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SUPREME COURT OF NEW JERSEY
DOCKET NOS. 082858 & 085146 (A-39/40-20)

STATE OF NEW JERSEY *Plaintiff-Petitioner*, **v.** **PETER NYEMA** *Defendant-Respondent*. **AND** **STATE OF NEW JERSEY** *Plaintiff-Respondent*, **v.** **JAMAR J. MYERS** *Defendant-Petitioner*.	:	**CRIMINAL ACTIONS** ON PETITIONS FOR CERTIFICATION TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NOS. A-0891-18T4 and A-00185-17T4 *Sat Below*: JUDGES CLARKSON S. FISHER, JR., P.J.A.D., ROBERT J. GILSON, J.A.D. AND SCOTT J. MOYNIHAN, J.A.D. and JUDGES ROBERT J. GILSON, J.A.D. AND ARNOLD L. NATALI, JR.

BRIEF OF *AMICI CURIAE* 66 BLACK MINISTERS AND OTHER CLERGY MEMBERS WHO HAVE PROVIDED PASTORAL SERVICES TO VICTIMS OF RACIAL PROFILING

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Preliminary Statement

Amici seek to participate in this case to convey the tremendous damage caused by racial profiling, or the use of generalized, race-based descriptions as a basis for conducting traffic stops. Courts typically learn about racial profiling allegations in the context of motions to suppress—*i.e.* where police action using race as a proxy for suspicion actually yielded evidence of criminal behavior. Clergy, who provide comfort and counsel to members of their faith communities whenever they are targeted by police, learn of these allegations and their ramifications upon the lives of their congregants much sooner, much more often, and, usually, where no evidence of criminal behavior exists.

As the clergy who comprise the *amici* here are well-aware, racial profiling does not simply hurt individuals – it injures entire communities. Accordingly, *amici* submit this brief to explain the prevalence of racial profiling and to convey the substantial humiliation and trauma caused by the practice, even where, as is usually the case, no arrest occurs. (Point I). Indeed, good reasons exist for why people—particularly Black people—try to limit their response to police action like shining a flash light into a car. A deep-seated and historically rooted fear of police violence evinces a reasonable instinct to "freeze." That well-founded fear, and any reactions stemming from it, cannot constitute reasonable suspicion. (Point II).

Even if the use of vague race and gender-based descriptions—like the one at the center of this case—provided a meaningful limitation on law enforcement's discretion to conduct traffic stops, criminal justice stakeholders would still be forced to determine whether any marginal public safety benefits flowing from reliance on those descriptions are worth the countervailing harms to public safety and individual dignity caused by them. In truth, these descriptions do so little to limit police action that they effectively authorize the stops of hundreds of thousands of New Jerseyans without check or limit. The Constitution forbids such a broad and porous search and seizure authority. (Point III).

In response to these assertions, the State will undoubtedly explain that the officers in the case did not rely *exclusively* on the vague race-based descriptions of the perpetrators, but also looked to a car's proximity to the crime scene or the car occupants' failure to respond to the officer's spotlight. But none of these facts, considered alone or in combination with the virtually meaningless suspect description, constitutes reasonable suspicion. (Point IV). If a description is so vague it automatically includes thousands of people or if a person is far enough away, in time or distance, from a crime scene that dozens, or hundreds, of people may be included within the parameters of the search, insufficient information exists to justify it and courts should use this framework in analyzing reasonableness. (Point IV, A).

In the instant case, police justified the stop based on what they deemed to be an inadequate reaction by the occupants of the car to an officer shining a light into it. If visible reaction (or, in fact, lack of visible reaction) gives rise to reasonable suspicion, virtually anything a person does can be used to justify a vehicle stop and courts should treat such rationales with extreme skepticism. (Point IV, B).

With that in mind, and to prevent abusive police behavior, the Court should impose limitations for police stops in New Jersey and bar police officers from conducting stops where the only, or predominant, basis justifying the stop is a match to the race and gender of the suspects. Although there would be significant value to such a rule, it would not break new ground: police already know that a tip informing them of a suspect driving a red car would not allow them to consequently stop what could arguably be tens of thousands of red cars on New Jersey's roads. Similarly, suspect descriptions merely identifying race and gender do not provide the reasonable, articulable suspicion the Constitution requires. There is deep value in this court explicitly saying so. (Point V).

Statement of Interest of *Amici*

Amici are 66 ministers and leaders of other faiths, including rabbis and imams, who have personally witnessed the harms associated with racial profiling.[1] Although the clergy members provide pastoral services in all parts of New Jersey, with congregations in 15 counties, these clergy share a common thread: members of their communities have been stopped by police solely because they were Black.

Amici have seen firsthand, and provided counsel and guidance following the trauma individuals close to them have suffered as a result of these stops, even when the stops only last for a few minutes and do not result in arrests.

Amici join this brief to urge the Court to take bold action to end the scourge of racial profiling that has caused significant harm to the people to whom *amici* provide spiritual counsel.

[1] A complete list of the clergy people who have joined this brief is attached hereto as Appendix A.

