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The Honorable _____
JUDGE'S ADDRESS

RE: State v Ind
Suppression Motion

Dear Judge:

In support of defendant's motion for suppression, please accept this letter brief in lieu of a more formal brief.

POINT 1

THE WARRANTLESS SEARCH WAS IN VIOLATION OF DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

POINT 2

NO POLICE STOP OF CAR WITHOUT PROBABLE CAUSE.

POINT 3

SEARCH OF THE INSIDE OF A CAR OR POSSESSIONS IS NOT PERMITTED EVEN IF A STOP IS VALID.

POINT 4

THE OFFICER'S PAT DOWN OF DEFENDANT WAS UNREASONABLE AND IN VIOLATION OF TERRY V OHIO.

POINT 5

THE EVIDENCE MUST BE SUPPRESSED BECAUSE IT WAS NOT IN THE "PLAIN VIEW" OF THE POLICE OFFICERS.

POINT 6

THE DEFENDANT DID NOT CONSENT TO THE ILLEGAL SEARCH

STATEMENT OF FACTS

The defendant was stopped on _____. The police did not have an arrest warrant or search warrant. There was no probable cause for the stop and search.

POINT 1

THE WARRANTLESS SEARCH WAS IN VIOLATION OF DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The New Jersey Constitution (1947, Article 1, Paragraph 7) prohibits any unreasonable searches and seizures and guarantees to the people the same rights as the Federal Constitution.

When evidence is seized or even a car is stopped without a warrant or violation, the burden of proof is upon the state to prove that there was no Fourth Amendment violation. State v. Brown, 132 N.J. Super. (App. Div. 1975). The state must prove that there was no Fourth Amendment violation by a preponderance of the evidence. State v. Whittington, 142 N.J. Super. 45 (App. Div. 1976). Such searches are presumptively invalid and the State carries the burden of proof of legality. State v Valencia 93 NJ 126, 133 (1983), State v. Brown, supra.; State v. Welsh, 84 N.J. 348, (1980). In the absence of a valid exception to the requirement for a search warrant, a search conducted without a warrant is per se unreasonable. Schnekloth v. Bustamonte, 412 U.S. 218,219, 93 S. Ct. 2041, 36 L. Ed 2d 854, 858 (1973)

Enforcement of the federally created rights has been effected by rendering the fruits of unconstitutional searches inadmissible in associated criminal court proceedings, Weeks v United States 232 US 383, 34 S. Ct. 341, 58 L. Ed 652 (1914). These

restrictions are applicable to the states, Mapp v Ohio, 367 US 643, 81 S. Ct. 1684, 6 L. Ed 2d 1081 (1961).

State judges, no less than federal judges, have the high responsibility for protecting constitutional rights. While they are disturbed to allow defendants to go unprosecuted, their oath of office requires them to continue the guarantees afforded by the Constitution. As explained in Weeks, supra,:

> The efforts of the courts and their officials to bring the guilty to punishment
> fundamental law of the land. Weeks v United States 232 US 383,393, 34 S. Ct. 34

Independently of federally mandated rights, each state has the power to impose higher standards on searches and seizures under dictate law than is required by the federal constitution, PruneYard Shopping Center v Robins 447 US 74, 81 (1980); State v Johnson 68 NJ 349, 353 (1975). In fact, New Jersey has chosen to afford to the accused in the search and seizure area greater rights than those deemed mandated by the United States Constitution. State v Alston, 88 NJ 21 (1981); State v Novembrino 220 NJ Super. 229, 240-243 (App. Div. 1985), aff'd 105 NJ 95 (1987)

Courts are to afford liberal, not grudging enforcement of the Fourth Amendment. We do not have one law of search and seizure for narcotics and gambling cases and another for breaking and entering and theft. The meanness of the offender or the gravity of his crime does not decrease, but rather accentuates the duty of the courts to uphold and dispassionately apply the settled judicial criteria for lawful searches under the Amendment. For it is the hard case which sometimes proves the Achilles' heal of constitutional rights, even as it tends to make bad law in other areas. State v Naturile 83 NJ Super. 563, 579 (App. Div. 1964).

