FILED, Clerk of the Supreme Court, 06 Sep 2022, **084493**

SUPREME COURT OF NEW JERSEY
Docket No. 084493

STATE OF NEW JERSEY, Plaintiff-Respondent, v. **CORNELIUS C. COHEN,** Defendant-Petitioner.	On Certification from the Final Judgment of Conviction of the Superior Court of New Jersey, Appellate Division, Docket No.: A-2354-18 Criminal Action Sat Below: Hon. Ellen Koblitz, P.J.A.D. Hon. Greta Gooden-Brown, J.A.D.

AMICUS CURIAE BRIEF ON BEHALF OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS - NEW JERSEY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has over 500 members across New Jersey. Throughout the years, ACDL-NJ has participated as *amicus curiae* in numerous cases before this Court, as detailed in the attached Certification of Aidan P. O'Connor.

PRELIMINARY STATEMENT

The question Certified in this case is a simple one: was law enforcement authorized to search defendant's trunk and engine compartment based on the alleged odor of raw marijuana in the passenger compartment of the vehicle? To answer that question, however, several other circumstances must be considered.

The Fourth Amendment of the United States Constitution and Article I paragraph 7 of the New Jersey Constitution guarantee an individual's right to be secure against unreasonable searches or seizures. These constitutional provisions offer an important layer of protection for the public – preventing overzealous police

officers from infringing on the rights of our citizens by requiring that an impartial judge make a probable cause determination before a search ensues. Over the past several decades, the warrant requirement has been whittled away with exceptions, essentially leaving police with unbridled discretion to conduct warrantless searches of vehicles throughout the State of New Jersey.

In this case, the Appellate Division further diluted the protections offered by the Fourth Amendment and Article I paragraph 7 of the State Constitution when it held that the officers' generalized detection of the "odor of raw marijuana" from the passenger compartment permitted them to search every inch of the vehicle, without offering any particularized basis to do so. In affirming the denial of defendant's suppression motion, the appellate panel cited State v. Guerra, 93 N.J. 146, 150-51 (1983) and State v. Kahlon, 172 N.J. Super. 331 (App. Div. 1980) for the proposition that the officers in this case were permitted to expand the scope of their search once they were unable to locate marijuana in the passenger compartment. ACDL-NJ respectfully submits that the appellate panel misapplied those holdings.

As noted by the Office of the Public Defender, there must be a clear requirement imposed on officers to pinpoint the source and location of the odor of raw marijuana to justify a warrantless search. ACDL-NJ urges this Court to reaffirm the reasonableness requirement regarding the scope of searches conducted under the

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automobile exception, and hold that officers must be able to articulate, with the requisite level of particularity, the location of the vehicle from which they believe the odor of marijuana to be emanating to justify warrantless searches of the trunk and/or hood of a vehicle. Such facts are absolutely essential for any court to fairly determine whether the scope of a search was reasonable under the totality of circumstances or violative of the Federal and State Constitutions.

Moreover, the facts of this case suggest that the arresting officers feigned the odor of marijuana to justify a full-scale search for guns in defendant's vehicle – a fact that the officers already knew at the time of the stop based upon their existing investigation of defendant. ACDL-NJ respectfully submits that under Witt and its progeny, there has been a pattern of officers claiming to smell raw marijuana as a pretext to conduct a full search of a vehicle that belongs to the subject of an existing investigation. In situations where officers claim that the odor of raw marijuana provided probable cause to search a vehicle, and no raw marijuana whatsoever is recovered during their search, any other evidence obtained during that search should be suppressed. ACDL-NJ asks this Court to hold officers accountable, and put an end to the "I detect the odor of marijuana" era.

In addition, ACDL-NJ respectfully urges the Court to adopt a bright-line rule for situations in which police rely on Witt to

conduct a warrantless search of a target of an active investigation: If an officer is in any way involved in a pre-existing investigation of a suspect, neither that officer, nor any other officer with information as to the existing investigation, may rely on Witt to search that suspect's vehicle. This simple rule would maintain the status quo automobile exception for truly spontaneous police encounters, while ensuring that officers do not abuse the broad discretion they have been afforded under Witt.

PROCEDURAL HISTORY & STATEMENT OF FACTS

ACDL-NJ relies upon the procedural history and statement of facts as set forth in petitioner's plenary brief and petition for certification.

LEGAL ARGUMENT

POINT I

THE SCOPE OF THE SEARCH OF DEFENDANT'S TRUNK AND HOOD WAS NOT BASED ON ANY PARTICULARIZED SUSPICION AND, THEREFORE, EXCEEDED CONSTITUTIONAL BOUNDS.

