272, and so there was no governmental interest that outweighed "[t]he indignity of being forced to provide a buccal swab while defendant - presumed innocent - resides in the county jail awaiting trial" *Id.* at 271-72. As the Appellate Division noted,

The State asserted at oral argument that it had neither inspected the weapon for DNA nor compared any DNA found there with defendant's DNA in CODIS because of some operating procedure employed by its laboratory. We have been provided with nothing - no sworn statements and no written laboratory

regulations - that would buttress the prosecutor's statement at oral argument.

[*Id.* at 273 n.5.]

Before this Court, the State does not contest that conclusion; instead, without mentioning its failure to produce this material before either lower court, and without moving to expand the record, the State seeks for the first time to introduce evidence in the form of laboratory procedures for why a buccal swab is necessary here.

By not contesting the Appellate Division's conclusion that the State failed before it to make a showing of why it needed to take a buccal swab from Gathers without confirming that the gun contained DNA and even though Gathers had provided a swab in the past, the State tacitly concedes that it did not make such a showing. For this reason, this Court should affirm the Appellate Division. *See, e.g., Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) ("It is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.") (internal quotation marks omitted).

II. THE EVIDENCE THE STATE HAS PRESENTED TO THE SUPREME COURT DOES NOT DEMONSTRATE THE GOVERNMENT INTEREST THAT NECESSITATES TAKING A BUCCAL SWAB FROM GATHERS.

Moreover, the evidence the State now submits does not show why Gathers's earlier DNA sample was insufficient for testing. The State proffers two arguments for why the gun could not be tested against a sample that Gathers had submitted earlier: first, the State argues that the guidelines put forward by the New Jersey State Police Office of Forensic Sciences prohibit DNA testing from a gun in the circumstances here, and second, it contends that the sample Gathers had submitted previously would not be admissible as evidence because of chain-of-custody concerns. Neither argument avails.

A. The State Has Not Shown That New Jersey's Crime Lab Procedures Prevent Testing a Gun For DNA Evidence Under the Circumstances Here.

The State contends that the sample taken from the gun here would not be eligible for inclusion in the National DNA Index System (NDIS), an argument that appears relevant to the necessity of taking another sample from Gathers because the New Jersey laboratory procedures are based on the NDIS and Combined DNA Index System (CODIS) procedures.

In discussing NDIS eligibility, the State explains, "[t]he NDIS Operational Procedures Manual specifically delineates what DNA records are not eligible for upload in the system." State Br.

at 8.² The procedures the State cites suggest that NDIS differentiates between "forensic" samples, which are samples taken from crime scenes that might not be associated with an identified suspect, which are generally eligible for NDIS inclusion, and "suspect or deduced suspect" samples, which are taken from known suspects, and are generally not eligible for inclusion. See Sa57. The procedures provide that "an item taken directly from a suspect shall generally not be considered a forensic sample but shall be considered as a suspect or deduced suspect sample," *id.*, and "[e]xamples of suspect or deduced suspect DNA records that are not eligible for NDIS include, but are not limited to, the following . . . An item for which the suspect's profile could reasonably be expected to be found that is at the crime scene" *Id.* Although such samples are generally not eligible for submission to NDIS, "documentation of the scene of the crime or the item's use in the commission of the crime[] are important factors to consider in determining a DNA record's eligibility for upload to NDIS," *id.*, suggesting that there are instances in which such samples may be eligible to be included in NDIS.

It seems possible from this language that because the gun is the only instrument of the possession charges Gathers received, a sample taken from it might be eligible for inclusion in the NDIS

² State Br. refers to the May 2, 2017 Letter-Brief on Behalf of the State of New Jersey submitted to this Court.

database. The State rejects this possibility, concluding without explanation or citation that "mere criminal possessory offenses like the unlawful possession of a weapon do not trigger NDIS eligibility because, in those instances, the item (i.e. gun) was not actually *used* in the commission of a crime." State Br. at 9 (emphasis in original). But it is not at all obvious that a gun is not "used" in the commission of the crimes of second-degree possession of a weapon for an unlawful purpose in violation of *N.J.S.A. 2C:39-4*, second-degree unlawful possession of a weapon in violation of *N.J.S.A. 2C:39-5(b)*, and fourth-degree certain persons not to have weapons in violation of *N.J.S.A. 2C:39-7(a)*. Indeed, the gun seems to be the *only* item that is used in the commission of those crimes. The State cites nothing to explain why a gun is not used in these crimes, either as a matter of logic or for the purposes of the NDIS procedures.

Turning to the New Jersey procedures, the State explains, "The New Jersey State Police Office of Forensic Sciences has set forth guidelines for the swabbing of 'crime guns' and DNA analysis submission resulting therefrom." State Br. at 9. According to those guidelines:

DNA Analysis Will Be Conducted On Gun Swabs
When:

The case facts meet CODIS eligibility
criteria:

- The gun originates from and/or is associated with a crime.

