SUPREME COURT OF NEW JERSEY
DOCKET NO. A-70-16 (079145)

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **Julian B. Hamlett**, Defendant-Petitioner.	CRIMINAL ACTION **ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION** Sat Below: Jose L. Fuentes, P.J.A.D. Marie Simonelli, J.A.D. Harry G. Carrol, J.A.D.

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

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SUMMARY OF ARGUMENT

This case concerns the constitutionality of two searches – the first conducted without a warrant, pursuant to the driving documents exception, and the second conducted pursuant to a warrant issued by a judge who was not authorized to do so under the cross-assignment order in effect.

The first search was impermissible. The driving documents exception is suspect and deserves reconsideration (Point I.A). Moreover, the search did not comply with the requirements of that exception, and so the evidence discovered during this search should be suppressed (Point I.B).

The results of the second search must also be suppressed. A cross-assignment order was in effect in Atlantic County, and the officers ignored that order in seeking the warrant that led to the second search, obtaining a warrant from a judge with whom they were familiar rather than from the judge authorized to issue the warrant under the order. This violation undermines the appearance of impartiality central to the integrity of warrant issuance in New Jersey and was thus a constitutional defect requiring suppression (Point II.A). Moreover, even if the Court considers this violation to be merely technical, it was not harmless error, nor was it done in good faith, and so suppression is nevertheless required (Point II.B).

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 *State v. Hamlett*, 449 *N.J. Super.* 159 (App. Div. 2017) and by Defendant-Appellant Julian B. Hamlett in the Letter-Brief and Appendix submitted on his behalf, 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:

A. The September 2011 Traffic Stop

On September 7, 2011, Officer Charles Heintz of the Atlantic City Police Department pulled over Julian B. Hamlett after observing him commit two motor vehicle violations. *Hamlett*, 499 *N.J. Super.* at 165. When Heintz asked to see Hamlett's license, registration, and proof of insurance, Hamlett provided his expired state-issued identification card and explained that the car was rented by his girlfriend, referred to as Ms. Boyd. *Id.*[2] Finding no documents in the glove compartment, Hamlett requested to call Boyd

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[1] The Statement of Facts and Procedural History have been combined for the convenience of the Court.

[2] Heintz later testified that at this point, he noticed a half-empty bottle of vodka on the backseat of the car and a smell of burnt marijuana, but this observation apparently played no role in the interaction.

"in an attempt to locate the necessary documents," and Heintz agreed. *Id.* Heintz asked Hamlett if he knew where the car's rental agreement was, and Hamlett said he did not know the agreement's location or whether it included his name. *Id.* After Hamlett concluded his call to Boyd, Hamlett told Heintz that Boyd was coming to the scene. *Id.* Heintz then ordered Hamlett out of the car and patted him down. *Id.* at 166. After finding no weapons, Heintz sat Hamlett on the curb, and, "in an effort to avoid unnecessarily prolonging the stop," searched for the driving documents in the side visor, glove compartment, an open compartment near the gear shift, and the center console. *Id.* In the center console, Heintz found cocaine, heroin, marijuana, and cash. *Id.* He arrested Hamlett, and found additional marijuana, cocaine, and heroin on Hamlett's person. *Id.*

B. The August 2012 Motel Room Search

Following this Court's ruling in *State v. Broom-Smith*, 201 *N.J.* 229 (2010), the Atlantic County Assignment Judge Julio L. Mendez issued an order providing for the assignment of substitute judges to cases outside their geographical jurisdictions in matters requiring immediate judicial action, like warrant applications, where the regularly-assigned municipal court judge was unavailable. *See Hamlett*, 449 *N.J. Super.* at 167. The cross-assignment order requires that applicants "only contact an Acting Municipal Court Judge listed on the attached Rider upon determining

that the Municipal Court Judge duly appointed for that court is disqualified from acting, has an inability to hear the matter, or is otherwise unavailable[.]" *Ibid.* The substitute judge must also make a record detailing the unavailability of the regularly-assigned judge. *Id.* (quotation marks omitted). The order also said law enforcement "shall apply to the Acting Municipal Court Judges in the sequence as listed on the attached Rider[]." *Id.* (quotation marks omitted). For requests coming from Galloway Township, the Atlantic City municipal judge was seventh in the sequence listed on the Rider. *Id.* at 168.

On August 7, 2012, Atlantic City Police Department officers Anthony Abrams and James Karins pulled Hamlett over for speeding and discovered marijuana, methamphetamines, and a Passport Inn Suites room key in his car. *Id.* at 166-67. Hamlett admitted to having other contraband in his room at the Passport Inn Suites in Galloway Township. *Id.* at 167.

At 4 a.m. the next morning, without contacting the Galloway Township municipal judge or any other judge on the list, Abrams sought a warrant from the Atlantic City Municipal Judge to search the hotel room in Galloway Township. *Id.* at 167. Abrams said he went to Judge Ward because he was "my on-call judge." Letter-Brief and Appendix on Behalf of Defendant-Appellant at 5, *State v. Hamlett*, No. 079145 (N.J. Mar. 28, 2017). Abrams had appeared before Judge Ward for eight years. *Ibid.* Abrams did not confirm

the Galloway Township judge's inability to hear the case and Judge Ward did not create a record as required by the cross-assignment order. *Hamlett*, 449 *N.J. Super.* at 167. Judge Ward issued the warrant, and the police executed the search. *Id.*

Hamlett sought suppression of the evidence obtained pursuant to both searches at the trial court, and the court denied his motions. The Appellate Division affirmed those decisions, and this Court granted certification.

ARGUMENT

I. THE DRIVING DOCUMENTS EXCEPTION DID NOT JUSTIFY THE WARRANTLESS SEARCH OF HAMLETT'S VEHICLE, SO THE EVIDENCE DERIVED FROM THE SEARCH MUST BE SUPPRESSED.

A. The Driving Documents Exception Is Constitutionally Suspect.[3]

In permitting police officers to search a car for evidence of ownership without probable cause, without exigency, or incident to lawful arrest, New Jersey takes a position at odds with its jurisprudence of robust protections against unreasonable search and seizure. Most other exceptions to the warrant requirement mandate probable cause or reasonable suspicion before allowing searches or seizures. *See, e.g., State v. Dangerfield*, 171 *N.J.* 446, 456 (2002) (search incident to arrest requires probable

[3] *Amicus* also raised concerns as to the exception's constitutionality in an *amicus* brief submitted to this Court in *State v. Terry*, Docket No. A-23-16 (077942).

cause); *State v. Witt*, 223 *N.J.* 409 (2015) (automobile exception requires probable cause); *State v. Edmonds*, 211 *N.J.* 117, 132 (2012) (emergency-aid exception requires (1) a "reasonable basis" to support an officer's "immediate assistance" and (2) a "reasonable nexus between the emergency and the area or places to be searched" based on the community-caretaking doctrine) (citing *State v. Frankel*, 179 *N.J.* 586, 600 (2004)); *State v. Gamble*, 218 *N.J.* 412, 431-32 (2014) (protective sweeps and frisks require "reasonable articulable suspicion" that an individual "is dangerous and may gain immediate access to weapons").[4]

The driving documents exception allows a search without reasonable suspicion, requiring only that (1) the officer give the driver a reasonable opportunity to provide driving credentials, and (2) the driver is unable or unwilling to do so. *State v. Keaton*, 222 *N.J.* 438, 450 (2015). The Appellate Division pointed out in *State v. Lark* that "[s]ince *Boykins*, no Supreme Court ha[d] allowed a search based solely on a driver's inability to present driving credentials," but rather required that searches be based on probable cause to believe the search would uncover evidence of

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[4] Though consent permits searches on less than probable cause, consent searches are properly understood in New Jersey not as an exception to the warrant requirement but rather as a waiver of Fourth Amendment rights. *See State v. Johnson*, 68 *N.J.* 349, 353 (1975) ("under Art. I, par. 7 of our State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver").

criminal activity. 319 *N.J. Super*. 618, 625 (App. Div. 1999), *aff'd*, 163 *N.J.* 292 (2000) (referencing *State v. Boykins*, 50 *N.J.* 73 (1967)). However, since *Lark*, the rule has allowed credential searches in routine traffic stops even where there is no suspicion that the search will produce evidence of unlawful conduct.

New Jersey law requires drivers to produce their credentials when a police officer requests them. *N.J.S.A.* 39:3-29. But a failure to produce driving credentials results in a $150 fine – not a warrantless privacy invasion. *Id.* If the fine is not the limit of what police may do in the face of a driver's failure to provide documents – if, instead, police may search for documents where the driver cannot produce them – then police can conduct invasive searches even where they lack reasonable suspicion or probable cause to believe the driver is engaging in criminal behavior.