ACDL-NJ joins in the arguments raised by defendant and the Office of the Public Defender regarding the impermissible scope of the search of defendant's trunk and hood.

The Fourth Amendment and Article I paragraph 7 of the State Constitution require that the probable cause required to conduct a search of a specific area be described with particularity. U.S Const. amend. IV; N.J. Const. Art. I, ¶7. The particularity

requirement was always an extremely important aspect of the Fourth Amendment. Indeed, as this Court has recognized:

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit. Thus, the scope of a lawful search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."
>
> [State v. Marshall, 199 N.J. 602, 611 (2009) (quoting Maryland v. Garrison, 480 US 79, 85 (1987).]

In recognition of the importance of the Fourth Amendment, exceptions to the warrant requirement are to be strictly limited and narrowly construed. Flipo v. West Virginia, 528 U.S. 11, 13 (1999); State v. Hempele, 120 N.J. 182, 218 (1990). One such narrowly construed exception is the automobile exception.

Even as the automobile exception was carved out of the Fourth Amendment, the reasonableness and particularity requirements remained. See, e.g., State v. Esteves, 93 N.J. 498, 507-08 (1983) ("The scope of a warrantless search of an automobile is defined by the object of the search and the places where there is probable cause to believe that it may be found."); State v. Patino, 83 N.J. 1, 10-11 (1980) ("A police officer must not only have probable cause to believe that the vehicle is carrying contraband but the

search must be reasonable in scope. . . . [and] '(t)he scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'") (internal citations omitted).

Our courts have consistently recognized that despite the automobile exception to the warrant requirement, the scope of a warrantless search must be objectively reasonable and strictly tied to the facts claimed to constitute probable cause by the officers. The reasonableness of the scope of a search must also take into account the areas of the vehicle that were searched and the officers' basis for doing so. Patino, 83 N.J. at 10-11. There are numerous reported decisions affirming searches under the automobile exception, which confirm the need for probable cause as to each area searched under the automobile exception.

For example, in State v. Guerra, State Troopers stopped the defendant's vehicle for a tail light violation. Upon approaching the vehicle and speaking with the driver, the troopers claimed to detect the odor of raw marijuana emanating from the interior of the vehicle. 93 N.J. at 148-49 (1983). After observing a small overnight suitcase in the rear seat of the vehicle, the troopers determined that it could not have been the source of the odor and asked the driver for consent to search the trunk, which he refused. The Troopers later searched the trunk of the vehicle, and discovered a large quantity of marijuana. Id. at 149-50. The

trial court denied defendant's motion to suppress, and the Appellate Division reversed. On Certification granted, this Court upheld the constitutionality of the search, citing a string of cases that analyzed the permissible scope of searches under the automobile exception. Id. at 150-51. Thus, even in affirming the search as constitutional, this Court expressly recognized and applied the requirement that the scope of the warrantless search must be reasonable and specifically tied to the facts relied upon to constitute probable cause. In this case, there was no evidence that the source and location of the alleged odor of marijuana came from defendant's trunk or hood area.[1]

Similarly, in State v. Kahlon, State Troopers stopped the defendant's vehicle for travelling significantly below the posted speed limit. 172 N.J. Super. at 335.__ Upon approaching the defendant's vehicle, the trooper initially detected the odor of burning marijuana. The trooper detained the occupants and conducted a search to determine the source of the odor. The trooper found the butt of a marijuana cigarette in the ashtray, and a small amount of marijuana in a clear bag in the passenger

[1] As noted by the Office of the Attorney General in its brief, the odor of marijuana no longer provides reasonable suspicion or probable cause to conduct a warrantless search. N.J.S.A. 2C:35-5(b)(12)(b)(1); N.J.S.A. 2C:35-10(a)(3)(b)(i). Nonetheless, the issues presented in this petition regarding the odor of marijuana should be addressed by this Court as there remain cases in the pipeline that will certainly be affected by the outcome of this case.

compartment, but continued to detect an odor of raw marijuana in the rear of the vehicle. When no additional marijuana was discovered in the rear of the passenger compartment of the vehicle (from which the officer indicated the odor of raw marijuana emanated), the officer opened the trunk of the vehicle and discovered a box that contained a large quantity of marijuana and other paraphernalia. Id. at 337. In holding that the search of defendant's trunk was permissible under the automobile exception, the appellate panel noted that it was reasonable for the officer to conclude that the trunk may contain marijuana, because he specifically detected a strong odor of marijuana in the rear seat of the vehicle and did not find any additional marijuana in the passenger compartment. Thus, the officer provided an objectively reasonable basis for probable cause to believe the trunk may contain contraband, which ultimately validated his warrantless search of the defendant's trunk. Id. at 338.