Statement of Facts and Procedural History

Amici accept the facts and procedural history contained in Defendant-Petitioner Myers' Petition for Certification, but highlight the following facts pertaining to the car stop at issue:

On May 7, 2011 just after midnight, Officer Mark Horan of the Hamilton Police Department heard over dispatch that a robbery had occurred at a 7-11 and the suspects, "two black males," had fled on foot. 2T 4:15-22; 3T 40:3; 7:13-15.[2] When Officer Horan received the call, he was near the city line (2T 5:7-8) and there was light traffic on the road between him and the store. 3T 31:6-14.

Officer Horan shined a handheld spotlight on cars that were traveling toward him, looking into each of the cars for a second or two. 3T 12:20-22. The first car he shined the light into contained a man and a woman who responded in "either [an] alarmed or annoyed" manner. 2T 9:10-24. The officer did not stop that car. When he shined his light into the second car, he saw three Black males inside. 2T

[2] Defendants use different transcript notations in their briefs, *amici* use the following abbreviations:

2T – May 14, 2013 Hearing on Motion to Suppress
3T – May 15, 2013 Hearing on Motion to Suppress
4T – August 7, 2013 Hearing on Motion to Suppress
5T – September 16, 2013 Ruling on Motion to Suppress
6T – September 6, 2018 Nyema's Sentencing
9T – November 29, 2016 Myers' Plea

8:12. None of the men responded to the light or made eye contact with Officer Horan; this behavior "struck [him] as odd." 2T 11:8-17. Although dispatch had advised him that only two Black males had committed the robbery and that they had left the scene left on foot, Officer Horan thought that the third man could be a getaway driver, even though he had never personally handled a robbery in which a getaway driver was involved. 2T 12:8-16. In light of these facts, Officer Horan made a U-turn, activated his lights, and stopped the car. 2T 12:18-13:7. Two other officers in two other cars arrived as Officer Horan stopped the car. 2T 15:7-18. All three officers approached the car with their weapons drawn. 2T 15:7-17:15. At the suppression hearing, Ajene Drew was identified as the driver, Peter Nyema was identified as the front-seat passenger, and Jamar Myers was identified as the rear-seat passenger. 2T 17:9-20:3.

The trial court denied the defense motion to suppress as to some of the evidence retrieved, but granted the motion as to other evidence. 5T 7:13-8:13. On November 29, 2016, Mr. Myers entered a conditional guilty plea. 9T 14:16-22. On October 4, 2017, in the midst of trial, Mr. Nyema entered a guilty plea. 6T 6:12-19. Both defendants appealed their convictions, challenging the validity of the car stop. The Appellate Division affirmed as to Mr. Myers, *State v. Myers*, No. A-0185-17T4, 2019 WL 1581430 (App. Div. Apr. 12, 2019), and reversed as to Mr. Nyema. *State v. Nyema*, 465 N.J. Super. 181, 193 (App. Div. 2020). The Court

granted the Petition for Certification filed by the State, *State v. Nyema*, No. 085146, 2021 WL 568510, at *1 (N.J. Feb. 12, 2021). And, after reconsideration, the Court granted Mr. Myers' Petition, "limited to the issue of whether the police officer had reasonable articulable suspicion to stop the car." *State v. Myers*, No. 082858, 2021 WL 568419, at *1 (N.J. Feb. 12, 2021).

Argument

I. Race-based stops cause tremendous harm.

A person need not be subjected to actual violence to benefit from the Constitution's prohibition on unreasonable searches or seizures; limitations on a person's freedom of movement or the risk of physical violence are sufficient to trigger the protections of Article I, Paragraph 7. "The right of freedom of movement without unreasonable interference by government officials is not a matter for debate at this point in our constitutional development." *State v. Shaw*, 213 N.J. 398, 421 (2012). Indeed, "'[t]he rights of the public to be free from the unwarranted use of power by law-enforcement officials would be in a sorry state if evidence obtained in violation of a citizen's constitutional rights were admissible merely because the citizen had not been subjected to physical abuse." *Id.* (*citing State v. Chippero*, 164 N.J. 342, 358 (2000) (*quoting State v. Johnson*, 118 N.J. 639, 659 (1990))). Put differently, people are profoundly harmed by racial profiling, even when it does not result in physical violence, or even prolonged

arrests. *Amici* have seen firsthand the trauma caused by racial profiling and social science only confirms the experiences shared with them. Those who minimize the damage caused by racial profiling and seek to write off those harms as marginal increase the resentment, hurt, and distrust that communities of color feel toward police.

In response to those minimizations, political philosopher Annabelle Lever has provided a succinct explanation of how racial profiling causes harm to Black peoples' psyches:

> Racial profiling publicly links [B]lack people with a tendency to crime. For that reason alone, it is likely to exacerbate the harms of racism. However scrupulous the police, racial profiling is likely to remind [Black people], all too painfully, that odious claims about their innate immorality and criminality justified their subordination in the past, and still resurface from time to time in contemporary public debate.
>
> [Annabelle Lever, *Why Racial Profiling is Hard to Justify: A Response to Risse and Zeckhauser*, 33 Phil. & Pub. Aff. 94, 97 (2005).]