POINT 2

POLICE CANNOT STOP AND SEARCH ANY CARS WITHOUT PROBABLE CAUSE

The United States Supreme Court has declared that random stops for license and registration checks violate the Fourth Amendment prohibition against unreasonable searches. Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed. 2d 660, 674 (1979); State v. Patino, 83 N.J. 1 (1980). There was no indication that motor vehicle laws were violated or that any other laws were violated. Therefore, the police officers violated the constitutional rights of defendant by ordering him to exit the vehicle so the police on the scene could conduct warrantless searches.

State v. Patino, 163 N.J. Super. 116, 125 (App. Div. 1970) aff'd 83 N.J. 1 (1980) prohibited a stop where the court found "in sum, the search was purely investigatory and the seizure a product of luck and hunch, a combination of insufficient constitutional ingredients."

Automobiles are areas of privacy protected by the Fourth Amendment of the United States Constitution. State v. Patino, supra.; State v. Williams, 163 N.J. Super. 352, 356 (App. Div. 1979). New Jersey Courts have held that Article 1, Paragraph 7 of the New Jersey Constitution affords greater protection than the Fourth Amendment. State v. Davis, 104 N.J. 490 (1986), State v. Kirk, 202 N.J. Super. 28, 35 (App. Div. 1985). The burden is on the State to prove an exception to the warrant requirement showing the need for the search. State v. Welsh, 84 N.J. at 852. Understandable, professional curiosity is not sufficient justification for an intrusion on a constitutionally protected automobile. State v. Patino, supra. In the case at bar, the search of the vehicle and seizure of evidence were unconstitutional. Therefore, the evidence obtained in that seizure must be suppressed.

Recent Cases Prohibit Searches Without A Warrant

Community care-taking does not permit a search of a car. State v Costa 327 NJ Super 22 (App. Div. 1999)

Although a police officer might have the authority to stop a driver and a passenger alighting from an automobile on a private parking lot to inquire as to

why the driver and his passenger had been sitting in the parked vehicle, the officer's subsequent investigation elevated the encounter to a detention, which was unsupported by an articulable suspicion, thus rendering the driver's consent to search void. We reject the State's contention that the officer's stop of both men was in conformity with its community care-taking function.

Request for Credentials is a Stop State v. Egan 325 NJ Super. 402 (Law Div. 1999).

Unsupported by probable cause or reasonable suspicion, a police officer's request of credentials from the driver of a parked vehicle constituted a "stop"; was more than minimally necessary to dispel the officer's naked suspicion; and not justifiable as a "field inquiry." The fruits of the stop are, therefore, suppressed.

MV Stop Not Permitted on Community Caretaking State v. Cryan 320 NJ Super. 325 (App. Div. 1999)

A motor vehicle stop may not be based on community caretaking grounds where the officer stopped the defendant because, at 4 a.m., the defendant did not proceed for five seconds after a traffic light turned green.

Legally parked car no grounds for search *State in the Interest of A.P.* 315 NJ Super. 166 (Law Div. 1998)

Here, where the juvenile was a passenger in a legally parked car and the officer who approached him to make a community - care-taking inquiry, as opposed to a lawful stop based on a traffic violation, had no prior knowledge of the juvenile, and there was no criminal activity in the area and no signs of alcohol or a controlled dangerous substance, the juvenile's furtive movements in avoiding eye contact with the officer did not provide a basis for an objective reasonable and articulable suspicion, and the evidence seized (a lighter and a "pipe-like smoking device") must be suppressed; the issue of whether or not the juvenile's statement to the

officer that he did not lean forward and down as the officer approached was a lie which would justify a suspicion that he might be armed, is subject to ambiguity and interpretation.