Though the driving documents exception does not allow a search of the entire car, a search for a driver's license, registration, and proof of insurance may nevertheless be intrusive. A glove compartment or center console may contain prescription drugs, toiletries, or other private items. "[I]t is no longer open to question that automobiles remain within the protection of the Fourth Amendment and the Warrant Clause," and "courts recognize that automobile travel is a basic, necessary and pervasive way of American life." *State v. Patino*, 83 *N.J.* 1, 8 (1980). Accordingly,

"expectations of privacy in the contents of an automobile are significant," and entry into a car, even for driving documents, implicates the Fourth Amendment. *State v. Esteves*, 93 *N.J.* 498, 504 (1983). Recognizing these expectations of privacy, this Court reaffirmed in 2015 that though people have a diminished privacy interest in their cars as compared to their houses, police may nevertheless intrude on that privacy only on a showing of probable cause. *Witt*, 223 *N.J.* at 423-24. "The point to be made is that constitutional rights to privacy in vehicles and effects must be accorded respect by police as well as courts and cannot be subordinated to mere considerations of convenience to the police short of substantial necessities grounded in the public safety." *State v. Slockbower*, 79 *N.J.* 1, 13 (1979). The driving documents exception undermines this principle.

Moreover, increased access to technology that permits officers to electronically access vehicles' ownership information weakens the justification for the exception. Resources like mobile data terminals (MDTs) provide officers access to the same information about a driver's license and registration that they would receive from looking at physical copies. *See State v. Donis*, 157 *N.J.* 44, 46-47, 48 (1998). This technology permits police to ascertain ownership information without having to conduct a warrantless roadside search. New Jersey courts have not fully addressed the impact of electronic records on the driving documents

exception. In an unpublished opinion, the Appellate Division acknowledged the use of such technology and noted that this Court "has applied the driving documents exception even though other technology similarly enabled the officer to obtain vehicle ownership and registration information without actually seeing the registration card." *State v. El-Bey*, No. A-2252-13T4, 2016 *N.J. Super. Unpub. LEXIS* 520 (App. Div. March 10, 2016) at *5, *certif. denied*, 228 *N.J.* 25 (2016).[5] The *El-Bey* court did not provide any reasoning as to why a physical search is necessary where an electronic search is available. It pointed solely to the precedent by which it was bound – cases that support the existence of the driving documents exception in New Jersey, such as *Keaton* and *State v. Pena-Flores*, 198 *N.J.* 6 (2009) (reversed in 2015 by *Witt*).[6] In light of New Jersey's commitment to protecting its citizens against unreasonable searches and seizures, a driver should not be subjected to a warrantless search where there exists a less

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[5] Pursuant to *Rule* 1:36-3, *amicus* attaches here the decision in *State v. El-Bey*, and *amicus* notes that it is unaware of any contrary unpublished opinions.

[6] To the extent *El-Bey* can be read as upholding the driving documents exception in spite of access to electronic records, the *El-Bey* court based its conclusion on *State v. Pena-Flores*, which *Witt* subsequently overruled. *Witt*, 223 *N.J.* at 450. *Witt* provides a strong basis for the argument that the driving documents exception is no longer necessary. By eliminating the separate exigency requirement, where police otherwise have probable cause to believe that the car is stolen, this Court permits officers to perform searches to establish ownership, thus satisfying one of the primary goals of the driving documents exception. *Id.*

intrusive means to reach the same result of ensuring lawful ownership.

B. The Warrantless Search Did Not Meet the Requirements Set Out by *Keaton* and Was Therefore Improper.

Warrantless searches are "presumptively invalid," *Edmonds*, 211 *N.J.* at 130, and "are permissible only if 'justified by one of the "few specifically established and well-delineated exceptions" to the warrant requirement.'" *Witt*, 233 *N.J.* at 422 (quoting *Frankel*, 179 *N.J.* at 598) (quoting *Mincey v. Arizona*, 437 *U.S.* 385, 390 (1978)). "It is the State's burden to prove that a warrantless search falls within one or more of those exceptions." *State v. Robinson*, 228 *N.J.* 529, 544 (2017). The search here failed to comport with the driving documents exception to the warrant requirement.

In order to conduct a search under that exception, an officer must provide the driver with the "opportunity to present his credentials before entering the vehicle." *Keaton*, 222 *N.J.* at 442. Only if "such an opportunity is presented, and defendant is unable or unwilling to produce his registration or insurance information," may an officer search the vehicle for that information. *Id.* at 442-43. The resulting search is limited in scope: it must be "confined to the glove compartment or other area where a registration might normally be kept in a vehicle." *Patino*,

83 *N.J.* at 12 (quotation marks omitted). If these conditions are not met, the search is unreasonable.[7]

Hamlett gave every indication of willingness to find the documents. He was not given a reasonable opportunity to produce them, and so at the time Heintz conducted the search, he did not know whether Hamlett would be able to produce the documents. Therefore, the evidence recovered from Heintz's unreasonable search must be suppressed.

1. Hamlett was not unwilling to provide his driving documents.

The search was improper because Hamlett was neither unable nor unwilling to provide his driving documents. If a driver is provided with a reasonable opportunity to present his credentials, "and defendant is unable or unwilling to produce his registration or insurance information, *only then* may an officer conduct a search for those credentials." *Keaton*, 222 *N.J.* at 443 (emphasis added). Hamlett gave no indication he was unwilling to provide his credentials. In fact, he demonstrated a willingness to cooperate with Heintz and produce the information he had on hand by providing an expired state-issued identification card and looking for the car's credentials in the glove compartment. *Hamlett*, 449 *N.J.*

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[7] Of course, any evidence found in plain view after an unlawful search must be suppressed, as the plain view exception requires an officer to be lawfully in the viewing area. *Keaton*, 222 *N.J.* at 450-51.

Super. at 165. Admitting to not knowing where the documents were located or whether his information was included on the registration, Hamlett requested "permission to call Boyd in an attempt to locate the necessary documents." *Id.* Though his ability to produce the credentials was not yet clear, Hamlett demonstrated a willingness to produce them.

2. Hamlett was not unable to produce his driving documents.

a. The absence of documents from the car did not constitute an inability to produce the documents.

To the extent the State contends that Hamlett was unable to produce the documents because he said they were not in the car and that his girlfriend would have to bring them, the "inability" the driving documents exception contemplates cannot be an inability caused by the absence of documents in the car. The point of the driving documents exception is that it allows officers to enter a car *to locate driving documents*. *See, e.g.*, *Keaton*, 222 *N.J.* at 448. Here, Hamlett said the documents were not in the car, and the State did not even argue, let alone make an evidentiary showing, that Heintz had any reason not to believe Hamlett and to think that in fact the documents were in the car. If a driver says documents are not in a car, unless there is reason to believe the driver is lying, there is no justification under the driving documents exception for entering the car.

The inability that the exception contemplates must instead be literal physical inability. For example, if a police officer arrives at the scene of a car accident where the only occupant of a car is unconscious, that unconsciousness may constitute inability to retrieve documents. In that case, a limited search of areas likely to contain driving documents would at least be reasonably likely to produce those documents.

> *b. Hamlett was not provided a reasonable opportunity to produce his driving documents, and so at the time Officer Heintz conducted the search, he did not know whether Hamlett would be able to produce the documents.*

Even if this Court understands inability to include the inability to produce documents because those documents are not in the car, Hamlett was also not provided a reasonable opportunity to produce those documents here. Under the driving documents exception, an officer must "provide defendant with the opportunity to present his credentials before entering the vehicle." *Keaton*, 222 *N.J.* at 442. *Keaton* provides no guidance as to what constitutes a reasonable opportunity, but the exception permits police to search for evidence of ownership in certain parts of "the glove compartment or other area where registration might normally be kept in a vehicle." *Patino*, 83 *N.J.* at 12 (quotation marks omitted).

Hamlett looked only in the glove compartment before Heintz removed him from the car – he could easily have kept looking himself while waiting for Boyd to arrive. *Hamlett*, 499 *N.J. Super.* at 165. By cutting off Hamlett's ability to retrieve the credentials, Heintz manufactured the authority to conduct a warrantless search under the driving documents exception. If this conduct were permissible, officers would be able to search a car under the driving documents exception merely by restricting a driver's access to the vehicle, undermining the requirements articulated in *Keaton*. This Court has never allowed police-created exigency to justify a warrantless search. *See Brown v. State*, ___ *N.J.* ___, No. 076656, 2017 *N.J.* LEXIS 805 (July 24, 2017) ("police-created exigency 'designed to subvert the warrant requirement' has long been rejected as a basis to justify a warrantless entry into a home, in comparison to exigency that arises 'as a result of reasonable police investigative conduct intended to generate evidence of criminal activity'") (quoting *State v. Hutchins*, 116 *N.J.* 457, 460, 470 (1989)). After allowing Hamlett to phone Boyd and ask her to bring the required documents, Heintz did not provide Hamlett with an opportunity to retrieve those documents.

At the time of the search, Heintz was operating under his stated belief that the car was not stolen and that Boyd was on her way to the scene, at which point she may have been able to produce the credentials. Heintz should have waited for her arrival to make

the determination of whether Hamlett was able to produce his driving documents.