In Patino, the defendant was pulled over for a "motor vehicle check" by a State Trooper. Upon approaching the vehicle and speaking with the driver, the trooper observed a clear plastic container in plain view, which he believed to contain marijuana, and a marijuana cigarette. 83 N.J. at 4-5. The trooper asked the occupants to step out of the vehicle and searched the interior of the passenger compartment for additional contraband. He found no additional evidence. Ibid. Following his search of the

passenger compartment, the trooper ordered the defendant to open the trunk at which time a large quantity of cocaine was discovered. Id. at 6. The trial court denied defendant's motion to suppress, which was reversed on appeal. On Certification granted, this Court held that the discovery of a small amount of marijuana in the passenger compartment did not provide the trooper with probable cause to search the trunk for dealer quantities. Id. at 12-13. In so holding, this Court stated:

> the bare circumstance of a small amount of marijuana does not constitute a self-evident proposition that more marijuana or other contraband might be elsewhere in the automobile. **The presence of the marijuana alone does not under these facts give rise to an inference that would lead a police officer of ordinary prudence and experience conscientiously to entertain a strong suspicion that additional criminal contraband is present in the trunk of the automobile** . . . . Nothing found in the interior of the passenger area or in the conduct of the defendants generated any suspicion of a drug cache in the trunk or of any personal danger to the officer. As the Appellate Division recognized, **"the search was purely investigatory and the seizure a product of luck and hunch, a combination of insufficient constitutional ingredients."**
>
> [Id. at 12 (emphasis added).]

Accordingly, this Court affirmed the suppression of the cocaine seized from the defendant's trunk. Id. at 14-15.

Finally, in State v. Young, this Court expressly recognized that the holding of Patino "requires that the scope of a search be

reasonable and that the State demonstrate probable cause as to all areas searched." 87 N.J. 132, 145 (1981). In that case, the officer stopped defendant's vehicle and observed what he believed to be a partially burned marijuana cigarette on the floor of the passenger side seat. Id. at 137. Although the Court ultimately upheld the warrantless search in Young, it went to great lengths to reaffirm and rearticulate the constitutional mandate that "the State demonstrate probable cause **as to all areas searched**." Id. at 145 (emphasis added).

As noted in the *amicus* brief submitted by the Office of the Public Defender in this matter, there have been numerous appellate and trial court decisions dealing with the permissible scope of warrantless searches conducted under the automobile exception. See OPD Amicus Br. at 11-16 (collecting cases). ACDL-NJ joins in this aspect of the *amicus* brief submitted by the Office of the Public Defender, as it aptly and succinctly demonstrates our courts' consistent application of the reasonableness requirement to the automobile exception.

In the present case, there is no indication that the officers even attempted to pinpoint the area of defendant's vehicle from which the alleged odor of marijuana was emanating. Instead, the officers, armed with prior information about defendant's alleged gun trafficking, generically claimed to detect an odor raw marijuana emanating from the passenger compartment. When no

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marijuana whatsoever was discovered in the passenger compartment, the officers unilaterally decided they had probable cause to expand the scope of the search to the trunk and hood of defendant's vehicle. In doing so, the officers did not provide any objectively reasonable basis to support probable cause to believe the trunk or hood of the vehicle would contain marijuana. The officers did not even attempt to use their senses to determine where the odor was more potent to justify the expanded scope of their search (like the officers in Kahlon).

If, after the search of the defendant's passenger compartment turned up no evidence, the officers made observations that the odor of marijuana seemed to get stronger in the area of the trunk or hood of the vehicle, or that one end of the vehicle appeared to be sitting lower than the other, probable cause to search those locations of defendant's vehicle may have existed under Witt. Since none of those reasonable measures were taken by the officers in this case, however, there was not sufficient probable cause to justify the expanded scope of their search. Under the circumstances of this case, the officers simply did not have sufficient probable cause to search the trunk or the hood of defendant's vehicle under the automobile exception to the warrant requirement, because there was no objectively reasonable facts to support their claim that marijuana would be contained in those locations.

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The officers may have had probable cause for a warrant to search the defendant's vehicle for guns based on their preexisting investigation, but they chose not to pursue that investigatory course. Because the officers in this case did not take any measures to pinpoint the source of the alleged odor of marijuana, and did not observe anything else that would provide an objectively reasonable basis for probable cause to search those areas, the search of defendant's trunk and hood violated the Fourth Amendment and Article I paragraph 7 of the State Constitution.