POINT 3

SEARCH OF THE INSIDE OF A CAR OR POSSESSIONS IS NOT PERMITTED EVEN IF A STOP IS VALID. THE FOLLOWING RECENT CASES RESTRICTED SEARCHES OF CARS.

Odor of Alcohol Insufficient to Search Car State v. Jones, 326 NJ Super. 234 (App. Div. 1999).

Absent proofs that an open container of alcohol was in plain view, the odor of alcohol, combined with the admission of consumption of one bottle of beer by a motor vehicle operator, is insufficient to establish probable cause to search the vehicle for open containers where a trained police officer testifies that, based upon the circumstances and his experience, occupants often possess open containers of alcohol.

No Search of Briefcase Without Warrant Flippo v. West Virginia 528 U.S. 11, 120 S. Ct. 7, 145 L.Ed.2d 16 (1999).

Where police searched a briefcase at a murder scene without getting a warrant, this violated the Fourth Amendment because there is no "crime scene exception."

Auto Exception to Search Applicable only if Exigent Circumstances State v. Santiago 319 NJ Super. 632 (App. Div. 1999)

The "automobile exception" justifies a police search of an automobile without a warrant only if there are exigent circumstances that render it "impracticable" to first obtain a warrant. When police have possession of a parcel and have it turned over to defendant by a "controlled delivery," police cannot later search defendant's automobile and the parcel without a warrant, since it was not impracticable to have

first obtained a search warrant, and whatever "exigency" may have existed was created by the police themselves.

Police cannot Search for Driver Identification in Minor Motor Vehicle Stop State v. Lark 163 NJ 294 (2000).

Under the federal and state constitutions, following a motor vehicle stop for a minor traffic violation, a police officer may not enter the vehicle to search for proof of the driver's identity even though the driver has failed to produce his driver's license and may have lied about his identity. The officers lacked probable cause to believe a crime had been committed. The dictum in State v. Boykins, 50 N.J. 73 (1967), does not authorize the search.

Drug Bags from motel brought to Police Station Suppressed State v. Padilla 321 NJ Super. 96 (App. Div. 1999).

Where bags containing the defendants' personal property were brought to police headquarters from the defendants' motel room after the defendants were arrested, the police had to give each defendant the opportunity to consent to a police inventory search or to make an alternative disposition of the property. [Source NJ Lawyer May 17, 1999]

Search not permitted for speeding ticket *Knowles v. Iowa* 525 U.S. 113, 119 S. Ct. 484, 142 L.Ed.2d 492, 67 U.S.L.W. 4027 (1998). (Unanimous U.S. Supreme Court decision - Justice Rehnquist).

Since searches incident to traffic citations are not required either to protect an officer's safety or to discover and preserve evidence, there is no justification for an exception to the Fourth Amendment's warrant requirement. Suppression granted.

Stop exceeds time limit State v. Dickey 294 N.J. 619 (1998)

Applying established principles to the circumstances of this case, the combination of the detention and the degree of intrusion on Dickey's liberty exceeded permissible bounds.

POINT 4

THE OFFICER'S PAT DOWN OF DEFENDANT WAS UNREASONABLE AND IN VIOLATION OF TERRY V OHIO

In determining the reasonableness of protective measures taken by an officer during a valid motor vehicle stop, the circumstances of that particular stop must be considered. State v. Lund, 119 N.J. 35, 49 (1990); State v. Lipski, 238 N.J. Super. 100, 105 (App. Div. !990).

In State v Lund, supra the Supreme Court held that mere furtive gestures of an occupant in an automobile do not give rise to an articulable suspicion or suggestion of criminal activity. The court found the search improper in Lund where on the Turnpike in nearby East Brunswick a trooper saw (an alleged) motor vehicle violation. The trooper alleged he saw driver Lund turn around to his left side and reach for the back seat. The trooper testified the driver appeared nervous and kept looking toward the back seat. The driver could not produce a car registration and had a Massachusetts license. The lone trooper asked the two occupants to step out of the vehicle where he performed a Terry - type "stop and frisk".