Moreover, the State's must show that Hamlett was unable to produce the credentials. The Appellate Division concluded only that Hamlett's "phone call to his girlfriend . . . failed to establish that he was *able* to produce" his registration and insurance information. *Hamlett*, 449 *N.J. Super.* at 174. The call likewise failed to establish he was *unable* to produce them. New Jersey precedent does not speak to what an inability to produce credentials looks like; recent cases interpreting the rule affirmed in *Keaton* focus primarily on the reasonable opportunity requirement. But *Keaton* explicitly conditions a credential search on a driver being "unable" to produce documents. *Keaton*, 222 *N.J.* at 443. By removing Hamlett from the car and declining to follow up regarding Hamlett's call to Boyd, Heintz did not affirmatively establish that Hamlett was unable to produce his credentials. Heintz could easily have asked Hamlett additional questions to determine the veracity of his claims that Boyd was coming, or at least provided a more reasonable opportunity for her to arrive, rather than immediately resorting to an invasive search. The burden on law enforcement to demonstrate the validity of a warrantless search requires proof as to the elements of the exception. *See Robinson*, 228 *N.J.* at 544 (2017) (citing *Gamble*, 218 *N.J.* at 425;

State v. Bogan, 200 *N.J.* 61, 73 (2009); *Esteves,* 93 *N.J.* at 503). The State has not met that burden here.

3. The search was not for the purpose of establishing evidence of vehicle ownership.

The State argues "the danger to police of waiting by the side of the road is inherent and removal of vehicles from roadways help maintain officer safety." SBr17.[8] But the State provides no evidence that the circumstances of this particular stop were inherently dangerous. Three officers were present. SBr8. A patdown showed Hamlett was unarmed. Heintz testified that he searched for Hamlett's credentials despite believing Boyd was on her way, not out of a concern for officer safety but because he wanted to "avoid unnecessarily prolonging the stop." *Hamlett*, 449 *N.J. Super.* at 166. The primary purpose for the driving documents exception is to produce proof of ownership, not to make motor vehicle stops quicker and easier. *See, e.g., Keaton*, 222 *N.J.* at 448 ("the officer may search the car for evidence of ownership" and "a defendant's constitutional right to privacy in his vehicle and personal effects cannot be subordinated to mere considerations of convenience to the police . . . ."") (quotation marks omitted); *Boykins*, 50 *N.J.* at 77 ("the officer may search the car for evidence of ownership");

[8] "SBr" refers to the State's June 14, 2016 brief before the Appellate Division.

Patino, 83 *N.J.* at 12 (permitting "'a search to find the registration'") (quoting *Barrett*, 170 *N.J. Super.* at 215).

C. The State Bears the Burden of Proving All the Elements of an Exception to the Warrant Requirement, and the Court Must Maintain Distinctions Among These Exceptions to Ensure the State Meets That Burden.

While the circumstances of the stop may give rise to a search under several exceptions to the warrant requirement, the State has the burden to prove the validity of that search by meeting all the requirements of whichever exception it relies on. *Robinson*, 228 *N.J.* at 544. Here, the State relies on the driving documents exception. The requirements of that exception were not met. Though, in the present case, it is possible the *Witt* exception could justify the search based on facts beyond the lack of credentials,[9] the State did not make any evidentiary showing as to the propriety of a search under *Witt*; instead, it attempted to meet its burden by justifying the search under the driving documents exception, and the Court should assess its permissibility through that lens. *Cf. State v. Witt*, 223 *N.J.* 409, 419 (2015) (where defendant did not challenge permissibility of stop at trial, Appellate Division "should have declined to entertain the belatedly raised issue.").

[9] *Amicus* takes no position as to the validity of the search based on *Witt*.

Moreover, "[i]n analyzing the validity of warrantless searches, we have stated that 'the strands of constitutional exceptions to the Fourth Amendment must be kept untangled.'" *Esteves*, 93 *N.J.* at 503-04 (quoting *State v. Welsh*, 84 *N.J.* 346, 354 (1980)). The danger of collapsing the inquiries of all exceptions that might apply to one search is the concern that doing so will undermine the need to provide clear directions to law enforcement about the limits of warrantless searches. This Court's directions must allow officers to determine – at the point where they initiate a particular privacy intrusion – whether such an intrusion is permissible. If the Court does not analyze the search by considering the moment it was initiated, a danger arises that the State will justify the search based on later-discovered evidence, a result that the law clearly forbids. "It is beyond dispute . . . that '[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light.'" *State v. Bruzzese*, 94 *N.J.* 210, 221 (1983) (quoting *Byars v. United States*, 273 *U.S.* 28, 29 (1927)). For instance, police may initiate a search for driving documents, exceed the boundaries of that exception, and later justify the search under *Witt*. Robust protection of Fourth Amendment rights requires clear delineation between exceptions to the warrant requirement in order to provide unambiguous guidelines for police behavior.

II. VIOLATION OF THE CROSS-ASSIGNMENT ORDER IS A CONSTITUTIONAL DEFECT, NOT A TECHNICAL ONE, BECAUSE IT CREATES AN APPEARANCE OF PARTIALITY.

There is a well-established procedure for how law enforcement officers may obtain warrants in New Jersey. In *State v. Broom-Smith*, this Court held, pursuant to both *N.J.S.A.* 2B:12-6 and *Rule* 1:12-3, that law enforcement officers can seek warrants from substitute municipal judges only when the regularly-assigned judge is disqualified or unable to hear the case. 201 *N.J.* at 235-36. So-called "cross-assignment" is limited to those cases where a judge cannot hear the case for an extended period; it is not justified when the regularly-assigned judge is simply "busy with other matters or home for lunch." *Ibid.*

In order to impose "some order and uniformity . . . on the cross-assignment procedure" and "eliminate any question of judge shopping," *Broom-Smith* establishes several procedural requirements. *Ibid.* Assignment Judges must issue cross-assignment orders establishing the sequence in which substitute judges will be assigned to cases. *Ibid.* Law enforcement officers seeking warrants from substitute judges must first contact the regularly-assigned judge and verify that judge's inability to hear the warrant application. *Ibid.* The substitute judge must then create a record detailing why the regularly-assigned judge is unable to

preside before proceeding. *Ibid.* ("It goes without saying that . . . a record should be made.").[10]

Abrams bypassed all of these protections when he sought the warrant to search Hamlett's hotel room. Rather than submitting the warrant application to a judge in Galloway Township, where the proposed search was to take place, Abrams brought the warrant to Judge Ward, the on-call judge in Atlantic City, where Abrams has worked for eight years. In doing so, the parties neglected to abide by any of the procedures outlined in *Broom-Smith*: Abrams did not contact a Galloway Township judge and did not verify that the regularly-assigned judge was unable to hear the case. *Ibid.* Abrams did not ensure Judge Ward created any associated record about his authority to preside. *Ibid.* Furthermore, even if Abrams had been justified in seeking a substitute judge, he should not have gone to Judge Ward, as the cross-assignment order issued by the Assignment Judge in Atlantic County listed him as the seventh judge to be contacted if the regularly-assigned judge were disqualified.

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[10] While these rules do not apply in the Superior Courts of the Law Division, in municipal court, where they do apply, they must be enforced, and the failure to enforce them creates the danger of the appearance of impropriety. This Court has expressed particular concern about "ensuring both conflict-free, fair hearings and the appearance of impartiality in municipal court," since "for millions of New Jerseyans each year, their only experience with the court system occurs at the municipal court level." *State v. McCabe*, 201 *N.J.* 34, 42 (2010).

The State's disregard for the protective procedures delineated in *Broom-Smith* profoundly undermines a purpose of the cross-assignment scheme, which is to "eliminate any question of judge shopping." *Ibid*. As such, the State's transgressions are not merely technical, but instead go to the very heart of state and federal constitutional protections against unreasonable searches and seizures. *U.S. Const.*, amends. IV, XIV; *N.J. Const.* art. 1, ¶ 7. This Court should overrule the Appellate Division's decision and suppress the evidence derived from the invalid warrant, both to protect the constitutional rights of Hamlett, and to preserve public faith in the impartiality of the judicial system.

A. The Officer's Failure to Follow the Cross-Assignment Order Was a Constitutional Violation That Requires Suppression.

Generally, this Court has noted, "Courts in this State consistently have maintained that strict adherence to the protective rules governing search warrants is an integral part of the constitutional armory safeguarding citizens from unreasonable searches and seizures." *State v. Valencia*, 93 *N.J.* 126, 133-34 (1983). As a result, a violation of a procedural rule will only be allowed if it is "insubstantial" – meaning that "the objectives underlying the procedural requirements that govern the application, issuance, execution, filing and return of the search warrants are not fundamentally compromised" despite the violation

of the rule. *Id.* at 134. When the State's violation of a procedural warrant rule is indeed substantial, the search will be considered warrantless and presumed invalid. *Id.* at 133, 136. If the State cannot show the search was justified by some recognized exception to the warrant requirement, any evidence obtained pursuant to the invalid warrant must be excluded. *Id.* at 133. *See State v. Macri*, 39 *N.J.* 250 (1963) (suppressing evidence obtained via an invalid warrant).