POINT II

OFFICERS WITH KNOWLEDGE OF A PREEXISTING INVESTIGATION SHOULD NOT BE PERMITTED TO RELY ON WITT TO SEARCH A DEFENDANT'S VEHICLE WITHOUT A WARRANT.

In 2015, this Court returned to its prior two-prong test for the automobile exception, which requires the State to establish that officers were entitled to search a vehicle without a warrant because: (1) they had probable cause to believe the vehicle contained evidence of a criminal offense; and (2) the circumstances giving rise to probable cause were unforeseeable and spontaneous. Witt, 223 N.J. at 447-48. Since the reemergence of that two-prong test in 2015, there have been very few cases addressing the "unforeseeable and spontaneous" prong.

The Witt Court overruled its prior holdings in State v. Cooke, 163 N.J. 657 (2000) and State v. Pena-Flores, 198 N.J. 6 (2009), and returned to the automobile exception as articulated in State

v. Alston, 88 N.J. 211 (1981). The Court decided to do so, in part, because of the "unintended consequences" of the Pena-Flores decision. Ironically, the State argued in Witt that a return to the Alston standard was required, because its police officers were circumventing the warrant requirement by misusing requests for consent to search vehicles. 223 N.J. at 442. Despite returning to the Alston standard, this Court maintained the critical "unforeseeable and spontaneous" requirement to protect the privacy and liberty interests of New Jersey citizens under Article I paragraph 7 of the State Constitution.

A. Officers Can Easily Feign the Odor of Marijuana

ACDL-NJ respectfully submits that Witt also had unintended consequences. In the wake of the Witt decision, officers have improperly relied on the automobile exception to stop and search vehicles driven by subjects of pre-existing investigations, without first obtaining a warrant. These officers often use the "odor of raw marijuana" as a basis to search vehicles bumper-to-bumper, even when there is no marijuana present in the vehicle and no marijuana is ultimately recovered.

Recently, several New York trial courts have addressed the widespread abuse of the "odor of marijuana" to justify invasive warrantless searches of vehicles. In People v. Suncar, 66 Misc.3d 672 (Sup. Ct. Bronx Co. 2019), the trial court granted defendants' motion to suppress evidence seized during a warrantless search of

a parked vehicle. In Suncar, officers initially observed the defendants' vehicle parked slightly into the crosswalk. The officers approached the two defendants who appeared to be sleeping in the vehicle. Upon approaching the vehicle, the officers claimed to detect "a strong smell of marijuana coming out of the vehicle," despite the fact that the windows were up, and the doors were closed. Id. at 674. According to the trial court, the officer "injected the 'strong smell of marijuana' into many of his answers." Ibid. Ultimately, the officers recovered a small amount of marijuana and cocaine from the rear of the passenger compartment.

In its decision, the trial court analyzed probable cause at each stage of the police encounter. In addressing the officers' claim that they detected the odor of marijuana, the court was skeptical.

> The court does not believe Officer Pichardo that there was a smell of marihuana. **In People v Hill (Sup Ct, Bronx County, July 2019, Newbauer, J., indictment No. 853-2017) Judge Newbauer labeled the smell of marihuana testimony as a canard. In Hill the court suggested and rightly so that the testimony about the smell of marihuana emanating from a car should be subject to a heightened level of scrutiny.** In this case, . . the amount of marihuana was so small and in sealed baggies within another bag, and there was not a scintilla of evidence of marihuana such as ashes, papers, a lighter, clips or evidence that the defendants discarded anything, the testimony concerning **the smell of marihuana is contradicted by the evidence in the record.**

> The People also have claimed that Pichardo and the Sergeant shared the information of the smell of marihuana, **which only compounds the initial fabrication and implicates both officers in the collective untruth to manufacture probable cause to justify a search.**
>
> . . . .
>
> Additionally, there has to be a sufficient quantity to occasion the smell; two little sealed bags of raw marihuana would not generate the smell that Officer Pichardo claimed he smelled.
>
> [Id. at 679-80 (emphasis added).]