The trooper searched both occupants, then returned to the car. He saw a towel sticking out of the back seat. He felt the towel and an inside hard object. He searched the towel and found cocaine. The Court held the record did not establish a specific particularized basis for an objectively reasonable belief that the vehicle occupants were armed and dangerous. Therefore, the officer had no right to search the passenger compartment of the vehicle in Lund.

In Lund, supra the officer did not claim to be in a position of actual fear, but rather was taking steps to make sure he could not be threatened. Police who do an automatic search of every person being questioned are violating these individuals' rights. Similarly, in State v Lipski, 238 N.J. Super. 100 (1990), the court invalidated a protective search based upon routine procedures with no articulable suspicion that the driver was armed or

dangerous. A frisk or "protective sweep" is not permitted or justified unless there are "specific and articulable facts" and not on an "inchoate and unparticularized suspicion or hunch... that [the officer] is dealing with an armed or dangerous person. Maryland v Buie, 110 S. Ct. 1093 (1990). In the case at bar the facts clearly indicate that even to believe the state, its evidence falls far short of the standards requiring a perceived fear of threat on the part of the police officers. No specific facts are found to articulate the officer's suspicions of a gun or other dangerous weapon.

In the course of motor vehicle stops, once the occupant exits the vehicle the propriety of the officer's pat-down and frisk is to be determined by the officer's belief that the occupant presents a threat to his safety. Terry v. Ohio, 392 U.S. 1 (1968). It is apparent from the officer's own statement that he was not concerned for his safety until he came across the keys in the defendant's pocket. Indeed, it is clear that the officer began to search the defendant prior to being concerned for his safety. Therefore, the officer's belief that the defendant posed a danger was not only unreasonable, it was nonexistent according to his own report. The absence of any reasonable belief of danger prior to conducting a search makes any subsequent search constitutionally impermissible. Pennsylvania v. Mimms, 434 U.S. 106 (1988); Michigan v. Long, 463 U.S. 1032 (1983); Terry v. Ohio, supra. It is immaterial that the officer discovered evidence which may have supported his belief during the search. The controlling fact remains that the officer began a search of the defendant without reasonable belief that danger existed; it is at that point the defendant's constitutional rights were violated and the subsequent discovery of any evidence can never abrogate the initial constitutional violation. Accordingly, any evidence proffered as the result of the unconstitutional search must be suppressed.

The Fourth Amendment to the United States Constitution requires the approval of an impartial judicial officer based on probable cause before most searches may be undertaken. State v Patino. 83 NJ 1,7 (1980). In the case at bar, there was no probable

cause at all. Any reasonable judge would not have granted a search warrant based upon the officer's hunch.

This was not a search incident to a lawful arrest. There was nothing in the current search that would give a prudent man or police officer a reasonable belief that he was about to he killed. Even the improper "Pat down" disclosed nothing that a reasonable person would think could kill or hurt him.

The circumstances presented to the officers in the case at bar did not give rise to probable cause. There was no reason for the officers to fear for their safety and therefore this warrantless search was unjustified and all the illegally obtained evidence must be suppressed.

Recent Cases Prohibit Frisks

Anonymous tip not sufficient for frisk. State v Goree 327 NJ Super. 227 (App. Div. 2000)

An anonymous tip that a black man in a distinctive motor vehicle had a gun was not sufficient to justify a stop and frisk where nothing presented which in any way corroborated the anonymous.

Presence in crime area not sufficient for *Terry* stop. Ilinois v Wardlow 528 U.S. 119, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000) United States Supreme Court

While an individual's presence in a "high crime area" is not enough to support a reasonable, particularized suspicion of criminal activity to justify a *Terry* stop, a location's characteristics, as well as unprovoked flight from police, are relevant in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Source: NJ Law Journal Jan. 17, 2000.