Here, the State's disregard for the cross-assignment scheme fundamentally compromises the core objective of the procedures: to guard against judge-shopping or even the appearance of judge-shopping. If the State is allowed to violate this set of rules, law enforcement officers will be able to seek out judges who are more likely to approve their warrant applications, and they will be perceived as being able to do so. Regardless of whether Abrams actually engaged in judge-shopping, the danger that he could do so without consequence creates the appearance of partiality. The Appellate Division has found the appearance of partiality poses so great a threat to the integrity of the judiciary that it can in some instances justify suppression of evidence. *See State v. McCann*, 391 *N.J. Super.* 542, 555 (App. Div. 2007) (establishing a prospective "'bright-line' rule invalidating the search warrant" when the defendant demonstrates there is an appearance of partiality). The error here is thus substantial, rather than

technical, and the warrant should be considered invalid and the evidence suppressed.

1. Violation of the cross-assignment order creates the appearance of partiality.

A central purpose of the cross-assignment scheme established in *Broom-Smith* is to "eliminate any question of judge shopping." 201 *N.J.* at 236. Thus, the objective of the rules is not only to ensure that warrants are in fact issued by a "neutral and detached magistrate" as our state and federal constitutions guarantee, but to maintain public confidence in the judiciary by eliminating even the appearance of partiality.

There is no question that a key constitutional protection against unreasonable searches is that inferences of probable cause must "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 *U.S.* 10, 13-14 (1948). This Court has also found that "the failure to have a neutral magistrate or judge determine whether the conditions in the warrant were satisfied" is always a constitutional violation, not a technicality "justifying overlooking the deficiencies in the warrant." *State v. Marshall*, 199 *N.J.* 602, 613, 618 (2009) (suppressing evidence because the warrant application did not specify where the alleged crime happened, allowing the police to act according to their discretion,

instead of at the direction of a neutral and detached magistrate). Because of the importance of neutrality among magistrates issuing warrants, the cross-assignment scheme seeks to "maintain public confidence in the integrity of the judiciary" by removing even the chance that law enforcement could manipulate the process. *State v. Presley*, 436 *N.J. Super* 440, 463 (2014)(*quoting In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm.*, 213 *N.J.* 63, 71 (2013).

New Jersey holds its judges to high standards. Canon 2 of the Code of Judicial Conduct requires that, "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." *Rule* 1:12-1(g) further requires a judge's disqualification "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." This Court has found that "'it is not necessary to prove actual prejudice on the part of the court' to establish an appearance of impropriety; an 'objectively reasonable' belief that the proceedings were unfair is sufficient." *DeNike v. Cupo*, 196 *N.J.* 502, 517 (2008) (quoting *State v. Marshall*, 148 *N.J.* 89, 279 (1997), *cert. denied*, 522 *U.S*. 850 (1997)). The relevant question is, "Would a reasonable, fully informed person have doubts about the judge's impartiality?" *Ibid.*

Indeed, though New Jersey has abandoned the appearance of impropriety standard for attorneys, that standard ”has never been altered as it relates to judges.” *Kane Properties, LLC v. City of Hoboken*, 214 *N.J.* 199 (2013). *See also, e.g., N.J. Court Rules, CJC Canon 2.1* (“Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety and must expect to be the subject of constant public scrutiny.”).

The cross-assignment order is a critical safeguard against any appearance of partiality because, when followed, it eliminates any chance of gamesmanship. Law enforcement officers may only go to a substitute judge when the regularly-assigned judge is disqualified for a documented reason, and officers are only permitted to approach the next substitute judge in sequence. *Broom-Smith*, 201 *N.J.* at 236. But if the cross-assignment order is not enforced, nothing will stop police officers from approaching only substitute judges they know, or substitute judges they suspect will be more likely to authorize a warrant. This possibility creates the appearance of partiality. As Professor Oren Bar-Gill and Professor Barry Friedman have written,

> In jurisdictions in which there is more than one magistrate, there is no excuse for having a system of warrant authorization that is anything other than random. The literature discusses police seeking out favorable magistrates. When it comes to judge-shopping as opposed to forum-shopping, however, courts

> are quite critical. Lawyers have been disbarred and criminal convictions overturned because of judge-shopping. The reasons for this are easy to understand: allowing such conduct is inimical to the rule of law. It is difficult to imagine, therefore, why police should get to pick their magistrate when seeking a warrant.
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> [Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U.L. Rev. 1609, 1640-41 (2012).]

Courts have more often had occasion to address judicial assignment schemes that seem to allow prosecutors to judge-shop.[11] But the same principles apply to judge-shopping by officers. As the Court of Appeals for the Tenth Circuit noted in *United States v. Pearson*, "If a judge is selected by a prosecutor rather than by a neutral procedure, then one might reasonably question the decisions made by the selected judge." 203 *F.*3d 1243, 1264 (10th Cir. 2000) (urging the District of Kansas to adopt a random assignment system for all cases). Likewise, the public, if fully informed, might reasonably question a system where police officers are able to choose which judges review their warrant applications.

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[11] *See, e.g.*, *Tyson v. State*, 619 *N.E.*2d 276, 300 (Ind. Ct. App. 1993) ("The existing system of filing cases is totally inappropriate and must be abandoned in favor of a system in which the prosecutor cannot control the assignment of a case to a particular judge."), *cert. denied*, 510 *U.S.* 1176 (1994); *State v. Simpson*, 551 *So.*2d 1303 (La. 1989) (finding a due process violation in a system that allows prosecutors to choose their judges); *McDonald v. Goldstein*, 83 *N.Y.S.*2d 620 (Sup. Ct. 1948) (district attorney cannot have power to assign cases to judges).

New Jersey courts have also vigilantly guarded against any appearance of partiality in other contexts. *See, e.g.*, *McCabe*, 201 *N.J.* at 38 (finding municipal judges must always recuse themselves if they are adversaries with one party's lawyers in another case, in order to "avoid not only actual conflicts but also the appearance of impropriety to promote the public's trust"); *DeNike*, 196 *N.J.* at 507 (remanding for a new trial because the judge's negotiations about post-retirement employment at the lawyer's firm created an "appearance of impropriety"); *State v. Tucker*, 264 *N.J. Super.* 549, 554 (App. Div. 1993) (reversing convictions because the judge had previously presented two cases against the defendant to a grand jury, undermining the "appearance of impartiality which fosters the confidence of litigants in the justice system"); *State v. Kettles*, 345 *N.J. Super.* 466, 471 (App. Div. 2001) (reversing a conviction because the judge had previously presented a case against the defendant to a grand jury); *see also State v. Perez*, 356 *N.J. Super.* 527, 532 (App. Div. 2003) (remanding because a judge made comments about "Spanish people" that "a reasonable person would take as reflecting bias").

Allowing law enforcement officers to select which judge will hear a warrant application, in violation of the cross-assignment order, creates an appearance of partiality that undermines public confidence in the integrity of the judiciary. The subversion of such a core principle cannot be considered an "insubstantial"

violation; instead, violation of the cross-assignment order is an error of constitutional magnitude requiring suppression.

2. Courts have recognized that appearance of partiality is grounds for suppression.

The integrity of the judicial process is of such paramount importance that the Appellate Division has decided that even the appearance of partiality justifies a "bright-line" application of the exclusionary rule. In *McCann*, the defendant argued that a municipal judge was not a "neutral and detached magistrate" because the judge had been the defendant's family attorney for over twenty years. 391 *N.J. Super.* at 542. While the Appellate Division declined to suppress evidence derived from the warrant in the case at hand, it created a prospective rule that "[i]n the future, if a defendant makes a particularized and credible assertion of facts that objectively suggest an appearance of partiality on the part of the judge issuing a search warrant, based on a prior relationship or otherwise, a 'bright-line' rule invalidating the search warrant will be applicable." *Id.* at 555. The court noted, "The need for such a remedy [of suppression] reflects the central place of the neutral and detached magistrate requirement in our state and federal search and seizure guarantees." 391 *N.J. Super.* at 555.[12]

[12] Even though the Appellate Division in *Presley* declined to apply *McCann*'s "bright-line" rule invalidating a warrant after a judge

New Jersey is not the only court system to apply the exclusionary rule in this context. While the appearance of partiality has not been found to be a violation of the federal Constitution warranting suppression, other state courts have excluded evidence on this basis. *Compare United States v. Harris*, 566 *F*.3d 422, 434 (5th Cir. 2009) (rejecting the argument that a warrant was invalid because the judge's "impartiality might reasonably be questioned" per the federal disqualification statute, noting that the disqualification statute is "more demanding" than the federal Constitution), *cert. denied*, 559 *U.S.* 975 (2010) *with Commonwealth v. Brandenburg*, 114 *S.W*.3d 830, 832-33 (Ky. 2003) (suppressing evidence because the trial

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recused himself, 436 *N.J. Super.* at 443, *Presley* is distinguishable from the instant case, and does not undermine *McCann*'s applicability here. In *Presley*, the behavior of both the judge and the party seeking to invalidate the warrant differed in important ways from the parties' behavior here. The judge in *Presley* had previously prosecuted only one of several defendants and was not aware that he was disqualified. *Ibid.* Crucially, the defendant in *Presley* also engaged in gamesmanship that Hamlett did not: in that case, for "strategic" reasons, the defendant delayed mentioning that the judge was disqualified. *Id.* at 446. As a result, in *Presley*, the Appellate Division found that a "fully informed" member of the public would not have doubts about the judge's partiality, and allowing the defendant to withhold information about a judge's disqualification until after an adverse result would undermine confidence in the integrity of the judicial process—the opposite intention of the bright-line rule. *Id.* at 465-66. Here, Judge Ward should have known he was not authorized to approve the warrant, and Hamlett engaged in no gamesmanship in challenging the propriety of the warrant. Thus, *Presley* does not undermine *McCann*'s applicability here.

commissioner's marriage to a prosecutor's office employee created an "appearance of impropriety" under Kentucky's Code of Judicial Conduct, which meant the trial commissioner was not a neutral and detached magistrate) and *People v. Lowenstein*, 118 *Mich. App.* 475, 486 (1982) (suppressing evidence because the magistrate had previously been sued by the defendant, which created "a sufficient appearance of impropriety"), *appeal denied*, 414 *Mich*. 947 (1982).