She also explains that although "being stopped and having one's papers examined when shopping, at an airport, or bus station [may only] . . . make one feel hurt, resentful, and distrustful of the police, being stopped on the motorway at night is likely to be a scarier experience." *Id.* at 103. After all,

> Police in the United States carry guns, and are known to use them. By the side of the motorway no one can really tell what is going on. A wrong move, the inability to hear or understand what is being said, a fit of coughing or a panic attack can all lead to violence and tragedy. Police have been known to mistake a [B]lack man gasping for air, or suffering from a heart attack or epilepsy, for someone trying to resist arrest or to attack them, and have then responded with what turned out to be deadly force . . . .
>
> In short, fear of violence and of death at the hands of the police—not just feelings of hurt, resentment and distrust—are likely to be among the harms of profiling in a racist society, and to occur even when the police officer one is dealing with appears to be polite and considerate.
>
> [*Id.* at 103-04.]

Law professor Randall Kennedy has explained how individual indignities create deep community harms. "[D]angerous, humiliating and sometimes fatal encounter[s] with the police [are] almost a rite of passage for a [B]lack man in the United States." Randall Kennedy, *Race, Crime and the Law*, 161 (1997). These experiences create "powerful feelings of racial grievance against law enforcement authorities." *Id.* at 159. The injuries to single people reverberate throughout entire communities:

> Each of these incidents becomes a story that is shared with others in the family, with others in the same neighborhoods, and with others in the same racial and ethnic groups. This leads to widely held perceptions across these groups that they—all the members of these racial or ethnic groups, not just the few individuals who

> may have engaged in some criminal conduct—are the actual target . . . .
>
> This aggregation of individual damage points to why racial profiling is deeply damaging on a societal level—not just to the communities subjected, but to all citizens, and even to police and their efforts to fight crime and disorder. When whole groups share stories about being targeted by police, this reinforces (or creates anew) the message that police enforcement practices land on people not because of what they do, but because of how they look—that is, the racial or ethnic group to which they belong. By any moral measure, this seems wrong.
>
> [David A. Harris, *Racial Profiling*, 2 Reforming Criminal Justice: Policing 117, 136 (Erik Luna ed., 2017).[3]]

It is this damage—to individuals and communities—that *amici* and members of their community have experienced far too often, and that they seek to prevent in the future.

II. Requiring an aggravation or discomfort response from black motorists in response to a police officer's act during a traffic stop ignores social science establishing a legitimate fear of potential violence by law enforcement.

Officer Horan explained that it stuck him as "odd" when the occupants of the car did not respond to his light. 2T 11:8-17. Far from odd, many people, especially Black people, frequently take steps to avoid interactions with police. Whether people flee or freeze, their motivation is often the same: they do not want

[3] Available at https://law.asu.edu/sites/default/files/pdf/academy_for_justice/5_Reforming-Criminal-Justice_Vol_2_Racial-Profiling.pdf.

to engage with law enforcement. New Jersey courts have long recognized that the discomfort many "city residents" feel around some police "is regrettable but true." *State v. Tucker*, 136 N.J. 158, 169 (1994). In *Tucker*, the Court acknowledged that reality and held that there were reasons other than guilt that might cause "a young man in a contemporary urban setting [to] . . . run at the sight of the police." *Id.* As a result of that recognition, in New Jersey, flight alone cannot constitute reasonable suspicion. *Id.* at 173.

Other courts have more explicitly named the legitimate fear many Black people have of police. As the Supreme Judicial Court of Massachusetts explained in 2016:

> the finding that [B]lack males in Boston are disproportionately and repeatedly targeted for [investigatory stops] suggests a reason for flight totally unrelated to consciousness of guilt. Such an individual, when approached by the police, might just as easily be motivated by the desire to avoid the recurring indignity of being racially profiled as by the desire to hide criminal activity.
>
> [*Com. v. Warren*, 475 Mass. 530, 540 (2016).]

The logic applies with equal force to people who try not to respond when they encounter a police officer. A recent dissent from an intermediate appellate court in California perfectly explains why courts should not treat a non-response to police action as sufficiently suspicious to warrant a stop and deserves a lengthy citation here:

> The court found it 'odd' and therefore suspicious that appellant did not move or speak when the spotlight came on and did not rise until the officers commanded him to do so. To the trial court, reasonable suspicion was created because appellant bent over and, unlike 'any normal human being,' waited 'too long' (an amorphous concept not quantified by the witness or the court) to stand erect and remained silent
>
> [. . . .]
>
> Under the trial court's ruling and the majority opinion, however, how does one avoid police contact without creating reasonable suspicion justifying detention?
>
> [. . .]
>
> The majority's approach that appellant froze and waited 'too long' to rise will apply to a wide array of conduct that cannot provide an objective basis for reasonable suspicion. Appellant's reaction was neither abnormal nor suspicious. Indeed, some even might instruct their children remaining still is a prudent course of action (and even then, it may not work. #BlackLivesMatter.) To hold otherwise ignores the deep-seated mistrust certain communities feel toward police and how that mistrust manifests in the behavior of people interacting with them.
>
> Even outside of communities distrustful of police authority, how safe is it anytime or anywhere to move suddenly when police approach? Movement is incredibly dangerous for anyone because if police deem it sudden, and hence threatening, someone may end up shot. On top of that, we know for some populations, to stand up from a bent position as the police approach would effectively be suicidal, as it would likely be interpreted as a threatening act. To find freezing and waiting 'too long' reasonably suspicious is irresponsible and dangerous to both law enforcement and those with whom it interacts.