Transit Police cannot always Search Passengers State v. Contreras, 168 NJ Super. 291 (App. Div. 1999)

The NJ Transit Police violated the Fourth Amendment rights of three train passengers when they seized evidence without any particularized suspicion that the defendants had been or were about to engage in criminal wrong doing pursuant to a Transit Police policy of conducting "consensual encounters." Although the initial contact between the officers and defendants may have begun as a consensual one, based on the totality of the circumstances, it elevated to a detention prior to the moment defendants were searched. Under the facts presented, an objectively reasonable person would have felt free to leave. Although the motion judge expressed disdain for the Transit Police policy of conducting these "consent searches," the final decision to suppress the evidence was predicated upon well-articulated findings of fact and conclusions of law. The suppression decision is affirmed.

Stop and Interrogation Not Permitted State in the Interest of J.G. 320 NJ Super. 21 (App. Div. 1999)

A police officer may conduct a simple street investigation or field inquiry as long as (1) the individual is not denied the right to move on; (2) A field inquiry cannot be converted into a detention without an articulable suspicion of wrongdoing; (3) A traditional arrest must be supported by probable cause.

Search on Street not Permitted

State v. Smith 155 NJ 83 (1998)

Because the police did not have probable cause to search defendant on the street, the seizure of evidence from his person was unlawful. That unlawful seizure, in turn, tainted the subsequent discovery of drugs in an apartment. All of the evidence so seized must be suppressed.

POINT 5

THE EVIDENCE MUST BE SUPPRESSED BECAUSE IT WAS NOT IN THE "PLAIN VIEW" OF THE POLICE OFFICERS.

"Plain view" can refer to a situation in which items are exposed to public view in a public place or in an otherwise constitutionally unprotected location. State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728 (App. Div. 1977). Such a situation did not exist in the present case because automobiles are within the areas of privacy protected by the Fourth Amendment of the United States Constitution. State v. O'Herron, 153 N.J. Super. 570, 380 A.2d 728 (App. Div. 1977).

A warrantless search was granted on a motion to suppress in State v. Barrett, 170 N.J. Super. 211 (Law Div. 1979). The court determined the police were not justified in conducting a search of a motor vehicle because one officer saw an empty hand reach from the front seat to the back seat. These movements, the operation of the vehicle with lights off from one point of the parking lot to the other, and the driver's lack of vehicle registration in no way sanctions the warrantless search of the vehicle. Neither policeman testified that he felt himself in any danger during the incident. Id. at 216. In the case at bar, the police were not justified in conducting a search merely because they saw a car parked. An opportunity for a "plain view" observance of objects can also occur where an officer has lawfully intruded into a constitutionally protected

place where he observes the item in question; such a lawful intrusion requires consent. State v. O'Herron, supra.

In State v. Jones, 195 N.J. Super. 119 (App. Div. 1984) police entered a vehicle at an accident scene and searched it. The court concluded that in the circumstances presented, the police officer had no right to be inside the motor vehicle searching for evidence of ownership or for the insurance identification card. The court held that even evidence falling into the plain view must be suppressed unless the officer is lawfully in the

viewing area. The court further held "a defendant's constitutional right to privacy in his vehicle and personal effects cannot be 'subordinated to mere considerations of convenience to the police short of substantial necessities as grounded in the public safety' ". 195 N.J. Super. at 124.

In State v. Murray, 151 N.J. Super. 300 (App. Div. 1977) the Appellate Division held that the police were not justified in taking out the front seat of a vehicle in order to conduct a warrantless search of a compartment behind the front seat just because a police officer saw an empty roach clip and vile of what appeared to be marijuana in plain view. In the case at bar, police were not justified in conducting a search on a "hunch" something was up. There is no evidence of criminality prior to the police ordering the occupants out of the vehicle and conducting a warrantless search.