This Court should apply *McCann*'s "bright-line" rule to invalidate the warrant here. Under the *McCann* standard, suppression is appropriate when the defendant would have been "entitled to recusal of the judge" who issued the warrant — either because the judge had a relationship with one of the parties, or because there was an appearance of bias for another reason. 391 *N.J. Super.* at 555 (describing a possible appearance of partiality "based on a prior relationship or otherwise"). *See also Rule* 1:12-1(g) ("The judge of any court shall be disqualified . . . when there is *any other reason* which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.") (emphasis added). Under *McCann*, "[t]he [bright-line] test is similar to that used in judging whether recusal is warranted under the principles discussed earlier [articulated in the Code of Judicial Conduct, *N.J.S.A.* 2A-15-49, and *Rule* 1:12-1]." 391 *N.J. Super.* at 550, 555.

Abrams created an appearance of partiality in this case when he chose to go to Judge Ward in violation of the cross-assignment order. A defendant may reasonably believe that a judge is biased when a law enforcement officer has picked him in contravention of prescribed court process. An additional concern of partiality arises from Abrams's prior relationship with Judge Ward, as Abrams appeared before Judge Ward during his eight years of service in Atlantic City. While the entitled-to-recusal test contemplates a situation where a judge could have been assigned to the case in the first place before being disqualified, here Judge Ward was not authorized to preside at all. Hamlett was more than entitled to the judge's recusal, and evidence obtained from the warrant the judge issued should be suppressed.

Finally, *McCann* underscores the fundamental nature of the objective at stake. Maintaining the real and perceived integrity of the judicial process is of such importance that any violations that undermine that goal should invalidate the warrant.

B. Violation of This Order Is Not a "Technical" Error, and Even if Technical, Was Not Harmless or Made in Good Faith.

The Appellate Division erroneously decided that the exclusionary rule did not apply in this case, reasoning that violation of the cross-assignment order was a "technical" and not a constitutional violation. From there, the court applied the two-prong test for technical violations articulated in *State v. Gioe*,

401 *N.J. Super.* 331, 343 (App. Div. 2008), *certif. denied*, 199 *N.J.* 129 (2009). Under *Gioe*, an error is "fundamental," and thus requires suppression, if it "involves a constitutional violation." *Id.* (quotation marks omitted). Technical violations of warrant requirements will only compel suppression if (a) the error is not harmless because "the search might not have occurred or would not have been so abrasive if [the rule] had been followed," or (b) there is bad faith or "evidence of intentional and deliberate disregard" of the rule. *Id. See also id.* at 344 n.4 (citing *State v. Novembrino*, 105 *N.J.* 95, 157-58 (1987)) (noting that *Gioe* does not disturb this Court's ruling that there is no good-faith exception for constitutional violations).

The Appellate Division's reasoning here was misguided because contravention of the cross-assignment scheme is a constitutional error, not a technical one. The fact that *McCann* declares that appearances of partiality should not be subjected to the kind of good faith and harmless error inquiries envisioned by *Gioe* is further evidence of the fundamental, constitutional nature of the violation at issue. *McCann*, 391 *N.J. Super.* at 554 n.4, 555.

Moreover, even if the Court analyzes the State's faults in this case as technical, the violation is not a harmless error, nor was it done in good faith. Finally, allowing violation of the cross-assignment order as a mere technical violation risks encouraging further contravention of this Court's rules.

1. This transgression is more fundamental than those that courts have considered merely "technical."

New Jersey courts have recognized there is a small category of clerical errors in warrants that do not constitute constitutional violations and consequentially do not automatically trigger the exclusionary rule. *See Rule* 3:5-7(g) ("In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution."); *State v. Gadsden*, 303 *N.J. Super.* 491, 505 (App. Div. 1997) ("[T]echnical violation of a procedural law does not automatically render a search and seizure unreasonable and does not require the exclusion of evidence.").

Examples of transgressions that New Jersey courts have considered to be only "minor deficiencies" include failure to file the affidavit with the County Clerk and an error in a property address alongside an otherwise accurate description of the property to be searched. *State v. Pointer*, 135 *N.J. Super.* 472, 478 (App. Div. 1975) (citing *State v. Harris*, 98 *N.J. Super.* 502, 504 (App. Div. 1968), *certif. denied*, 51 *N.J.* 396 (1968), and *State v. Daniel*, 46 *N.J.* 428, 438-39 (1966)). The Appellate Division has also noted, "[O]ur courts have been reluctant to invalidate search warrants based on confusion over jurisdiction or other issues that do not implicate probable cause or the neutrality of the issuing

judge."[13] *State v. Broom-Smith*, 406 *N.J. Super.* 228, 239 (App. Div. 2009) , *aff'd*, 201 *N.J.* at 229 (citing *State v. Bisaccia*, 58 *N.J.* 586, 592 (1971) (reversing suppression of evidence when the officer provided the wrong address but an accurate description of the property); *State v. Jones*, 185 *N.J. Super.* 285, 288-89 (App. Div. 1982) (rejecting a challenge to a warrant issued by an acting judge whose official appointment order had technically lapsed); *Gadsden*, 303 *N.J. Super.* at 503-05 (declining to suppress evidence Hillside police officers obtained during an arrest of a man in Newark who was suspected of robberies in Hillside)).

But the errors here do implicate the neutrality of the issuing judge. Because the errors here call into question the integrity of the warrant itself, the problems are far more analogous to the

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[13] While "the issuance of a warrant by an unauthorized judge" alone does not necessarily constitute a "fundamental" error under federal jurisprudence, *see United States v. Luk*, 859 *F.*2d 667, 673 (9th Cir. 1988), federal courts have found that a warrant issued outside a court's jurisdiction can rise to the level of a Fourth Amendment violation. *See, e.g.*, *United States v. Horton*, Nos. 16-3976, 16-3982, 2017 *U.S. App.* LEXIS 13333 (8th Cir. July 24, 2017) (finding that a warrant to search a computer in a different jurisdiction was "void *ab initio*, rising to the level of a constitutional infirmity"); *United States v. Glover*, 736 *F.*3d 509 (2013) (reversing convictions because the district court authorized a warrant for a search outside its jurisdiction); *United States v. Master*, 614 *F.*3d 236, 241 (6th Cir. 2010) (finding that a search authorized by a general sessions judge in a different county "violated Defendant's Fourth Amendment rights"); *United States v. Levin*, 186 *F. Supp.* 3d 26, 37 (D. Mass. 2016) (suppressing evidence from a warrant because the magistrate did not have authority to issue it).

kinds of problems that have rendered warrants invalid. *See, e.g.*, *Marshall*, 199 *N.J.* at 618 (invalidating a warrant because the police did not specify which of two apartments should be searched); *State v. Fariello*, 71 *N.J.* 552, 559-60 (1976) (holding a warrant was invalid because there was no transcript of oral testimony supporting the application); *State v. Cassidy*, 179 *N.J.* 150, 155, 158-59 (2004) (finding a warrant was invalid because the witnesses were not sworn); *State v. Bobo*, 222 *N.J. Super.* 30, 34 (App. Div. 1987) (suppressing evidence because the "complaint was not signed in the presence of the deputy clerk and it was not signed under oath"); *State v. Stolzman*, 115 *N.J. Super.* 231, 234-35 (App. Div. 1971) (suppressing because the affidavit was insufficient and there was no transcript of oral testimony); *State v. Bisaccia*, 131 *N.J. Super.* 270, 272, 274 (App. Div. 1974) (affirming a motion to suppress because the application lacked sufficient facts and there was no transcript of alleged additional facts).

New Jersey courts have declined to allow violations of rules governing warrants as "technical insufficiencies" when doing so would undermine the judicial system at large. *See Valencia*, 93 *N.J.* at 134 ("A primary objective of our rules governing search warrants is to enhance the soundness and integrity of the judicial decisional process entailed in their issuance."). This Court found that when the failure to follow rules governing warrants "subverts the reliability of the decisional process; it undermines the proper

discharge of the judiciary's responsibility and clouds the judge's role in authorizing the search," and as such, the error is not merely "technical" and the warrant itself is invalid. *Id.* at 136. The cross-assignment scheme was instituted for the very purpose of maintaining the neutrality of judges and the integrity of the judicial system. Abrams's transgressions were not technicalities but a "wholesale departure from" that scheme. *Ibid*. Failing to create a record of why the regularly-assigned judge cannot hear the case "subverts the reliability of the decisional process." *Ibid*. Choosing a judge out of the sequence prescribed in the Assignment Judge's order "undermines the proper discharge of the judiciary's responsibility." *Ibid.* Going to the wrong judge entirely "clouds the judge's role in authorizing the search." *Ibid.* These violations are not technical but fundamental, and they require suppression.