> The majority says you can't duck and freeze and then wait too long to stand up. What's left? The only option for a 'normal' human being, according to the majority, is to immediately stand erect and politely inquire about the purpose of the stop, a conversation we all have an absolute right not to start . . . . The majority opinion narrows the options for those who want to be judged 'normal' and hence beyond suspicion. They must stand erect and chat up the officers who approach them. Tell that to Eric Garner.
>
> [*People v. Flores*, 60 Cal. App. 5th 978, 275 Cal. Rptr. 3d 233, 243–44 (2021) (Stratton, J, dissenting), review filed (Mar. 19, 2021).]

While it should suffice to recognize, as Judge Stratton did, that both historical and contemporary realities[4] distort interactions of Black people with the police, any judicial recognition of this particularly fraught reality for many Black Americans finds extensive support in social science. Put simply and frankly:

[4] Much has been written on this subject. From the historical roots of modern policing in slave patrols, Jill Lepore, *The Invention of the Police*, The New Yorker, (July 13, 2020) (linking the rise of modern policing to the enforcement of slave codes), to the targeted enforcement of laws against Black people at the turn of the twentieth century, *see generally*, Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (2010) (discussing racialize policing in the late nineteenth and early twentieth century), to the more recent recognition of racial profiling here in New Jersey, *State v. Soto*, 324 N.J. Super. 66 (App. Div. 1999), it is no longer reasonably in dispute that the enforcement of laws in the United States has not fallen equally on all Americans. Indeed, racialized policing is hardly a relic of the past. *See, e.g.*, American Civil Liberties Union, *A Tale of Two Countries Racially Targeted Arrests in the Era of Marijuana Reform* (2020), available at https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform (documenting significant disparities across the country and in New Jersey in arrests for marijuana possession between Black people and white people, despite similar usage rates).

"[b]eyond avoiding the indignity of racism, our study reveals that running from police may also be motivated by a legitimate fear of death and a desire to avoid it." Jocelyn R. Smith Lee & Michael A. Robinson *"That's My Number One Fear in Life. It's the Police": Examining Young Black Men's Exposures to Trauma and Loss Resulting From Police Violence and Police Killings*, 45 J. of Black Psych. 143, 173 (2019). Although "hypervigilance [from Black people afraid of the police] was predominantly expressed as running from police" *id.* at 172, "freezing" can also be a similar but inverse response.[5] Regardless, race-specific trauma reactions should not be judged as criminality and most certainly should not be allowed to serve as a substitute for reasonable suspicion.

III. Race-based stops are unreasonable because they fail to meaningfully limit the number of people subject to them.

Not all stops relying on suspect descriptions including race can be considered "race-based stops" or racial profiling; indeed, "[t]he use of a person's racial or ethnic appearance as part of a reasonably detailed description of a known suspect does not constitute racial profiling . . . [r]ather, it constitutes good police work and may assist in the apprehension of the right person." David A. Harris,

[5] Indeed, in far too many instances, the police command of "freeze!" is followed within mere seconds with gunshots. Accordingly, stillness within seconds of interactions may be an effort to avoid triggering what is often perceived as a justified fear in a police officer that could result in an almost immediate and fatal response.

Racial Profiling, 2 Reforming Criminal Justice: Policing, at 120. Very general descriptions, such "a Black man with a baseball cap" or "Black man with a hooded sweatshirt" could "describe a huge percentage young [B]lack men in any neighborhood on almost any given day, and would not allow a police officer to pick out any particular person as suspicious. On the contrary, it would give the officer a license to stop almost every young [B]lack man." *Id.*

Our courts have long-recognized the inefficacy and constitutional insufficiency of vague descriptions. In *Shaw*, the Court condemned a police stop where police stopped a pedestrian where the only feature the pedestrian "shared with the person sought on the warrant to be executed . . . .w[as] that both were [B]lack men." 213 N.J. at 420. Similarly, in *State v. Love*, the Appellate Division applied the exclusionary rule after police stopped a man who "fit some but not all particulars of the general description given of [a] person or persons who committed purse snatchings in a busy large section of Atlantic City three or four months earlier." 338 N.J. Super. 504, 508 (App. Div. 2001). In that case, "the description of the perpetrator given by the various witnesses was of a thin black male wearing dark clothing ranging in height from five foot eight inches to six feet and in age from twenty to forty." *Id.* at 505. Although, the defendant, a skinny 36 year old, arguably fit the description "it can be safely said that countless others matched the same descriptions." *Id.* at 508. These "fishing expedition" stops violate the

Constitution because they make every black man a potential suspect, and provide police with almost unlimited, albeit unwarranted, license to detain. *Shaw*, 213 N.J. at 420. As Professor LaFave has explained, "[q]uite obviously, the more the description provided . . . can be said to be particularized, in the sense that it could apply to only a few persons in the relevant universe, the better the chance of having at least sufficient grounds to make a stop." 4 Wayne R. LaFave, *Search and Seizure* § 9.4(g), at 198 (3d ed. 1996). Using that logic, courts have invalidated searches that relied upon descriptions so vague they "could have fit many if not most young [B]lack men." *In re T.L.L.*, 729 A.2d 334, 340 (D.C. 1999).