POINT 6

THE DEFENDANT DID NOT CONSENT TO THE ILLEGAL SEARCH

When the police search a person or vehicle by consent of the owner, the prosecutor must prove that the consent was freely and voluntarily given. Schnekloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041 (1973), on remand 479 F.2D 1047 (9th Cir. 1973). This means, among other things, that the prosecutor must prove by "clear and positive evidence" that the person knew that he had a right to refuse to consent to the search. State v. Johnson, 6 N.J. 349, 346 A.2d 66 (1975). The New Jersey Supreme Court has held that Article I, paragraph 7, of the New Jersey Constitution of 1947 requires that where the State seeks to justify any search on the basis of consent, then it has the burden of showing that the person knew that he had a right to refuse to consent to the search. State v. Johnson, supra. The court said that several ways by which the State could satisfy this burden were detailed by Justice Marshall in his dissenting opinion in Chnekloth v. Bustamonte, 412 U.S. at 286, 93 S. Ct. at 2077. There Justice Marshall's opinion was cited:

> In contrast, there are several ways by which the subject's knowledge of his rights may be shown. The subject may affirmatively demonstrate such knowledge by his responses at the time the search took place, as in the United States v. Curiale, 414 F.2d 744 (2nd Cir. 1969). Where, as in this case, the person giving consent is someone other than the defendant, the prosecution may require him to testify under oath. Denials of knowledge may be disproved by establishing that the subject had, in the recent past, demonstrated his knowledge of his rights, for example, by refusing entry when it was requested by the police. The prior experience or training of the subject might in some cases support inference that he knew of his right to exclude the police.

State v. Johnson, supra.

One factor which courts have found weigh against finding of voluntariness is that consent was given and the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered. See e.g. Arnold, New Jersey

Practice, Criminal Practice and Procedure 682, page 136, referring to Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954).

"If the State relies on consent as the basis for a search, it must demonstrate 'knowledge on the part of the person involved that he had a choice in the matter.' " State v. Binns, 222 N.J. Super. 583, 603, 537 A.2d 764 (App. Div. 1988), quoting, State v. Johnson, 68 N.J. 349, 354, 346 A.2d 66 (1975).

In State v. Binns, the trooper informed the defendant of his right to refuse a search of the vehicle. The trooper also asked the defendant to sign a consent form which the defendant testified he signed with the intent to give consent to the search. These things were not done in the case at bar.

In State v. Santana, 215 N.J. Super. 63, 521, A.2d 346 (App. Div. 1987), the trooper wanted to search the car, but did not think he had probable cause to either obtain a search warrant or to place the defendants under arrest. He, therefore, asked the defendant, who had been given use of the car, for consent to search, informing him that he could refuse to give such consent. Id. at 67.

In State v. Pierce, 140 N.J. Super. 408, 414 (App. Div. 1983) the searching officer had Pierce fill out a written consent form to search the passenger compartment of the car. A second officer later had defendant Pierce fill out a second written consent form for the search of the trunk. At no time was consent requested from or received from the other defendant, Carroll. Even though lawfully obtained evidence was found on Carroll in the passenger compartment, the New Jersey Superior Court suppressed the evidence from the trunk which incriminated her.

The ensuing search by the police in the case at bar was unlawful because the police did not have a right to conduct a warrantless search on the basis of an event which they themselves created. State v. Welsh, 167 N.J. Super. 233, 236-237 (App. Div. 1979); State v. Williams, 168 N.J. Super. 352 (App. Div. 1979). The police report did not indicate the police were in risk of harm or even feared harm or a loss of evidence. The

evidence obtained in the search in the case at bar was unlawful and therefore must be suppressed.

Based on the foregoing, the law requires the suppression motion be granted. Additional caselaw will be cited on the record at the motion to support defendant's motion.

Very truly yours,

KENNETH VERCAMMEN
ATTORNEY AT LAW

cc: client
cc: Prosecutor's Office