2. Questions about appearance of partiality should not be subjected to harmless error or good faith inquiries.

Neither the harmless-error nor the good-faith analysis sheds light on the permissibility of the officers' conduct here. The Appellate Division has identified the problems with applying harmless error analysis to questions of partiality. Rejecting harmless error as an "unworkable" inquiry, the *McCann* court explained,

> A harmless error inquiry would presumably require evaluation of the strength of the

> warrant application, as well as whether the issuing judge was favorably inclined toward the defendant or biased against him as a result of the prior relationship, a finding that could only be made by taking testimony from the judge. We view these inquiries as problematic at best.
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> [391 *N.J. Super.* at 554 n.4.]

Every time the cross-assignment order is violated, the trial court should not be forced to engage in fact-finding about the strength of the warrant application or the nature of a police officer's relationship with a municipal judge. Law enforcement should simply be required to follow the law.

The good-faith inquiry is likewise inappropriate, because it is irrelevant to the question of the appearance of impropriety. As this Court has noted, even where there is no evidence that a judge has acted unethically, or that the plaintiff has attempted to judge-shop, "[i]t is the appearance of impropriety — and that alone — which requires recusal . . . ." *McCabe*, 201 *N.J.* at 47 (creating a rule that municipal judges must recuse themselves if they are engaged in another open case against one party's attorney). *See also McCann*, 391 N.J. Super. at 555 (noting that "'[g]ood faith is not a defense'" to the appearance of partiality). A bright-line rule barring admissibility should apply in this case as well.

Because harmless-error and good-faith analyses cannot appropriately address the problems inherent in the violation of

the cross-assignment order, the Court should apply a bright-line rule requiring suppression in such cases.

A law governs the assignment of municipal court judges. Abrams acted in breach of that law, creating an appearance that he was judge-shopping. Whether intended or not, Abrams's violation fundamentally compromises a key objective of the warrant rules — to maintain the integrity of the judicial system. *Valencia*, 93 *N.J.* at 134.

3. Even if this Court finds the violation was a technical one, the evidence should be suppressed under *Gioe*.

Assuming the violation was only "technical," the evidence derived from the technically-deficient warrant should still be suppressed under the two-prong test in *Gioe,* 401 *N.J. Super.* at 343. Abrams's error was neither harmless nor conducted in good faith.

First, the Appellate Division found that the error was harmless because "[i]f Abrams had appeared before the Galloway Township municipal court judge, that judge would undoubtedly have issued a substantively identical warrant." *Hamlett*, 449 *N.J. Super.* at 178. However, there is no guarantee that the regularly-authorized judge would have come to the same conclusion. The Tenth Circuit recently declined to "accept such a speculative approach" in an analogous case:

> The Government sought and obtained Warrant 2 from a federal magistrate judge in the

> District of Kansas who clearly lacked Rule 41 authority to issue a warrant for property already located in Oklahoma. Had the magistrate judge recognized that clear and obvious fact, he surely would not have issued Warrant 2. And, had Warrant 2 not been issued, the Oklahoma search would not have occurred as it did, meaning that the Government would not have had occasion to secure Krueger's cooperation or seize his hard drive and computer. Although the Government *may have* been able to obtain a warrant from a federal magistrate judge in the Western District of Oklahoma, meaning it *may have* ultimately secured Krueger's cooperation and seized his devices without violating Rule 41, such hypotheticals simply cannot cure the Government's gross negligence in failing to comply with Rule 41(b)(1) in the first instance.
>
> [*Krueger*, 809 *F.*3d at 1116-17 (suppressing evidence derived from the defective warrant) (emphasis in original).]

Moreover, one of the most important protections that the warrant requirement provides is to "insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police." *Wong Sun v. United States*, 371 *U.S.* 471, 481-82 (1963). By obtaining a warrant from a judge who was not authorized to issue it, Abrams undermined that protection and cannot prove the error was harmless.

The Appellate Division further found that Abrams had not acted with "bad faith or deliberate disregard" because he had erroneously believed that he was entitled to seek a warrant from the Atlantic City judge. *Hamlett*, 449 *N.J. Super.* at 178. However, Abrams's

failure to comply with the law was itself bad faith because law enforcement officers are expected to know the law. *See State v. Puzio*, 379 *N.J. Super.* 378, 384 (App. Div. 2005) ("We cannot countenance an officer's interference with personal liberty based upon an entirely erroneous understanding of the law."). *But see State v. Sutherland*, 445 *N.J. Super.* 358, 367 (App. Div. 2016) (questioning the continued validity of *Puzio* in light of the U.S. Supreme Court's ruling in *Heien v. North Carolina*, 135 *S. Ct.* 530 (2014)), *certif. granted*, 228 *N.J*. 246 (2016).[14] *See also Sneed v. State*, 876 *So*.2d 1235, 1238 (Fla. Dist. Ct. App. 2004) (suppressing

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[14] *Amicus* also raised concerns as to the Appellate Division's decision in an *amicus* brief submitted in *Sutherland*, 228 *N.J.* at 246. Regardless, in both *Heien* and *Sutherland*, the officers had to make split-second decisions about whether there was reasonable suspicion for driving statute violations. *Sutherland*, 445 *N.J. Super* at 367 (quoting *Heien*, 135 *S. Ct.* at 539-40). The courts concluded that "'so long as such a mistake is objectively reasonable, it may give rise to reasonable suspicion.'" *Ibid.* In contrast, Officer Abrams had plenty of time to obtain a warrant, and he should know how to do so legally. Furthermore, this Court has often found that the New Jersey Constitution provides greater protections against unreasonable searches and seizures than does the federal Constitution. *See State v. Hempele*, 120 *N.J.* 182, 196 (1990) ("[A]lthough [the U.S. Supreme Court] may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship."). In particular, this Court has rejected the U.S. Supreme Court's jurisprudence on the good-faith exception in another context, on the grounds that "the good-faith exception will ultimately reduce respect for and compliance with" constitutional protections. *Novembrino*, 105 *N.J.* at 154 (declining to adopt the good-faith exception established in *United States v. Leon*, 468 *U.S.* 897 (1984)). This Court should apply the same reasoning here and hold officers responsible for knowing the rules governing warrants.

medical records that had been mistakenly obtained in violation of state law because "a law enforcement officer's ignorance of the law is not tantamount to good faith"); *State v. Adams*, 409 *S.C.* 641, 652-53 (2014) (suppressing evidence after police installed a GPS tracker on a suspect's car in contravention of state law because their ignorance of the statute was not an excuse). The procedures for obtaining a warrant from the authorized judge have been clearly articulated in *Broom-Smith*, 201 *N.J.* at 229, *N.J.S.A.* 2B:12-6, *Rule* 1:12-3, and the Assignment Judge's cross-assignment order. It is Abrams's duty to understand and comply with the cross-assignment scheme, and ignorance of the law is not an excuse.

Therefore, even under *Gioe*, the evidence should be suppressed.

4. Declining to invalidate the warrant would encourage future violations of the rule this Court established in *Broom-Smith*.

This Court has said, "We serve the criminal justice system best by enforcing clear and uniform rules whenever appropriate under the circumstances." *State v. Johnson*, 168 *N.J.* 608, 623 (2001). This Court was very straightforward in its ruling in *Broom-Smith*. The procedures for seeking a warrant from a municipal judge are clearly explained by New Jersey case law, New Jersey statute, New Jersey rule, and judicial orders from Assignment Judges. Those procedures were violated. Failing to enforce the clear and uniform

rules in this case would send mixed signals to courts and law enforcement.

Many courts have recognized that the purpose of the exclusionary rule "is prophylactic—to deter and discourage police conduct which is constitutionally offensive." *State v. Morant*, 241 *N.J. Super.* 121, 135 (App. Div. 1990) (quoting *State v. Whittington*, 142 *N.J. Super.* 45, 51 (App. Div. 1976), *certif. denied*, 127 *N.J.* 323 (1990)). This Court has also said "the exclusionary rule is applied to those circumstances where its remedial objectives can best be achieved." *State v. Williams*, 192 *N.J.* 1, 15 (2007). This case involves those circumstances. Law enforcement already had notice of the procedures governing the assignment of judges to warrant applications. Suppressing the evidence is the only way to ensure compliance with the cross-assignment scheme.

If police officers are permitted to circumvent protective procedures to apply only to their favorite judges for warrants, New Jersey citizens might reasonably question whether there truly is a neutral and detached magistrate standing between them and the State. As this Court said in *In re Advisory Letter No. 7-11*, "Appearances matter when justice is dispensed, and therefore public perception that a judge might be partial to one party over another — whether true or not — cannot be reconciled with the ideal of blind justice." 213 *N.J.* at 65-66.

CONCLUSION

For the foregoing reasons, the Appellate Division's decision should be reversed.