As a guide, *United States v. Brown*, contrasts permissible, helpfully detailed descriptions, providing reasonable suspicion, with vague and inaccurate descriptions that do not. 448 F.3d 239, 247 (3d Cir. 2006). In *Brown*, officers heard a broadcast identifying "the suspects as African–American males between 15 and 20 years of age, wearing dark, hooded sweatshirts and running south on 22nd Street, where one male was 5'8" and the other was 6'." *Id.* In that case, like here, the match of the defendants "to even this most general of descriptions was hardly close." *Id.* There, the suspect bulletin described suspects between 15 and 20 years of age, but the people arrested were 28 and 31 years old, respectively. *Id.* Indeed, "about the only thing [the people arrested] had in common with the suspects was

that they were Black . . . By no logic does it, by itself, support reasonable suspicion."[6] *Id.*

To serve as a constitutionally sufficient justification for a stop, a description, whether it contains information about race or not, must include "enough other detail that would allow law enforcement to distinguish people of the same racial or ethnic group from each other." *Id.*

IV. The other factors in this case—proximity to the crime scene and a (non)reaction to the spotlight—fail to create reasonable, articulable suspicion.

If the imprecise description provided in this case cannot provide a basis for the stop in this case, the Court must still determine whether the other bases for the stop render it constitutionally permissible. They do not.

A. Although proximity to the crime scene may be considered, the stop in this case was not so close in time or location to the crime scene to create reasonable suspicion.

It is both axiomatic and a matter of common sense that "[c]ritical to the resolution of the existence of a reasonable and articulable suspicion is the proximity of the stop in time and place to the crime in question." *State v. Gavazzi*,

[6] The already vague "bulletins" or broadcast identifications used by police in stops like the ones at issue here may be rendered even more unreliable where eyewitnesses are involved. Memory does not work like a video recording, but is "far more complex . . . [and] a constructive, dynamic, and selective process. *State v. Henderson*, 208 N.J. 208, 245 (2011). Indeed, eyewitness identifications are incorrect a third of the time. *See Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

332 N.J. Super. 348, 357 (Law Div. 2000). According to Officer Horan, when he learned about the robbery, he was "on Broad Street maybe a few blocks east of the city line so around Cedar Lane maybe." 2T 5:7-8. Based on the route the officer drove, he was just under three miles from the store when he got the call.[7] He estimated that he encountered the car approximately three-quarters of a mile from the store. 2T 7:19-21. The record does not reveal how long it took before police officers received a call about the robbery nor how long it took officers to distribute the suspects' descriptions over police radio. After that occurred, Officer Horan had to travel more than two miles. So, suffice it to say, Officer Horan did not stop the car *immediately* after the robbery nor was he in the immediate vicinity of the scene of the robbery when the stop occurred.

There are several features of this case that distinguish it from the cases where New Jersey courts have determined that proximity to a crime scene—both in time and space—can create reasonable articulable suspicion. In *State v. Reynolds*, a police officer observed only the defendant leaving a field in the area of the crime; the defendant matched a general description of the perpetrator. 124 N.J. 559, 563, 569 (1991). In contrast to that defendant's presence in a deserted, rural area, the defendants in this case were stopped stop less than a mile from a busy highway

[7] *Amici* arrive at this estimate through use of commonly available mapping software such as Google Maps. *See* N.J.R.E. 201(b) (court may take judicial notice of facts not reasonably in dispute).

interchange and near stores (like the 7-11) and restaurants that are open late at night.[8] Whereas in *Reynolds* "[t]he trial court found that defendant's proximity to the crime in both time and space and that his similarity to the general description of the suspect were sufficient to generate a reasonable suspicion . . ." (*id.* at 569), such was clearly not the case here, either in description or proximity.

In *State v. Anderson*, police had a description similarly vague to the one in this case—merely identifying the race and gender of the suspects. However, police pulled the car over mere minutes after the robbery, a few blocks away from the crime scene, and the suspects' car was the only non-police car on the road. 198 N.J. Super. 340, 347 (App. Div. 1985). Similarly, in *State v. Todd*, police officers saw a man who matched a vague build and clothing description of a burglary suspect. 355 N.J. Super. 132, 138 (App. Div. 2002). The Appellate Division found that reasonable suspicion had been established to support the stop of a suspect who was found on a street just a few blocks from the crime scene a few minutes after the crime had been committed. *Id.* Critically, the defendant "was the only person then walking on that street, at approximately 3:30 a.m." *Id.*

Although the description of the suspect in *State v. Gavazzi*, was more robust than here, the officer was unable to verify some aspects of the description. 332 N.J.

[8] Here, too, *amici* rely on Google Maps for facts that should not be in reasonable dispute and asks the Court to take notice of these facts.