- The source of the resultant DNA is attributable to a putative perpetrator.

OR

A DNA reference sample is submitted from the suspect for direct comparison to DNA results from the gun swabs that are not CODIS eligible.

[Sa128.]³

It appears from the language of the regulations the State cites, that the gun here would be eligible for testing. After all, the gun is associated with a crime, and the source of the DNA that might be on the gun is likely attributable to the putative perpetrator - these principles justify the need to identify the DNA on the gun in the first place. The State says that this logical reading of the regulations is incorrect, however, because "criminal possessory offenses do not trigger CODIS eligibility." State Br. at 9. Again, the State provides no citation that would support this contention.

Even if the State is correct, and for some reason criminal possessory offenses do not trigger CODIS eligibility, it is not clear why the "DNA reference sample" the regulations refer to could not come from the sample Gathers had previously submitted, and the State provides no explanation for why that sample could not be used.

³ Sa refers to the Appendix to the Letter-Brief on Behalf of the State of New Jersey.

If the State contends that the previously-provided sample could not be used for some reason - for example, because of the chain-of-custody problems discussed further below - the State would seem to be arguing that samples collected pursuant to the DNA Act, *N.J.S.A. 53:1-20.17, et seq.*, cannot be used in later criminal investigations. But using samples collected pursuant to the DNA Act in later criminal investigations was the "primary purpose[]" the Court recognized for allowing collection of those samples. *O'Hagan*, 189 *N.J.* at 160. If they cannot be so used, then in a case where the State seeks to collect DNA pursuant to the DNA Act, a circumstance not present here, the Court should revisit the "special needs" justification for DNA Act collection that it accepted in *O'Hagan*.

B. The Chain of Custody Concern the State Raises With Regard to DNA Act Samples Does Not Excuse the State from Comparing Those Samples in the First Instance, Before Seeking Subsequent DNA Collection.

The State next contends that it cannot use the DNA sample collected earlier because samples collected pursuant to the DNA Act do not comply with the chain-of-custody standards that govern admissibility. This argument is flawed for two reasons. First, the protocols for how to handle DNA samples collected pursuant to the DNA Act are determined by law enforcement. It appears from the New Jersey State Police Office of Forensic Sciences Memorandum, on which the State relies, that New Jersey law enforcement determines

the protocol for sending these samples. See Sa 129. While the kit used to collect samples appears to conform to federal standards - the memorandum says the "CODIS Compliance Unit" supplies the "Offender DNA Collection Kits," see *id.* - the choice to send it by U.S. mail, which disrupts the chain of custody, seems to have been made by New Jersey law enforcement. Even if the requirement that samples be mailed were determined federally, it is nonetheless a law enforcement choice. When considering the government need that justifies the intrusion on individual privacy, the Court determines whether the government need is reasonable. Deliberately creating processes that require additional privacy intrusions would not be reasonable. *Cf. Brown v. State*, ___ N.J. ____, No. 076656, 2017 N.J. LEXIS 805 (July 24, 2017) ("police-created exigency cannot form a basis to enter a residence to secure it").

Moreover, even if it is reasonable to require that CODIS samples taken under the DNA Act be submitted by mail, and thus not conform with chain-of-custody admissibility requirements, the fact that a match between a CODIS sample and the gun would not be admissible as evidence does not exempt police from seeking such a comparison. As the State notes, a match between the CODIS sample and the gun would create probable cause to conduct a confirmatory buccal swab. See State Br. at 11. The State could thus have compared the gun to the existing databank, and if Gathers's DNA

was a match, it could have sought a warrant to take a confirmatory sample.

Again, the special need the Court recognized in affirming the constitutionality of suspicionless DNA collection under the DNA Act was the utility of DNA samples for investigating future cases. See *O'Hagan*, 189 N.J. at 160-63. If DNA samples taken under the DNA Act cannot be used as comparators in future cases because of the chain-of-custody concern law enforcement procedures have created, then the Court should reexamine the special need justification that supports collection under the DNA Act.

CONCLUSION

What is at stake here is a physical intrusion by the State on the body of an individual. That intrusion is a search, the need for which the State must support by showing probable cause. This is so even if the intrusion is minimal: "could the police engage, without any suspicion of wrongdoing, in a brief and minimal intrusion into the home of an arrestee - perhaps just peeking around the curtilage a bit? Obviously not." *King*, 133 S. Ct. at 1982 (Scalia, J., dissenting). The State failed before the trial courts and the Appellate Division, and continues to fail before this Court, to show probable cause for the search, and so *amicus curiae* respectfully asks that the decision of the Appellate Division be affirmed.

Dated: August 29, 2017

A handwritten signature in cursive script, appearing to read "R Livengood".

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