REBECCA LIVENGOOD (ID # 028122012)
ALEXANDER SHALOM
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Counsel for *Amicus Curiae*

Dated: August 15, 2017

State v. El-Bey

Superior Court of New Jersey, Appellate Division

November 10, 2015, Argued; March 10, 2016, Decided

DOCKET NO. A-2252-13T4

Reporter
2016 N.J. Super. Unpub. LEXIS 520 *

STATE OF NEW JERSEY, Plaintiff-Respondent, v. DARIUS X. EL-BEY, a/k/a OTIS CLINTON, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Union County, Indictment No. 10-07-0739.

Counsel: Rochelle Watson, Assistant Deputy Public Defender, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Ms. Watson, of counsel and on the briefs).

Garima Joshi, Volunteer Attorney, argued the cause for respondent (John J. Hoffman, Acting Attorney General, attorney; Teresa A. Blair, Deputy Attorney General, of counsel and on the brief; Ms. Joshi, on the brief).

Judges: Before Judges Reisner and Leone.

Opinion

PER CURIAM

Defendant, known as Darius X. El-Bey and Otis Clinton, appeals from the denial of his motion to suppress a handgun found during a warrantless search of the glove compartment of his vehicle. We affirm.

I.

The following facts were elicited at the suppression hearing. At approximately 11 p.m. on April 11, 2010, defendant was stopped for speeding by Linden Police Department Officer Christopher Guenther. After approaching the vehicle, Guenther requested defendant's license, registration, and proof of insurance. Defendant responded that he lived in Rahway and that the vehicle belonged to his wife. Defendant then handed Guenther "an unofficial homemade book" entitled "right [*2] to travel documents for Darius Xavier El-Bey." Defendant stated that "it was his right-to-travel documents and [that] he was claiming diplomatic immunity." Guenther testified that the book contained a birth certificate and documents that stated "[defendant] was not a driver" and that the "vehicle was not a motor vehicle because it was not involved in commerce and therefore he was not subject to the laws of the state." Guenther testified that he suspected these documents were fraudulent, so he radioed for an officer familiar with immigration documents to report to the scene.

While waiting for assistance, Guenther inputted the vehicle's license plate into his police cruiser's on-board computer. The computer displayed that the vehicle was owned by Cheri Minter, that it had not been reported as stolen, and that it was registered to an address in Elizabeth, not Rahway.

Guenther further attempted to verify that defendant was licensed to drive by requesting the Police Department's central dispatch to perform a records search. Central dispatch could not find a driver's license for Darius El-Bey. However, defendant's "right to travel" documents contained a date of birth and social security number [*3] which central dispatch confirmed belonged to "Otis Clinton."

The computer displayed Otis Clinton's driver's license photo, which looked exactly like defendant. The computer also revealed that Clinton had several warrants for his arrest. When confronted with this information, defendant denied it, "became combative and uncooperative," and refused to leave his vehicle. Guenther and two other officers then removed defendant from the car and arrested him on the warrants.

Once defendant was placed in the police cruiser, Officer Perez, who had arrived on the scene, approached the vehicle and searched the glove compartment for the vehicle's registration and insurance cards. Simultaneously, Cheri Minter arrived on the scene. She claimed she was defendant's

wife.[1] Less than a minute after Officer Guenther began speaking with Minter, Officer Perez informed him that a handgun had been found in the glove compartment.

Defendant was charged with unlawful possession of a handgun, N.J.S.A. 2C:39-5(b)[2]; and receiving stolen property, namely a handgun, N.J.S.A. 2C:20-7. Judge Stuart L. Peim issued an order and oral opinion denying [*4] defendant's motion to suppress the handgun found in the glove compartment. The court credited Officer Guenther's testimony. The court found that after the officer requested the registration and insurance cards, and defendant instead handed only the "right to travel documents for Darius Xavier El-Bey," Supreme Court case law authorized an officer to enter the vehicle and look for the registration and insurance cards in the glove compartment, where the officer inadvertently found a handgun which he then seized.

Defendant then entered into a plea agreement. Pursuant to that agreement, the trial court dismissed the receiving stolen property charge, and sentenced defendant to five years in prison with three years of parole ineligibility on the second-degree weapons charge.

II.

Defendant appeals his October 31, 2013 judgment of conviction. He argues:

> THE POLICE HAD NO LEGITIMATE REASON TO ENTER THE GLOVE COMPARTMENT TO SEARCH FOR EVIDENCE OF OWNERSHIP BECAUSE THEY HAD ALREADY DETERMINED THE DRIVER'S IDENTITY AND ARRESTED HIM, AND THROUGH [*5] THEIR ELECTRONIC RECORDS, THEY HAD DETERMINED THE NAME OF THE CAR'S OWNER, THAT THE CAR WAS VALIDILY REGISTERED, AND THAT IT WAS NOT REPORTED STOLEN.

We must hew to our standard of review. "'[A]n appellate court reviewing a motion to suppress must uphold the factual findings underlying the trial court's decision so long as those findings are supported by sufficient credible evidence in the record.'" State v. Robinson, 200 N.J. 1, 15, 974 A.2d 1057 (2009) (quoting State v. Elders, 192 N.J. 224, 243, 927 A.2d 1250 (2007)). Those findings warrant particular deference when they are "substantially influenced by [the trial judge's] opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." *Ibid.* (quoting Elders, supra, 192 N.J. at 244). The suppression court's "findings should be disturbed only if they are so clearly mistaken that the interests of justice demand intervention and correction." *Ibid.* (quoting Elders, supra, 192 N.J. at 244). A trial court's interpretation of the law, however, "is 'not entitled to any special deference,' and its 'legal conclusions are reviewed de novo.'" State v. Sorensen, 439 N.J. Super. 471, 486, 110 A.3d 97 (App. Div. 2015) (quoting State v. Gamble, 218 N.J. 412, 425, 95 A.3d 188 (2014)).

III.

"'It is firmly established that a police officer is justified in stopping a motor vehicle when he has an articulable and reasonable suspicion that the driver has committed a motor vehicle offense.'" State v. Locurto, 157 N.J. 463, 470, 724 A.2d 234 (1999) (citation [*6] omitted). Here, it is undisputed that Officer Guenther lawfully stopped defendant based on reasonable suspicion that he was speeding.

It is equally well-established that an officer conducting a traffic stop may request a driver to produce his driver's license, vehicle registration, and proof of insurance. *See, e.g.*, State v. Baum, 393 N.J. Super. 275, 286, 923 A.2d 276 (App. Div. 2007), *aff'd as modified*, 199 N.J. 407, 424, 972 A.2d 1127 (2009); *see also* Delaware v. Prouse, 440 U.S. 648, 659, 99 S. Ct. 1391, 1399, 59 L. Ed. 2d 660, 671 (1979) (emphasizing that in "[v]ehicle stops for traffic violations[,] . . . licenses and registration papers are subject to inspection").

Under N.J.S.A. 39:3-29, defendant was required *both* to have these documents in his possession *and* to produce them when requested by a police officer performing his duties. State v. Perlstein, 206 N.J. Super. 246, 253, 502 A.2d 81 (App. Div. 1985). N.J.S.A. 39:3-29 provides, in pertinent part:

> The driver's license, the registration certificate of a motor vehicle and an insurance identification card shall be in the possession of the driver or operator at all times when he is in charge of a motor vehicle on the highways of this State.
>
> The driver or operator shall exhibit [that documentation] . . . when requested to do so by a police officer [.]

The *Fourth Amendment* and Article I, Paragraph 7 of the New Jersey Constitution both provide 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 [*7] no warrant shall issue except on probable cause. *U.S. Const. amend. IV*; N.J. Const. art. 1 par. 7. However, there are exceptions allowing warrantless searches under the New Jersey and Federal Constitutions.

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[1] Minter later testified that she and defendant were in a relationship and had a son together, but were never married.

[2] The indictment mistakenly stated this was a crime of the third degree, but the trial court amended the indictment to show it was a crime of the second degree.

One such exception is the automobile exception, under which our Supreme 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. State v. Pena-Flores, 198 N.J. 6, 28, 965 A.2d 114 (2009) (requiring that "exigent circumstances exist under which it is impracticable to obtain a warrant"); *see* State v. Witt, 223 N.J. 409, 423-25, 427, 450, 126 A.3d 850 (2015) (prospectively overruling this requirement of Pena-Flores, and requiring no exigency beyond "the inherent mobility" of the vehicle).

"[S]eparate and apart from the automobile exception," our Supreme Court has repeatedly recognized another exception permitting a limited warrantless search of a vehicle to uncover proof of ownership or insurance. Pena-Flores, supra, 198 N.J. at 31. Under this "driving documents" exception, "[i]f the vehicle's operator is unable to produce proof of registration, the officer may search the car for evidence of ownership." State v. Keaton, 222 N.J. 438, 448, 119 A.3d 906 (2015) (citing State v. Boykins, 50 N.J. 73, 77, 232 A.2d 141 (1967)); *accord* Pena-Flores 198 N.J. at 31; State v. Patino, 83 N.J. 1, 12, 414 A.2d 1327 (1980); State v. Gammons, 113 N.J. Super. 434, 437, 274 A.2d 69 (App. Div.), *aff'd o.b.*, 59 N.J. 451, 283 A.2d 897 (1971); *State v. Hock, 54 N.J. 526, 533, 257 A.2d 699 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970).*[3]

Our Supreme Court [*8] has explained that "a traffic violation may justify a search for things relating to that stop." Keaton, supra, 222 N.J. at 448 (citing Boykins, supra, 50 N.J. at 77). "Such a search must be reasonable in scope and tailored to the degree of the violation." Id. at 448-49 (quoting Patino, supra, 83 N.J. at 12). "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, supra, 83 N.J. at 12); *accord* Pena-Flores, supra, 198 N.J. at 31 (upholding such a search).