Super. at 360. Several factors, however, differentiate *Gavazzi* from this case. There, the suspect was arrested six minutes after the crime within three blocks from the scene. *Id.* Also, the car was the *only* one encountered by officers that night, in a rural or residential area. *Id.* at 352, 360. Although *Gavazzi* is easily distinguished based on the closer proximity and the absence of other cars in the area, it is also worth noting that the trial court there determined that "[t]he initial stop of defendant's vehicle was minimally intrusive." *Id.* at 363. That conclusion requires courts to ignore the harms that flow from racial profiling (*see*, *supra*, Point I) and the *very* intrusive way that the stop was effectuated in this case, with officers approaching the car with their guns drawn and ordering all occupants to place their hands on the roof. 2T 17:13-19.

In short, although proximity in time and place to a crime scene can create reasonable suspicion, it only does so when the act of being close to the scene is specific enough to raise suspicion.

B. Defendants' behavior did not create reasonable suspicion.

Officer Horan explained that while driving toward the crime scene, he shined a light into oncoming cars. (3T 12-20 to 22). The occupants of the first car he shined the light into responded in "either [an] alarmed or annoyed" manner. (2T 9-10 to 24). The officer did not stop that car. When he shined his light into the second car, none of the occupants responded to the light or made eye contact with

the officer; this behavior "struck [him] as odd." (2T 11-8 to 17). Although the occupants of neither car exactly matched the description of the suspects (the first contained a man and a woman (2T 9-10 to 24) and the second contained three men (2T 8-12)) the officer stopped the second car but not the first. A constitutional rule that allows the stop of a car where people do not respond but does not allow the stop of a car whose occupants express alarm or annoyance fails to meaningfully limit police behavior.

On the most basic level, Officer Horan identified a suspicion; but that articulated suspicion cannot qualify as reasonable. After all, would the converse reaction also be "odd" enough to justify a stop? That is, does an expression of annoyance or alarm contribute to reasonable suspicion? Officers' experience, of course, is relevant to their decision making, (*see Terry v. Ohio*, 392 U.S. 1, 27 (1968)) but when that experience, and their categorization of what is suspicious has a "chameleon-like way of adapting to any particular set of observations . . . ." *United States v. Sokolow*, 490 U.S. 1, 13–14 (1989) (Marshall, J., dissenting) (*quoting United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987)), it ceases to provide a limitation on police behavior and rather becomes carte blanche to stop. The Constitution forbids such a result.

As Justice Marshall illustrated in dissent in *Sokolow*, courts utilized a series of behaviors *and their converse* to justify stops. *Id.* In that dissent, Justice Marshall

catalogs these justifications by citing cases: (1) finding reasonable suspicion because suspect was first to deplane, where the suspect was the last to deplane, and where the suspect deplaned from middle; (2) where suspicion was based on the purchase of one-way tickets and where the suspect bought round-trip tickets; (3) where suspicion derived from the booking of a nonstop flight and where the suspect changed planes; (4) where courts found suspicion because the suspect traveled with no luggage, where the suspect had a gym bag, and where the suspect traveled with new suitcases; (5) where reasonable suspicion was based on the suspect traveling alone and where the suspect traveled with companion; and, similar to the facts in the instant case, (6) where officers grew suspicious because the suspect acted nervously and another where the suspect acted too calmly). *Id*. (citations omitted).

V. The Court should create a prophylactic rule preventing police officers from effectuating stops where the only or predominant basis justifying the stop is that the people stopped match the race and gender of the suspects.

This Court has a "common law supervisory power over criminal practice within our jurisdiction." *State v. Long*, 119 N.J. 439, 518 (1990). "[W]hen we perceive, as we do here, that more might be done to advance the reliability of our criminal justice system, our supervisory authority over the criminal courts enables us constitutionally to act." *State v. Kuchera*, 198 N.J. 482, 500 (2009) (*quoting State v. Romero*, 191 N.J. 59, 74-75 (2007)). The Court has not hesitated to use its

supervisory power to mandate that law enforcement take or not take particular actions. *See, e.g.*, *State v. Lazo*, 209 N.J. 9 (2012) (invoking supervisory power to regulate police officers' administration of photo identification procedure); *Henderson*, 208 N.J. at 270-71 (invoking supervisory power to require that police officers ask identification witnesses whether the witness has spoken with anyone about the identification and what was discussed); *State v. Delgado*, 188 N.J. 48, 63 (2006) (invoking supervisory power to require law enforcement officers to make a written record detailing the out-of-court identification procedure as a condition to the admissibility of an out-of-court identification). In *State v. Carty*, the Court imposed limitations on police authority to conduct certain searches under the State Constitution. 170 N.J. 632, *modified*, 174 N.J. 351 (2002). In his concurrence to the judgment, Justice Stein urged the Court to "impose precisely the same condition" not under the State Constitution, but as "*a prophylactic rule of law adopted by this Court for the purpose of preventing abuses of the power of law enforcement officers*." 170 N.J. 655-56 (Stein, J., concurring). (emphasis added).