The court's decision in the Suncar case (and the Hill case cited therein) demonstrates that courts are beginning to notice the same pattern of officers feigning the odor of marijuana to conduct full-scale warrantless searches. See also Lewis v. State, 470 Md. 1, 24 n.7 (2020)(citing Suncar with approval and noting that "In our sister state of New York, trial judges have been similarly critical about whether the mere odor of marijuana may provide probable cause for law enforcement officers to seize an individual.").[2]

Again, despite the fact that marijuana is now legal in New Jersey, and the odor of marijuana no longer provides probable cause

[2] The Hill case and its holding was examined in great detail by the New York times. Joseph Goldstein, Officers Said They Smelled Pot. The Judge Called Them Liars., N.Y. Times, (Sept. 12, 2019),https://www.nytimes.com/2019/09/12/nyregion/police-searches-smelling-marijuana.html

for warrantless searches, there are many pre-legalization cases pending that will likely be affected by the outcome of this matter.

Cases such as this, and Suncar, lead to ACDL-NJ's proposed rule. When officers rely on the odor of raw marijuana as probable cause to search a vehicle under the automobile exception, and no controlled substances whatsoever are recovered during their search of the vehicle, any other evidence obtained during the search must be suppressed. By applying this rule, officers who legitimately detect an odor of raw marijuana, and indeed uncover raw marijuana during their search, would be vindicated, while officers that feign the odor of marijuana as a pretext to search for other contraband would not receive the benefit of their ill-gotten evidence.

B. The "Unforeseeable and Spontaneous" Prong

In Witt, the majority stated

> **Alston 's requirement of "unforeseeability and spontaneity," does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so.** In this way, we eliminate the concern expressed in Cooke — the fear that "a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs." In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.
>
> [Id. at 447-48 (emphasis added).]

When an officer is involved in the investigation of a particular defendant, and has substantial information that the defendant is engaged in some form of criminal activity, the automobile exception, and the "odor of raw marijuana" is a dangerously convenient way to conduct a warrantless search and secure evidence without the "inconvenience" of preparing a warrant affidavit.

In the present case, the defendant was under investigation by the State Police for alleged gun trafficking for at least a month before he was stopped. The State Police were working with a confidential informant (CI) who provided a great amount of detail including the defendant's routes between the Carolinas and New Jersey, the make and model of defendant's vehicles, his license plates, and the dates he would be traveling. On the date of his arrest, the State Police had issued a "be on the lookout" or "BOLO" for defendant's vehicles, based upon the CI tip, and had knowledge from the CI that defendant would likely be in possession of firearms.[3]

[3] The factual situation presented in this case is strikingly similar to the hypothetical that Justice Albin wrote into Witt with regard to the "unforeseeable and spontaneous" standard when he noted: "For example, if a police officer has probable cause to search a car **and is looking for that car**, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so."

Upon stopping defendant's vehicle, the officer claimed to detect not a "faint" or "mild" odor of raw marijuana, but a "strong" odor of raw marijuana emanating from the passenger compartment. Despite that "strong" odor, absolutely no marijuana was recovered. Instead, the officers decided to search the hood and trunk of defendant's vehicle, and serendipitously discovered the very guns that the CI said would be in the defendant's vehicle on the very date in question. While ACDL-NJ acknowledges that this Court typically defers to a trial court's credibility determinations, these facts are far more than coincidence and cannot be overlooked.

To prevent the abuse of the automobile exception by police officers involved in active investigations, ACDL-NJ urges this court to adopt a simple bright-line rule for situations in which police rely on Witt to search the target of an active investigation: If an officer is in any way involved in a pre-existing investigation of a suspect, neither that officer, nor any other officer with knowledge of the existing investigation, may rely on Witt to search that suspect's vehicle. This rule would accomplish two main objectives. First, it would continue to allow officers to rely on Witt in truly unforeseeable and spontaneous encounters as was expressly intended by this Court. Second, it would prevent unscrupulous investigating officers from making an end-run around the Fourth Amendment by barring them from relying

on Witt to expedite their investigation at the expense of a defendant's constitutional rights.

CONCLUSION

For the reasons set forth above, and based on the authorities cited, ACDL-NJ urges this court to reiterate the longstanding reasonableness and specificity requirements under Witt and, as articulated above, to adopt two rules. First, if officers rely on the odor of raw marijuana to justify a warrantless search, and no raw marijuana is ultimately recovered, any other evidence obtained during the search must be suppressed. Second, ACDL-NJ urges this Court to adopt a bright-line rule preventing investigating officers from relying on Witt to conduct warrantless searches of targets of their investigation. Finally, since the search of defendant's vehicle in this case did not comport with the Fourth Amendment or Article I paragraph 7 of the New Jersey Constitution, the defendant's convictions must be reversed.

Respectfully Submitted,

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Attorneys for *Amicus Curiae*
Association of Criminal Defense
Lawyers of New Jersey

By: /s CJ Griffin
CJ Griffin

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