Before conducting such a "limited search," the police are "required to provide [the] defendant with the opportunity to present his credentials before entering the vehicle. If such an opportunity is presented, and the defendant is unable or unwilling to produce his registration or insurance information, only then may an officer conduct a search for those credentials." Keaton, supra, 222 N.J. at 442-43 (applying the exception in a one-car accident situation, but finding that the officer failed to ask the defendant for his credentials).

Here, there was ample justification for the officer's limited search of defendant's glove compartment for the required driving documents for the vehicle. After being pulled over defendant failed to provide his license, registration, and/or proof of insurance despite being [*9] given the opportunity to do so. Instead, he provided homemade, fraudulent "right to travel documents" and claimed diplomatic immunity. As the trial court found, defendant's failure to provide the registration and insurance cards was "a traffic violation" which entitled the officer "to look into the areas in the vehicle in which evidence of ownership might be expected to be found." Pena-Flores, supra, 198 N.J. at 31 (citing Boykins, supra, 50 N.J. at 77). In particular the search would show whether defendant had the registration in his possession "at all times when he is in charge of a motor vehicle," as required by N.J.S.A. 39:3-29.

In addition, defendant disclaimed ownership of the car, claiming he was driving "his wife's car." Upon speaking to defendant and checking the on-board computer, Officer Guenther confirmed that defendant was not the owner of the vehicle, he did not live in the same town as the owner of the vehicle, that he did not give the officer his real name, and that he had several warrants out for his arrest. Moreover, he became combative and resisted the officers. Thus, the officers were more than justified in the looking in the glove compartment for proof of ownership.

A search for the registration and insurance cards was further justified by [*10] the simultaneous arrival of Minter. At the suppression hearing, Minter testified that upon arriving at the scene she informed Officer Guenther that she was the owner of the vehicle, but she did not produce any proof of her identity, or the registration or insurance cards. Minter further testified that the vehicle's registration card and insurance card were normally in the vehicle's glove compartment or ashtray, and that defendant knew they would be there. Minter's testimony further supported the officer's limited search of the vehicle for proof of ownership and insurance to determine if she was, in fact, the owner of the vehicle, and to ascertain the presence in the vehicle of the registration and insurance cards that were required before police could allow her to drive the vehicle.[4]

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[3] We have repeatedly recognized this exception. *E.g.*, State v. Dickey, 294 N.J. Super. 619, 625, 684 A.2d 92 (App. Div. 1996), *rev'd on other grounds*, 152 N.J. 468, 706 A.2d 180 (1998); State v. Holmgren, 282 N.J. Super. 212, 215, 659 A.2d 939 (App. Div. 1995); State v. Hill, 217 N.J. Super. 624, 628-29, 526 A.2d 742 (App. Div. 1987), *rev'd on other grounds*, 115 N.J. 169, 557 A.2d 322 (1989); State v. Jones, 195 N.J. Super. 119, 122-23, 478 A.2d 424 (App. Div. 1984).

[4] Moreover, Minter testified that she observed defendant trying to get her attention from the back seat of the police cruiser by motioning to her to "let [the police] know that [his] weapon [was] in the car." Minter testified that she told the police that defendant had a weapon in the car simultaneously with the discovery of the handgun.

Defendant argues that there was no need to search the vehicle for registration [*11] and proof of insurance because the police could and did retrieve the vehicle's ownership information through the police cruiser's on-board computer without retrieving the physical documents. Such an on-board "mobile data terminal (MDT) consists of a screen and keypad that are linked to the computerized databases of the New Jersey Division of Motor Vehicles (DMV)." *State v. Donis, 157 N.J. 44, 46, 723 A.2d 35(1998)*. "When an officer enters a vehicle's license plate number" in the MDT, it shows "the expiration date of the registration for that vehicle; the status of the vehicle, including whether it has been reported stolen; the registrant's name, address, date of birth, and driver's license number; the year, make, model, license plate number, and color of the vehicle; [and] the vehicle identification number." *Id. at 46*. Other inquiries can produce other information about whether the registration is suspended, and information about driver's license. *Id. at 47*.

Defendant argues that given the advent of MDT technology in the 1990s, older cases such as *Boykins* are no longer good law. Defendant's argument is contrary to our Supreme Court's reaffirmation of this exception as recently as 2015. *Keaton, supra, 222 N.J. at 448*. Moreover, the Supreme Court has applied the driving documents [*12] exception even though other technology similarly enabled the officer to obtain vehicle ownership and registration information without actually seeing the registration card. *Pena-Flores, supra, 198 N.J. at 15-16, 31* (finding the exception applied even though the officer used the radio to obtain a "lookup" of the vehicle's ownership information from the dispatcher). As the Court noted in *Donis*, "[p]rior to the installation of MDT terminals in patrol cars, law enforcement officers had access to the same information as is available from the MDT. Access to that information, however, was provided by the dispatcher over police-band radio rather than in vehicle terminals." *Donis, supra, 157 N.J. at 48*.

Most importantly, New Jersey law requires that the physical registration certificate "shall be in the possession of the driver or operator at all times when he is in charge of a motor vehicle on the highways of this State." *N.J.S.A. 39:3-29*. Therefore, the presence or absence of the physical registration card remains relevant, and a search for it remains permissible, regardless of the information available on the on-board computer.[5]

The driving documents exception is "well-established" [*13] and widely-recognized. *Hill, supra, 217 N.J. Super. at 628*; *see* Wayne R. LaFave, *Search and Seizure* § 7.4(d) at 870-72 (5th ed. 2012) (terming the exception "the better view"); *see also United States v. Kelly, 267 F. Supp. 2d 5, 13 (D.D.C. 2003)* (noting "[t]he state courts of New Jersey have adopted a sagacious approach to the issue"). Defendant has shown no basis to disturb this "settled law." *Keaton, supra, 222 N.J. at 450*.[6]

Defendant cites *State v. Hill, 115 N.J. 169, 557 A.2d 322 (1989)*, but that case concerned an unoccupied car that was safely but illegally parked. *Id. at 176-77*. The Court invalidated an officer's search of the car for ownership information, noting that "[f]or this garden-variety parking violation there was no need to ascertain the identity of the owner: the officer need simply have placed a summons on the vehicle, as happens every day." *Id. at 177* (citation omitted).

Moreover, in *Hill* the State did not invoke, and the Court did not discuss, the driving documents exception. In rejecting the State's argument under the "community caretaking" doctrine, the Court made clear it implied "no view of the applicability of *any other theory* on which the entry into defendant's automobile might be justified." *Id. at 177-78* (emphasis added).

Defendant also cites our opinion in [*14] *State v. Lark, 319 N.J. Super. 618, 726 A.2d 294 (App. Div. 1999), aff'd o.b., 163 N.J. 294, 748 A.2d 1103 (2000)*. In *Lark*, the passenger in a vehicle "promptly handed the officer a valid registration, insurance card, and his own driver's license." *Id. at 621*. We found that a search of the vehicle for proof of the driver's identity was unreasonable because the driving documents exception did not apply to searches for proof of identity. *Id. at 624-25*.

Because *Lark* did "not involve a registration search," our discussion questioning *Boykins* was admittedly dictum. *Id. at 623-26*. Our dictum in *Lark* has been superseded by the Supreme Court's subsequent decisions in *Pena-Flores* and *Keaton*. In particular, the court in *Pena-Flores* held that an officer "was 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" for evidence of the traffic violation itself. *Pena-Flores, supra, 198 N.J. at 31* (citing *Boykins, supra, 50 N.J. at 77*).

Defendant does not dispute that once the officer opened the glove compartment and saw the handgun, he was justified in

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[5] Moreover, nothing in the record indicates that the computer provided information on whether the vehicle was insured.

[6] In any event, "[a]s an intermediate appellate court, we are bound to follow and enforce the decisions of our Supreme Court[.]" *State ex rel. A.C., 424 N.J. Super. 252, 254, 37 A.3d 534 (App. Div. 2012)*.

seizing it "'under the well-recognized "plain view" exception to a warrantless seizure of property under the *Fourth Amendment*.'" *State v. Bruzzese, 94 N.J. 210, 235-36, 463 A.2d 320 (1983)* (citation omitted), *cert. denied, 465 U.S. 1030, 104 S. Ct. 1295, 79 L. Ed. 2d 695 (1984)*. Defendant's remaining arguments are without sufficient merit to warrant discussion. *R. 2:11-3(e)(2)*.

Affirmed. [*15]

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