It may be of use to look outside the legal sphere for guidance to this point. Media and educational organizations have recognized that ambiguous racial descriptions not only fail to inform the public, but cause community harms. For example, News5 Cleveland has an explicit policy forbidding the publishing of descriptions that fail to sufficiently describe suspects. As the network explained:

> On the News 5 website we publish specific descriptions, with identifying details, when alerting the public to potential danger, when helping to locate a missing person and when police ask for the public's help in the apprehension of an individual.
>
> If a description is vague, and it could literally describe thousands or millions of people, we don't share it.
>
> In other words: Race and gender alone are not enough.
>
> [Joe Donatelli, *When we include suspect descriptions in our reporting, and when we don't*, News 5 Cleveland (June 23, 2020), https://www.news5cleveland.com/about-us/news-literacy/when-we-include-suspect-descriptions-in-our-reporting-and-when-we-dont.]

For that network, deciding whether to publish a description relies on the potential harm involved. When measured against the marginal value to public safety that could flow from distributing those uninformative descriptions, the network determined that "sharing vague descriptions that are of little value repeatedly to a mass audience does more harm than good." *Id. Accord* Therese Bottomly, *Why not include race in descriptions of suspects?*, The Oregonian (Mar. 27, 2019).[9]

Similarly, some colleges and universities have begun to recognize the limited utility of vague racial descriptions and the countervailing harms created by their distribution. The University of Minnesota, for example, discontinued the use

9 https://www.oregonlive.com/oregonianeditors/2007/06/why_not_include_race_in_descri.html.

of race in crime alert bulletins "when there is 'insufficient detail to reasonably aid in identifying a suspect.' FOX 9 Minneapolis-St. Paul, *University of Minnesota removes race description from vague crime alerts* (Feb. 25, 2015).[10]

How, then, can courts respond knowing that the use of vague racial descriptions do not promote public safety but cause significant harm? Although the law is clear that a description that contains race and gender and nothing more cannot justify a stop, (*see*, Point III, *supra*), in reality, this has not and cannot substantially alter police behavior and thus will not significantly diminish the harms caused by racial profiling. Bold interventions are thus warranted here.

Professor David Harris explained the problems with rules that prohibit the use of particular things as the "sole" or "only" justification for a stop:

> No action a police officer takes—neither a traffic stop nor a pedestrian stop, for example— happens because of just one factor. Many factors might come into play in any explanation of an officer's behavior: the event having taken place in darkness, presence in a high-crime area, the subject's dress, or the number of subjects present, for example. Therefore, using a definition that includes this "solely" approach effectively defines the problem out of existence.
>
> [David A. Harris, *Racial Profiling*, 2 Reforming Criminal Justice: Policing, at 119.]

[10] https://www.fox9.com/news/university-of-minnesota-removes-race-description-from-vague-crime-alerts.

The Court has already created rules under the State Constitution or under its supervisory authority to ensure that law enforcement officers do not take actions that cause significant harms without corresponding benefits. It should do so here as well by making clear that a description containing only race, gender, or other extremely common features, without more, cannot contribute to a finding of reasonable, articulable suspicion required for a stop. That is, not only do vague racial descriptions fail to justify stops on their own: but they provide so little value that they cannot convert an otherwise impermissible stop into a permissible one.

The elephant in the room, is, of course, that here, the officers got it right: Myers and Nyema are not blameless victims, but participants in the robbery. This is why these cases have reached this Court; they constitute two of a small handful of instances where a police hunch happens to generate evidence of a crime. But "an officer's hunch or subjective good faith—even if correct in the end—cannot justify an investigatory stop or detention." *Shaw*, 213 N.J. at 411 (*citing State v. Arthur*, 149 N.J. 1, 8 (1997)). More importantly, an officer's hunch cannot justify the experiences of the nameless others who have done nothing other than drive their cars on New Jersey's roadways, only to end up seeking comfort and counsel from *amici* for the trauma unjustified stops by police have forced them, inexcusably, to endure.

Conclusion

The behavior of the officers here, and of the so many others for whom this behavior goes unnamed, relies on vague racial descriptions to justify searches, thus creating tremendous harm to people and communities all over New Jersey. *Amici* urge the Court to find that stops based on vague descriptions, like the one articulated in these cases, violate the Constitution. Moreover, *amici* seek an explicit holding from the Court finding that vague racial descriptions cannot convert otherwise impermissible searches into lawful ones.

Respectfully submitted,

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Appendix A

The following clergy people have signed onto this brief. All of them have agreed to this statement: "We are clergy members from different faith traditions from all corners of New Jersey. All of us have provided pastoral services to members of our community who have been stopped by police because they are Black. We have seen firsthand the trauma that our parishioners have suffered as a result of these stops, even when they only last for a few minutes and do not result in arrests." *The names of houses of worship are provided for identification purposes only*.

1. Rabbi Joel N. Abraham, Temple Sholom, Scotch Plains;
2. Associate Minister Dr. Betty Livingston Adams, Fountain Baptist Church, Summit;
3. Reverend Annie Allen, Rutherford Congregationalist Church, Rutherford;
4. Reverend, Dr. Sammy Arroyo, First United Methodist Church of Hightstown, Hightstown;
5. Pastor Dr. Eric Billups, North Stelton AME Church, Piscataway;
6. Pastor Dr. Myra Billups, North Stelton AME Church, Piscataway;
7. Reverend Emilie Boggis, Beacon Unitarian Universalist Congregation, Summit;
8. Reverend Dr. Charles Boyer, Bethel AME Church, Woodbury;
9. Pastor George Britt, Mt. Teman AME Church, Elizabeth;
10. Imam & President Mohammad Ali Chaudry, Islamic Society of Basking Ridge, Basking Ridge;
11. Pastor Michael Chism, Mt. Zion AME Church, Lawnside;
12. Pastor Dr. James Coaxum, St. James AME Church, Atlantic City;
13. Reverend Julian Cooper, North Stelton AME Church, Piscataway;
14. Reverend Dave Delaney, St. Paul's United Methodist Church, West Deptford;
15. Pastor Dr. Lesly Devereaux, Trinity AME Church, Long Branch;

16. Reverend Dr. LL DuBreuil, Willow Grove Presbyterian Church, Scotch Plains;

17. Doctor Mary Early-Zald, PhD, MDiv, Beacon Unitarian Universalist Congregation, Summit;

18. Reverend Dr. Michael Granzen, Second Presbyterian Church, Elizabeth;

19. Pastor Rupert A. Hall, Turning Point United Methodist Church, Trenton;

20. Pastor Denison D. Harrield, Jr., Wallace Chapel A.M.E. Zion Church, Summit;

21. Pastor Dr. Leslie Harrison, Mt. Zion AME Church, Riverton;

22. Pastor Stanley Hearst II, Mt. Pishah AME Church, Jersey City;

23. Reverend Chris Hedges, Second Presbyterian Church of Elizabeth, Elizabeth;

24. Reverend Dr. Deborah Huggins, Central Presbyterian Church, Summit;

25. Pastor Jamal T. Johnson, Zion Baptist Church, Jersey City;

26. Reverend Seth Kaper-Dale, The Reformed Church of Highland Park, Highland Park;

27. Reverend Erich Kussman, Saint Bartholomew Lutheran Church, Trenton;

28. Reverend Sara Lilja, ELCA Lutheran, Hamilton Square;

29. Acting Executive Director, Charles Loflin, UU FaithAction NJ, Summit;

30. Pastor Faith E. Mack, Greater Mt. Zion AME Church, Trenton;

31. Reverend Bryan McAllister, Heard AME Church, Roselle;

32. Pastor Reverend Anthony Mitchell, Union Chapel, Newark;

33. Pastor Natalie Mitchem, Quinn Chapel, Atlantic Highlands;

34. Reverend Lukata Agyei Mjumbe, Witherspoon Street Presbyterian Church, Princeton;

35. Pastor Jameel Morrison, Grant AME Church, Chesilhurst;

36. Reverend Naomi Myers, Heard AME Church, Roselle;

37. Pastor Richard Norris II, Bethel Hosanna AME Church, Pennsauken;

38. Reverend, Dr. Ronald L. Owens, New Hope Baptist Church, Metuchen;

39. Pastor Mark E. Parrott, Lighthouse Temple Church, Newark;

40. Pastor Mark E. Parrott, Sr., Lighthouse Temple Church, Newark;

41. Reverend Candido Perez, Iglesia de Dios Pentecostal la Gloria del Altisimo, Union City;

42. Deacon Kathryn Prinz, ELCA, Morristown;

43. Reverend Ann C. Ralosky, First Congregational Church, Montclair;

44. Reverend Dr. Terry Richardson, First Baptist Church, South Orange;

45. Pastor Marti Robinsin, Ebenezer AME Church, Rahway;

46. Reverend John Rogers, First Congregational Church of Montclair, Montclair;

47. Reverend Louise Scott-Rountree, Good Neighbor Baptist Church, Newark;

48. Bishop Fred Rubin, Community Refuge Church of Christ, Manalapan;

49. Pastor Cassius Rudolph, Saints Memorial Baptist Church, Willingboro;

50. Reverend Chuck Rush, Christ Church, Summit;

51. Reverend Teresa Rushdan, St. Matthew AME Church, Orange;

52. Reverend Blake Scalet, Saint John's Lutheran Church, Summit;

53. Reverend Ron Sparks, Bethel AME Church, Freehold;

54. Bishop Gus Swain, Jr., New Life Church Ministries, Pennsauken;

55. Reverend Preston E Thompson, Ebenezer Baptist Church, Englewood;

56. Rabbi David Vaisberg, Temple B'nai Abraham, Livingston;

57. Pastor Gloria Walker, Bethel AME Church, Camden;

58. Pastor Cassandra Renee White, Mt. Laurel AME Church, Pilesgrove;

59. Mother Reverend Diana L. Wilcox, Christ Episcopal Church in Bloomfield & Glen Ridge, Bloomfield and Glen Ridge;

60. Pastor Charles Wilkins, Grant Chapel AME Church, Trenton;

61. Pastor Douglas Wilkins, Bethel AME Church, Patterson;

62. Reverend Vernon Williams, Fountain Baptist Church, Summit;

63. Pastor Reverend Melvin Wilson, St. Matthew AME Church, Orange;

64. Reverend Barry Wise, Greater Mt. Moriah Baptist Church, Linden;

65. Emma Worrall, MDiv. Student, United Methodist Church, Denville; and

66. Reverend Julie Yarborough, Christ Church, Summit.